

COMMENT

INCREASING THE PRICE OF PARENTHOOD: WHEN SHOULD PARENTS BE HELD CIVILLY LIABLE FOR THE TORTS OF THEIR CHILDREN?*

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* This paper was selected as the recipient of the 2001 Vinson & Elkins Award for an outstanding paper in an emerging area of law.

I. INTRODUCTION

“[The tragedy of Columbine] continues and is bound to recur if we bury our heads in the sand and fail to scrutinize the behavior of those entrusted with the safety of our children.”¹

Three years after the disaster at Columbine High School, the ominous warning not to “bury our heads in the sand”² continues to occupy an important element in our nation’s consciousness.³ Indeed, throughout the 2000 presidential race, the candidates and the national media continued to tragically recall the events at Columbine.⁴ On a calm spring day in April of 1999, two troubled teenagers, Eric Harris and Dylan Klebold, entered Columbine High School, in Littleton, Colorado, and, before taking their own lives, brutally murdered twenty-five students and faculty and wounded at least twenty other students.⁵ This event has been considered the deadliest school massacre in United States history.⁶ After the

1. *Columbine Dad Denies Bomb Claim*, AP Online, Oct. 7, 2000, 2000 WL 27904163 (quoting Howard Zucker) (internal quotation marks omitted). Howard Zucker is the attorney representing the family of Mark Taylor, a student injured in the Columbine High School massacre in Littleton, Colorado, in its lawsuit against the parents of the shooters, Dylan Klebold and Eric Harris. *See id.*

2. *Id.*

3. *See, e.g., Week 6: Gun Control Series: The President Next Door*, ATLANTA J. CONST., Oct. 15, 2000, at F7, 2000 WL 5481294 (reporting that “[t]he massacre at Columbine High School ignited widespread debate on American gun laws and spurred more calls for gun restrictions than at any time since President Reagan . . . [was] shot in 1981”).

4. *See, e.g., The Presidential Debate: ‘Sensible Gun Safety Measures Are Warranted,’* L.A. TIMES, Oct. 12, 2000, at A14, 2000 WL 25906520 (discussing Governor Bush’s and Vice-President Gore’s divergent views regarding gun control in light of the Columbine massacre); Marie Cocco, *Nice-Guy Debate Lets Bush Off Hook*, NEWSDAY, Oct. 13, 2000, at A53 (criticizing Governor Bush’s cure for the massacre at Columbine as naive and simplistic).

5. *See* Tom Kenworthy, *Up to 25 Die in Colorado School Shooting; Two Student Gunmen Are Found Dead*, WASH. POST, Apr. 21, 1999, at A1, 1999 WL 16998501 (documenting the deaths and injuries caused by Dylan Klebold and Eric Harris at Columbine High School in Littleton, Colorado).

6. *Id.* (describing the Columbine massacre as a “shooting rampage on a scale unprecedented in an American school”). While Columbine remains the deadliest attack at a school in American history, other attacks continue to occur throughout the nation. In March of 2001, a teenager “went on a shooting rampage at a suburban high school, killing two students and wounding another 13 people” in Santee, California. Jeff Adler & William Booth, *2 Students Die in Calif. Shootings; 13 Are Injured; Classmate, 15, Is Held*, WASH. POST, March 6, 2001, at A1, 2001 WL 2548948. Unfortunately, in addition to Columbine and Santee, there have been a myriad of fatal shootings at American schools, including: on February 29, 2000, a six-year-old boy fatally wounded a classmate; on May 21, 1998, in Springfield, Oregon, a fifteen-year-old opened fire in his high school, killing two teenagers and injuring twenty; on April 24, 1998, a fourteen-year-old at a middle school in Pennsylvania killed a science teacher at a graduation dance while his fellow students were watching; and on March 24, 1998, in Jonesboro, Arkansas, two boys, eleven and thirteen, after activating the fire alarm to “lure” people outside, began shooting at their middle school, killing four students and a teacher and wounding ten others. *See Santee*

mourning of such a tragedy subsided, many, justly or not, sought to assign blame,⁷ achieve retribution,⁸ or advocate public policy solutions in hopes of preventing such a horrific event in the future.⁹ Indeed, it did not take long for the parents of many of the Columbine victims to seek some semblance of justice in a court of law.¹⁰ In the aftermath of Columbine, parents of some of the victims filed lawsuits against the parents of the shooters,¹¹ alleging that Eric Harris and Dylan Klebold's parents "knew or should have known that the boys were building bombs, storing weapons at home and planning an attack" on Columbine High School.¹² In other words, the parents of the victims alleged that the parents of the shooters should be held civilly liable for the actions of their sons.

In the weeks that followed the Columbine massacre, many commentators and advocacy groups questioned the fairness of holding parents civilly liable for the actions of their children;¹³

School Shootings: Past School Shootings, L.A. TIMES, March 6, 2001, at A17, 2001 WL 2467363.

7. See Pam Belluck & Jodi Wilgoren, *Caring Parents, No Answers*, in *Columbine Killers' Pasts*, N.Y. TIMES, June 29, 1999, at A14, 1999 WL 30525603 (suggesting that the Harris and the Klebold families should not be held responsible for the acts of their children because they were "caring, conscientious parents who structured their lives around supporting their children—and who believed, from all accounts, that they were on the right track"); Mary McGrory, *Guns Are Why*, WASH. POST, Apr. 25, 1999, at B1, 1999 WL 16999433 (opining that American society's fascination with guns led to the Columbine tragedy).

8. See Tom Kenworthy, *Littleton Probers Casting Wide Net; Possible Accomplices Sought in Massacre*, WASH. POST, Apr. 24, 1999, at A1, 1999 WL 16999165 (stating that federal and local investigators "conducted more than 500 interviews with potential witnesses in a sprawling search" to find and bring to justice any accomplice that assisted in the massacre).

9. *What's News, World-Wide*, WALL ST. J., Apr. 28, 1999, at A1, 1999 WL-WSJ 5450304 (reporting that after the Columbine massacre President Clinton "proposed legislation to raise the legal age for possession of handguns, tighten parental liability for children's crimes and require background checks for buyers of explosives").

10. See, e.g., Valerie Richardson, *Columbine Family Sues Gunmen's Parents*, WASH. TIMES, May 28, 1999, at A5, 1999 WL 3086196 (reporting that the family of Isaiah Shoels, a victim of the Columbine massacre, "filed a \$250 million wrongful-death action . . . against the Columbine High School gunmen's parents, saying their negligence was in part to blame for Isaiah's death"). In April 2001, two years after the Columbine massacre, three dozen families of the victims agreed to a settlement of \$2.5 million in their lawsuits against the gunmen's parents and the providers of a gun used in the shooting. *Families to Settle Columbine Suits for \$2.5 Million*, HOUS. CHRON., Apr. 20, 2001, at 17A, 2001 WL 3014872. Eric Harris and Dylan Klebold's parents agreed to pay about \$1.6 million to the victims. *Id.*

11. See, e.g., *Columbine Dad Denies Bomb Claim*, *supra* note 1 (explaining that the parents of Eric Harris, Dylan Klebold, and others are being sued by the families of six students who were killed in the massacre).

12. *Id.*

13. See, e.g., Judy Mann, *High Schools Are the Real Problem*, WASH. POST, Apr. 28, 1999, at C14, 1999 WL 16999741 (maintaining that parental responsibility laws "are unlikely

others argued our society must hold parents accountable for the acts of their children.¹⁴ Moreover, in the twenty-first century, the idea of parental civil liability goes beyond the vicious acts committed by Dylan Klebold and Eric Harris. In an age where technically-savvy minors can manipulate computer systems and cause millions in damages, who will be held responsible?¹⁵ In an era where many children are on medication to control their behavior, who will warn their teachers and fellow students if the children suddenly forget to take their pills?¹⁶ And what of the perennial jilted boyfriend or girlfriend? Should the former boyfriend's or girlfriend's parents be held financially liable for the actions taken to cure a wounded heart?¹⁷ Indeed, all of these questions lead to the topic of this Comment—when should parents be found civilly liable for the tortious acts of their children?

In the United States, there have been three major stages in the development of jurisprudence regarding parental civil liability.¹⁸ The first stage is the traditional common law view that—

to prevent more dreadful horrors such as the Littleton massacre"); Robert J. Samuelson, *Enough Blame to Go Around*, WASH. POST, May 3, 1999, at A25, 1999 WL 17000914 (maintaining that blaming only the parents of the Columbine shooters is not just); Caroline Forell, Commentary, *Perspective on School Violence: Who Should Pay?*, L.A. TIMES, May 4, 1999, at B7 (opining that everyone in our society should be responsible for compensating the victims and their families).

14. See, e.g., Julia C. Martinez, *Making Criminals Pay, Repay Mandatory Reimbursement Pushed*, DENVER POST, Sept. 3, 1999, at B1, 1999 WL 7893524 (reporting that Colorado Governor Bill Owens and Colorado Attorney General Ken Salazar recommended to the state legislature an increase of the cap on parental liability for their children's criminal actions from \$3,500 to \$25,000); Laura Sessions Stepp & Edward Walsh, *Sins of the Sons: Laws Aim at Parents*, WASH. POST, Apr. 27, 1999, at C1, 1999 WL 16999616 (documenting that various state legislatures and interest groups have enacted parental responsibility laws in an effort to curb juvenile crime).

15. See, e.g., Michael Schroeder & Ruth Simon, *Teenager in Stock-Fraud Case Kept \$500,000 in Profits*, WALL ST. J., Oct. 20, 2000, at C1, 2000 WL-WSJ 26613947 (disclosing that a sixteen-year-old was caught violating Securities and Exchange Commission rules by using Internet message boards to manipulate stocks in order to pocket over \$272,826).

16. See, e.g., *Nieuwendorp v. Am. Family Ins. Co.*, 529 N.W.2d 594, 596, 602 (Wis. 1995) (affirming the verdict against the parents of a hyperactive nine-year-old who hurt his teacher while resisting discipline, but stressing that the parents would not be liable had they warned the school when their son stopped taking behavior-controlling medication); Michael D. Simpson, *Laws that Make Parents Pay*, NEA TODAY, Mar. 1, 1999, at 25, 1999 WL 3540469 (reporting that the National Education Association (NEA) supported a lawsuit against the parents of a student who framed his teacher for illegal drug possession).

17. See Sheila R. McCann, *Lawsuit Dismissed Against Parents of Son Who Hit Ex-Pal Over Girl*, SALT LAKE TRIB., Nov. 15, 1995, at B1, 1995 WL 10916652 (reporting that after a teenager slugged one of his male peers during a dispute over a girl, the injured boy sued the aggressor and his parents, arguing the parents knew their son was violent and "could have acted to prevent the . . . assault").

18. See Jeffrey L. Skaare, Note, *The Development and Current Status of Parental Liability for the Torts of Minors*, 76 N.D. L. REV. 89, 90 (2000) (explaining the evolution of parental responsibility laws); see also 59 AM. JUR. 2D *State & Federal* § 116 (1987) (discussing the common law and case law development of parental civil liability).

except in rare instances—parents are not civilly liable for the actions of their minor children.¹⁹ “The second stage is an exception to the common law tradition, enumerated in the Restatement (Second) of Torts, section 316, which holds parents liable, in certain circumstances, for the torts of their minor children.”²⁰ The third stage is the creation of state statutes that hold parents liable for the willful, malicious, or intentional conduct of their minor children.²¹ This Comment will examine each of these stages separately and will explore the current status of parental civil liability in the United States, focusing specifically on Texas case law and Texas’s parental liability statute.²² Moreover, this Comment advocates that the Texas state legislature adopt section 316 of the Restatement (Second) of Torts to ensure that victims of juvenile crime in Texas are able to seek redress. Indeed, this Comment maintains that the adoption of the Restatement is the only means by which Texas citizens harmed by juveniles will be able to achieve the goals of tort law.²³

Part II of this Comment will address the common law rule that parents are not liable for the torts of their minor children, except in certain rare instances. Part III will document the movement that led to the American Law Institute’s promulgation of the Restatement (Second) of Torts, section 316. Moreover, this Part will review the Restatement’s exception to the common law

19. Skaare, *supra* note 18, at 90; see also Carl David Adams, Note, *Has the Family Code Made Any Changes in the Liability of a Parent for His Child’s Conduct?*, 26 BAYLOR L. REV. 687, 687–88 (1974) (explaining the common law view of parental civil liability).

20. Skaare, *supra* note 18, at 90; see also RESTATEMENT (SECOND) OF TORTS § 316 (1965) (imposing a parental duty to control one’s minor child and to prevent the child from intentionally harming others).

21. Skaare, *supra* note 18, at 90, 104–09 (discussing parental responsibility laws in various states); see also L. Wayne Scott, *Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of ‘Culpability’*, 20 ST. MARY’S L.J. 69, 87 (1988) (providing a more detailed list of those states that have adopted parental civil responsibility laws).

22. TEX. FAM. CODE ANN. §§ 41.001–41.003 (Vernon 1996 & Supp. 2001). Section 41.001 states:

A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by:

(1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other persons to exercise that duty; or

(2) the willful and malicious conduct of a child who is at least 12 years of age but under 18 years of age.

Id. § 41.001.

23. See CASES AND MATERIALS ON THE LAW OF TORTS 5 (George C. Christie et al. eds., 3d ed. 1997) (stating that the four goals of tort law are “(1) prevention of self-help by victims and their relatives and friends against those who have caused injury, (2) retribution against wrongdoers, (3) deterrence of wrongdoers, and (4) compensation for the victims of wrongdoers”).

rule and analyze how this exception has been applied in a few key cases throughout the United States. Part IV will explore the history of parental liability statutes, specifically sections 41.001–41.003 of the Texas Family Code, and how these statutes have continued to increase the civil responsibility of parents to monitor their minor children. Part V will analyze how Texas case law has addressed parental liability and will conclude by advocating that the Texas state legislature adopt the Restatement to mitigate future injustice for the victims of juvenile crime.

II. COMMON LAW TRADITION

Throughout jurisdictions embracing common law jurisprudence, the parent-child relationship, alone, is not a sufficient ground for enforcing civil liability against parents for the tortious acts of their minor children.²⁴ Similarly, Texas common law recognized parental liability for the torts of minor children only in a few limited situations.²⁵ Generally, Texas common law only imposed liability on a parent for the tort of a minor child when: (1) a master and servant relationship existed between the parent and child; (2) the parent directed the child in committing the tortious act; or (3) the parent negligently permitted the child to engage in conduct likely to harm another.²⁶

In the 1872 case *Chandler v. Deaton*,²⁷ the Texas Supreme Court held that, as a general rule, no presumption arises from the relation of parent and child by which the former can be held responsible for torts committed by the latter.²⁸ The court held that a parent should not be held liable for the torts of a child without the parent's knowledge, consent, participation, or sanction.²⁹ Adhering to the common law, the court found that the father should not be held civilly liable for the mules his son shot unless it was shown that he was implicated as a principal or accessory in the shooting.³⁰

Texas case law has produced a narrow exception to the common law premise that parents are not civilly liable for the torts

24. Refer to notes 25–36 *infra* and accompanying text.

25. See, e.g., *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (listing those instances in which parents will be held liable for the torts of their minor children).

26. *Id.*

27. 37 Tex. 406 (1872).

28. *Id.* (holding that minors are responsible for their own torts).

29. See *id.*

30. *Id.* (“Had it been shown on the trial that Chandler counseled or abetted his sons in shooting Deaton’s mules, he might have been held responsible for the act . . .”).

of their children.³¹ In *Trahan v. Smith*, the court found that the father of minor children encouraged his “boys” to kill the plaintiff’s hog.³² While the court recognized that parents are generally not held civilly liable for the acts of their children, the father satisfied one of the few exceptions to this rule by instructing his son to kill the plaintiff’s hog—consequently, the father was held civilly liable for his son’s action.³³

In addition to Texas, “[n]early every state has recognized in its common law that parents are not liable for the acts of their minor children.”³⁴ For instance, South Dakota and Oklahoma have enacted statutes that completely abolish parental liability.³⁵ However, the Oklahoma Supreme Court has recognized that, although parents are not liable for the acts of their minor children, parents may be found liable for being negligent as parents.³⁶ “This parental negligence exception is most often based upon the Restatement (Second) of Torts, section 316.”³⁷

III. THE RESTATEMENT (SECOND) OF TORTS, SECTION 316

The Restatement (Second) of Torts, section 316, provides:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.³⁸

31. See, e.g., *Trahan v. Smith*, 239 S.W. 345, 347 (Tex. Civ. App.—Beaumont 1922, no writ).

32. *Id.* at 347 (explaining that, for the parent to be held liable in tort, “it must appear that the tort was committed at the direction of the parent, express or implied, or within the scope of duties imposed upon the minor by the parent”).

33. *Id.* (finding that the appellant’s boys were acting under their father’s direction).

34. Skaare, *supra* note 18, at 91; see also 59 AM. JUR. 2D *State and Federal* § 116 n.96 (citing cases in support of the proposition that paternity alone does not make a parent liable for the torts of his minor children).

35. See Skaare, *supra* note 18, at 91 (citing title 10, section 20 of the Oklahoma Statutes and section 25-5-14 of the South Dakota Codified Laws, which both state that neither parent nor child is liable for the acts of the other).

36. *Id.*

37. *Id.* at 91–92 (explaining that parental negligence has provided the foundation for many states’ parental liability statutes). See also *Barth v. Massa*, 558 N.E.2d 528, 533–34 (Ill. App. Ct. 1990) (noting that section 316 of the Restatement (Second) of Torts represents an exception to the common law rule that parents are not liable for the torts of their children).

38. RESTATEMENT (SECOND) OF TORTS § 316 (1965).

The examination for liability under the Restatement is therefore predicated upon a two-part test based on the text of section 316.

A. *Defining Section 316's Two-Part Test*

Subsection (a) of the Restatement test concentrates on parents' ability to control their children.³⁹ Specifically, this requirement pertains to the parents' *knowledge* that they have the "ability to control [their] child."⁴⁰ The "knowledge" aspect of this test seems to indicate that a parent must be aware that his child's behavior should be controlled. This begs the question: what if a parent does not know that he is supposed to supervise or control his child's behavior? Would ignorance of society's expectations excuse conduct prohibited by section 316?⁴¹

In addition to measuring the parent's knowledge of the need to "control" his child, the comments to the Restatement suggest that section 316 also holds a parent responsible for his child's conduct "in so far as he has the ability to control it."⁴² In other words, subsection (a) of section 316 seeks to *measure* a parent's true ability to control his child in determining civil liability.

This element of the test indicates that the greater the amount of control a parent has over a child, the greater the likelihood that the parent will be held liable for the actions of that child. This rule has been interpreted as presenting a greater responsibility for parents of younger children.⁴³ Comment c of section 316 explicitly states that "the very youth of the child is likely to give the parent more effective ability to control" the child.⁴⁴ The comments to section 316 further suggest it is not necessary for the actions of the child to be so severe as to subject the child to liability.⁴⁵ Thus, even if the child were so young as to be incapable of negligence, the

39. *Id.*

40. *Id.*

41. While an analysis of this predicament would be enlightening, it is not the emphasis of this paper.

42. RESTATEMENT (SECOND) OF TORTS § 316 cmt. a.

43. See, e.g., *Jarboe v. Edwards*, 223 A.2d 402, 403-05 (Conn. Super. Ct. 1966) (affirming the verdict against parents whose four-year-old son stuffed paper in another child's pants and set it afire, as the parents had despaired at ending his fascination with fire and did not monitor his playtime or keep him away from matches); *Moore v. Crumpton*, 295 S.E.2d 436, 442 (N.C. 1982) ("The opportunity to control a young man of this age [seventeen and a half] obviously is not as great as with a younger child."); *Bell v. Hudgins*, 352 S.E.2d 332, 334 (Va. 1987) (noting, in declining to adopt section 316, that "parental control diminishes as the child matures").

44. RESTATEMENT (SECOND) OF TORTS § 316 cmt. c.

45. *Id.*

parent may still be found liable for negligent parental supervision under section 316.⁴⁶

While the Restatement requires that a parent have the knowledge that he or she has the ability to control his or her child, this knowledge requirement is not dispositive of a parent's civil liability.⁴⁷ Historically, the second part of the test has been more determinative of parental liability than the first.⁴⁸

"The second part of the Restatement test focuses on the necessity and opportunity to exercise parental control."⁴⁹ Specifically, this part requires that the parents "know[] or should [have] know[n] of the necessity and opportunity for exercising . . . control" over their child.⁵⁰ However, as one author has noted, the comments explaining this section of the test seem to overlap.⁵¹ The comments to the Restatement explain that "[t]he duty of a parent is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing."⁵² Accordingly, the *opportunity* and *necessity* elements of the Restatement appear to be "individually important and dependent on one another to form parental liability."⁵³ Therefore, "it is not exactly clear from the Restatement or its comments what this test really means."⁵⁴

Due to this confusion, the Alaska Supreme Court recently commented that it seems as though the Restatement (Second) of Torts, section 316, should be analyzed as a three-part test, rather than its textual two-part test.⁵⁵ "The first part remains the ability to control, but the second part may be broken into two separate parts: (1) the necessity to control and (2) the opportunity to control."⁵⁶ This new test asks whether the "parents knew or should

46. *Id.*

47. See RESTATEMENT (SECOND) OF TORTS § 316 (providing a *two-part* test for parental liability where both requirements must be fulfilled in order to assign liability).

48. See *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 981 (Alaska 1999) (explaining that courts usually resolve cases in favor of the parents after concluding the parents did not have the knowledge necessary to put them on notice of the need to correct their child's conduct).

49. Skaare, *supra* note 18, at 93; RESTATEMENT (SECOND) OF TORTS § 316(b).

50. RESTATEMENT (SECOND) OF TORTS § 316(b).

51. Skaare, *supra* note 18, at 93–94.

52. RESTATEMENT (SECOND) OF TORTS § 316 cmt. b.

53. See Skaare, *supra* note 18, at 94 (arguing that, while each element of the test is independent, both elements must be present to determine liability).

54. *Id.*

55. *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 981 (Alaska 1999) (stating that section 316 of the Restatement suggests a three-part test).

56. Skaare, *supra* note 18, at 94.

have known of the (1) need, (2) ability, and (3) opportunity to control their child.”⁵⁷

“Even with the test divided into three parts, understanding it may still be complex. Part of the complexity is determining the difference between the ability to control and the opportunity to control.”⁵⁸ Courts adopting the Restatement have not used these terms in a consistent manner.⁵⁹ “Some courts have equated the term ‘ability’ to mean physical presence.”⁶⁰ In other words, if a parent is not living with the child, he cannot be held civilly liable for that child’s torts. In line with this reasoning, a Louisiana appellate court proposed that absent parents have no direct immediate control over their child.⁶¹ “By doing so, [this] court failed to address whether absent parents lacked the opportunity, or lacked the ability, to control their minor child.”⁶² One of the consequences of this view is that parents may avoid liability by not maintaining custody of a child known to have a propensity to commit tortious acts. Furthermore, this interpretation of section 316 seems to reward parents who sever all ties with their children by relieving them from liability. Consequently, some jurisdictions have held that the physical presence of the parent is irrelevant and, thus, the mere absence of the child from the parent’s custody does not release the parent from liability.⁶³

In addition to physical presence, many courts require that the parents of the minor child who commits the tortious act be aware of

57. *Dinsmore-Poff*, 972 P.2d at 981 (stating that, while the Alaska Supreme Court prefers the three-part test, the courts around the country have not utilized it).

58. Skaare, *supra* note 18, at 94 (footnote omitted).

59. *Id.* at 94–95 (illustrating the various definitions the courts have used pertaining to “ability” and “opportunity”).

60. *Id.*; *see, e.g.*, *Campbell v. Haiges*, 504 N.E.2d 200, 203 (Ill. App. Ct. 1987) (refusing to hold parents liable for child’s actions because the parents were at work and therefore not able to control their minor child); *see also* RESTATEMENT (SECOND) OF TORTS § 316 cmt. b (1965) (“The duty of a parent is *only* to exercise such ability to control his child as he in fact has at the time.” (emphasis added)).

61. *See Jackson v. Ratliff*, 84 So. 2d 103, 104–05 (La. Ct. App. 1955) (discussing *Toca v. Rojas*, 93 So. 108, 111 (La. 1921) and recognizing that a state’s removal of a child from his parents’ custody eliminates the parents’ ability to control the child *and* the parents’ responsibility for the child’s actions).

62. Skaare, *supra* note 18, at 95; *see, e.g.*, *Audubon Ins. Co. v. Fuller*, 430 So. 2d 343, 345 (La. Ct. App. 1983) (decreeing that only the parent with legal custody of a child may be held vicariously liable for a tortious act of such child under the parental liability statute).

63. *See Pizzo v. Graves*, 453 So. 2d 592, 593–94, 596 (La. Ct. App. 1984) (holding a mother liable for her seventeen-year-old son’s tort even though the son had moved from the mother’s home two months prior to the accident). *See also Mullins v. Blaise*, 37 La. Ann. 92 (La. 1885) (holding that it would do violence to the language and reason of the law if it construed the “responsibility of the father as dependent upon his actual presence in the domiciliary house” and stating that “[n]o such limitation was intended”); *In re James D.*, 455 A.2d 966, 972 (Md. 1983) (stating that Texas is one of five states requiring legal custody and control before holding parents liable for the acts of their children).

specific acts of conduct their child has previously committed.⁶⁴ These acts must be similar, and in some instances identical, to the act committed for the parents to be considered on notice that this type of harmful conduct could reoccur.⁶⁵ If the parents have the requisite knowledge, it then becomes necessary, under the Restatement, that they exercise control over their minor child.⁶⁶ Stating the test in this way, it seems these courts closely link necessity with knowledge, thereby making knowledge the most important element of the test when determining parental liability.⁶⁷

“The confusion between the actual Restatement and the *application* of the Restatement results in the Restatement being applied under a different two-part test than what is written.”⁶⁸ Instead of applying the written Restatement test, courts have frequently determined first if the parents had knowledge that their child’s repetitive harmful conduct could lead to the tort at issue.⁶⁹ Courts will then often inquire as to whether the parents had the opportunity to control or prevent their child’s tort before it

64. Skaare, *supra* note 18, at 95.

65. See, e.g., *Singer v. Marx*, 301 P.2d 440, 444–45 (Cal. Dist. Ct. App. 1956) (demonstrating the inquiry necessary to determine whether the parents knew of previous conduct similar to the case at bar); *Barth v. Massa*, 558 N.E.2d 528, 534 (Ill. App. Ct. 1990) (maintaining that, to establish liability under section 316 of the Restatement, the plaintiffs must show “that the parents were aware of specific instances of prior conduct” that would place them on notice of their child’s destructive behavior); *Wells v. Hickman*, 657 N.E.2d 172, 179 (Ind. Ct. App. 1995) (ruling that a parent is not liable for behavior that is not reasonably foreseeable).

66. Skaare, *supra* note 18, at 95; see *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 985 (Ala. 1999) (holding that, if the tortfeasor’s parents had reason to know of their need to control the child, then they must make a reasonable effort to prevent the child’s foreseeably destructive and harmful behavior).

67. See, e.g., *Gissen v. Goodwill*, 80 So. 2d 701, 705 (Fla. 1955) (reasoning that, because the defendants had no knowledge of their child’s habitual previous tortious tendencies, they could not be found liable); *Dunaway v. Kaylor*, 194 S.E.2d 264, 265 (Ga. App. 1972) (emphasizing that for parents to be held liable for failing to control their children, they must have knowledge of their child’s habitual conduct manifested by evidence of prior acts which are the same as, or similar to, the acts complained of in the suit).

68. Skaare, *supra* note 18, at 95 (emphasis added).

69. *Id.* at 95; see, e.g., *Robertson v. Wentz*, 187 Cal. App. 3d 1281, 1290–91 (Cal. Dist. Ct. App. 1986) (refusing to hold parents liable for their child’s conduct where evidence showed the parents did not have “knowledge of [the child’s] propensity for violence”); *Gellner v. Abrams*, 390 S.E.2d 666, 667 (Ga. Ct. App. 1990) (granting summary judgment in favor of parents upon showing that the parents were not aware “of any tendency or proclivity on their son’s part to engage in . . . violent behavior”); *Brahm v. Hatch*, 609 N.Y.S.2d 956, 958 (N.Y. App. Div. 1994) (holding that evidence was insufficient to prove the parents had the requisite knowledge to be held responsible or financially liable for their child’s present harmful action); *Rodriguez v. Spencer*, 902 S.W.2d 37, 45 (Tex. App.—Houston [1st Dist.] 1995, no writ) (finding that the mother was not civilly liable for her son’s brutal killing of a homosexual because he had never shown conduct indicating he would commit such a serious crime).

occurred.⁷⁰ An analysis of how this test has been applied in a few key cases throughout the country may provide some guidance in understanding the varied interpretations of section 316.

B. Application of the Restatement (Second) of Torts, Section 316

1. *The Dinsmore-Poff Decision—Alaska's Exploration of Parental Liability.* The divergent views regarding the application of section 316 of the Restatement are quite evident after an examination of the case law from the various states that have adopted either section 316 or the principles behind it. Recently, the Supreme Court of Alaska reviewed these differences in the 1999 case of *Dinsmore-Poff v. Alvord*.⁷¹ In that case, a minor, Brian Hall, who had an extensive history of misconduct, shot and killed Mickey Dinsmore and Stanley Honeycutt.⁷² “The relatives of the victim and his estate (collectively known as Dinsmore) brought a wrongful death suit against various people, including the parents of Brian Hall (collectively known as the Alvords), claiming liability based on negligent supervision.”⁷³ In doing so, Dinsmore asked the Alaska Supreme Court to officially adopt section 316 of the Restatement (Second) of Torts.⁷⁴ “The lower court granted summary judgment to the Alvords through the application of the Restatement test.”⁷⁵ While “[t]he Supreme Court of Alaska declined to address whether Alaska should adopt the Restatement (Second) of Torts, section 316,”⁷⁶ it did examine “out-of-state precedent” commenting on section 316 to determine if the district court’s grant of summary judgment was correct.⁷⁷

“The Alaska Supreme Court specifically analyzed case law from states that adopted the Restatement (Second) of Torts,

70. Skaare, *supra* note 18, at 95; see, e.g., *Dinsmore-Poff*, 972 P.2d at 986 (outlining the method of inquiry in determining whether parents acted reasonably and stating that the fourth and final question should be whether the parents made “reasonable efforts” to prevent their child’s foreseeable actions).

71. 972 P.2d 978.

72. *Id.* at 979–80 (chronicling Hall’s behavioral problems from early childhood up to the time of the murders).

73. Skaare, *supra* note 18, at 96; see also *Dinsmore-Poff*, 972 P.2d at 980.

74. *Dinsmore-Poff*, 972 P.2d at 980.

75. Skaare, *supra* note 18, at 96; see also *Dinsmore-Poff*, 972 P.2d at 980.

76. Skaare, *supra* note 18, at 96; see also *Dinsmore-Poff*, 972 P.2d at 981 (holding that because the parties agreed section 316 of the Restatement should apply to their dispute, there was no reason for the court to either accept or reject section 316). The court further noted that this “issue must slumber until awakened by parties who present us with adversarial expressions of ‘reason, policy, and precedent’ for or against adoption of § 316.” *Id.*

77. Skaare, *supra* note 18, at 96; see also *Dinsmore-Poff*, 972 P.2d at 981–85. The court examined how the various states that have adopted the Restatement have applied the language of section 316 to various situations. See *id.*

section 316” or the principles behind it.⁷⁸ “The court noted that instead of applying the three-part test, most courts first ask whether the parents of the minor child ‘knew of past conduct enough like that at issue to put them on notice of the need to correct their child’s dangerous propensity.’”⁷⁹ The court recognized that most cases, in implementing this criteria, are resolved “in the parents’ favor upon finding [that] no such past misconduct” was sufficiently similar to the conduct in the case at bar or, at least, there was no parental knowledge of that conduct.⁸⁰ In the *Dinsmore-Poff* case, the court found that, due to Brian Hall’s previous history, the Alvords could not dispute that they were consciously aware of their child’s “propensity for violence.”⁸¹

In documenting the application of section 316 throughout the country, the court further noted that “[m]ost courts, upon finding parental knowledge of past misconduct, have not then made a demanding, detailed inquiry.”⁸² Courts have historically asked whether the parents made “some reasonable effort to prevent a recurrence” of the child’s harmful conduct.⁸³ Cases in which the parents knew of similar past violence can be categorized into those:

(a) reversing Rule 12(b)(6) dismissals (or their equivalent) upon taking as true allegations that parents knew of, yet did absolutely nothing to correct, and even encouraged, a violent tendency; (b) finding parents liable, or reversing nonsuits in their favor, based not on allegations but on evidence; (c) exonerating parents who made adequate disciplinary efforts; and (d) exonerating parents who had no chance to prevent the harm.⁸⁴

However, in those rare cases in which courts *did find* that the parents had specific knowledge of past conduct similar to the tort committed, their analysis was continued by asking “whether the parents had the opportunity or ability to control their child.”⁸⁵ In

78. Skaare, *supra* note 18, at 96; see also *Dinsmore-Poff*, 972 P.2d at 981 (noting that not all courts embrace section 316). “Three state supreme courts in the last two decades have squarely declined to adopt § 316, [including the state of Texas,] and an intermediate appellate court in a fourth state partly did so.” *Id.*

79. Skaare, *supra* note 18, at 96–97 (quoting *Dinsmore-Poff*, 972 P.2d at 981).

80. *Dinsmore-Poff*, 972 P.2d at 981.

81. *Id.* (concluding that the Alvords were aware of Hall’s past harmful conduct toward others and his prior assault with a stolen gun).

82. *Id.* at 982.

83. *Id.*

84. *Id.* (footnotes omitted).

85. Skaare, *supra* note 18, at 97. See also *Eldredge v. Kamp Kachess Youth Servs., Inc.*, 583 P.2d 626, 627–30 (Wash. 1978) (en banc) (affirming the verdict against a program for troubled youth for not increasing the supervision of two boys who, ten days before, had

its analysis, the *Dinsmore-Poff* court examined various cases from across the country in order to determine the appropriate meaning of the phrase “ability and opportunity to control” under the Restatement.⁸⁶

2. *The Narrow (Parent-Friendly) Interpretation.*

a. *Illinois.* One case the *Dinsmore-Poff* court utilized to determine how narrowly to define the “opportunity, ability, and need to control a child”⁸⁷ clause was the seminal case of *Cooper v. Meyer*.⁸⁸ In this case, Cooper visited Meyer’s home to complain about one of Meyer’s children.⁸⁹ During this visit, one of Meyer’s sons flew into a rage and viciously attacked Cooper.⁹⁰ The court reasoned that, even if it was assumed Meyer knew of his son’s violent tendencies, he nonetheless “had no opportunity to directly control the . . . child at the time of the tort.”⁹¹ Accordingly, Meyer had no chance to warn Cooper of the danger and no opportunity to control his son’s behavior.⁹²

The *Cooper* court seemed to maintain that section 316 of the Restatement only required determination of whether the parent of the tortfeasor had the ability and opportunity to prevent the specific tort in the case at bar.⁹³ Thus, even while assuming Meyer had knowledge of his son’s proclivity for violence, the court still refused to hold him liable unless it was proven that Meyer had the ability and opportunity to prevent his son from specifically attacking Cooper.⁹⁴ In explaining its holding, the court noted that Meyer had neither invited nor expected Cooper’s visit, and accordingly did not have the ability to prevent his son’s attack.⁹⁵ By narrowly construing section 316, the court found that no cause of action was established.⁹⁶

escaped and stolen a car); *Norton v. Payne*, 281 P. 991, 991–93 (Wash. 1929) (reversing nonsuit after evidence was presented that the father not only had not tried to restrain his daughter, but had actually encouraged her habit of hitting other children with sticks).

86. *Dinsmore-Poff*, 972 P.2d at 983–85 (reviewing how various courts have interpreted the language of section 316).

87. *Id.* at 984.

88. 365 N.E.2d 201 (Ill. App. Ct. 1977).

89. *Id.* at 202 (explaining that the defendant’s child threw a brick bat, striking the plaintiff’s child).

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* (concluding that the requirements of section 316 had not been satisfied).

94. *Id.*

95. *See id.* (connecting Meyer’s ignorance of Cooper’s visit with his lack of awareness that his son needed to be supervised).

96. *Id.*

In another Illinois case, *Barth v. Massa*,⁹⁷ an appellate court held that the tortfeasor's parents were not liable under section 316 because there was no evidence to suggest the parents "knew or should have known of the necessity and opportunity to control" their son's conduct on the day of the incident.⁹⁸ In *Barth*, the evidence indicated that fifteen-year-old Michael Massa's parents knew that he had a propensity to dangerously misuse BB guns.⁹⁹ There were facts disclosed in the *Barth* case indicating that despite the parents' knowledge that their son had fired at other children, they failed or refused to obtain counseling to address his behavior.¹⁰⁰ Subsequent to these incidents, Michael bought stolen guns and kept them in his house.¹⁰¹ Two weeks later, Michael and a friend broke into a store to steal ammunition.¹⁰² The police fired at the boys as they fled, and Michael shot and injured Officer Barth.¹⁰³ Barth sued Michael's parents, and the appellate court ultimately ruled the Massas were entitled to a directed verdict.¹⁰⁴

The court found that Michael's previous BB-gun incidents could not "reasonably be interpreted as putting the Massas on notice that Michael was likely to buy a stolen gun, commit a burglary and shoot a police officer."¹⁰⁵ In the alternative, the court held there was "no evidence of [an] opportunity to prevent the shooting."¹⁰⁶ Quoting from the commentary to section 316 of the Restatement, it stated that a parent is bound "only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing."¹⁰⁷ "Nor was there any evidence from which it could reasonably be inferred that they knew Michael was armed when he left the[ir] house" on the day of the robbery.¹⁰⁸ The *Barth* court

97. 558 N.E.2d 528 (Ill. App. Ct. 1990).

98. See *id.* at 534 (concluding that the elements of section 316 of the Restatement were not satisfied).

99. *Id.* at 531 (noting that Michael owned three pellet or BB guns with his parents' knowledge and recounting an incident involving Michael using the guns to shoot at children in their neighborhood).

100. *Id.* (documenting Mrs. Massa's failure to provide counseling, even after being made aware of its availability).

101. *Id.* at 530–31.

102. *Id.*

103. *Id.* (detailing the chronology of events leading up to the shooting of Officer Barth).

104. *Id.* at 535.

105. *Id.* at 534.

106. *Id.* (explaining that even if the defendants had knowledge of Michael's propensity to misuse guns, the court's liability analysis would not be altered).

107. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 316 cmt. b (1965)).

108. *Id.*

concluded there was no evidence that “the Massas knew or should have known of the necessity and opportunity to control Michael’s conduct” on the specific day Michael committed the tort and, thus, no liability could exist.¹⁰⁹

b. *North Carolina*. The North Carolina Supreme Court construed section 316 of the Restatement to enable parents to be held liable for their child’s behavior when they were aware or should have been aware of “the propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences.”¹¹⁰ In *Moore v. Crumpton*, the North Carolina Supreme Court affirmed summary judgment for the parents of seventeen-year-old John Crumpton, Jr., who late one night became intoxicated and raped Ms. Moore at knife point while he was under the influence of drugs.¹¹¹ Applying section 316, the court held that John, Jr.’s parents did not know of their son’s dangerous propensity and that they did not have the ability or opportunity to control their son at the time of the rape.¹¹²

In its ruling, the court described how John, Jr. began to use drugs, argue with his parents, and skip school before he turned thirteen.¹¹³ The court further noted John, Jr. had been “arrested for carrying a concealed knife” and “involved in an assault . . . with a deadly weapon a year or more before the [rape].”¹¹⁴ However, psychologists had deemed him “not disposed toward violent or dangerous behavior,” and the court found no evidence that his parents had “had any indication that John, Jr. was disposed to commit the crime committed.”¹¹⁵ In their defense, John Jr.’s parents described how they continuously sought help from psychologists and counselors for their son, “made frequent attempts to discipline John Jr. and to reason with him,” and even placed him in a private school to mitigate his destructive behavior.¹¹⁶ Furthermore, the court commented there was little

109. *Id.*

110. *See Moore v. Crumpton*, 295 S.E.2d 436, 440 (N.C. 1982).

111. *Id.* at 438–40.

112. *See id.* at 442–43 (stating that the Crumptions did not have the ability or opportunity to stop their son because they did not have the specific knowledge that their son would commit this act).

113. *Id.* at 438 (explaining that John, Jr. began using marijuana and other drugs at an even earlier age and was regularly using by age thirteen).

114. *Id.* at 438, 442.

115. *Id.* at 439, 442.

116. *Id.* at 439 (stating that the Crumptions took John, Jr. to a psychologist at nine years of age and continued seeking treatment while he was in junior high school).

more the parents could have done to control their near-adult son short of constantly guarding him:¹¹⁷

John, Jr. was 17 years old at the time of the rape The opportunity to control a young man of this age obviously is not as great as with a younger child. The crime involved occurred during the very early morning hours after parents would ordinarily be expected to be in bed. Short of standing guard over the child twenty-four hours a day, there was little that the defendant father could do to prevent John, Jr. from leaving the home after [he] was asleep [His] parents . . . sought professional help for John, Jr. early and often. We fail to see that much more could have been done by them, short of physically restraining his movements and placing him under twenty-four hour a day observation.¹¹⁸

In this description of the challenges faced by the Crumptions, the *Moore* court seems to have a sympathetic view toward the parents of violent children.¹¹⁹ Indeed, in its holding, the court states that there are finite limitations on what parents can do to control the actions of their child.¹²⁰ However, while the Crumptions did seek help for their son, it is undisputed that they had knowledge of his continuous violent behavior; it is possible, notwithstanding the court's opinion, that they could have exercised greater control over his actions by other means.¹²¹ At the very least, a jury should have been allowed to determine if the Crumptions had taken reasonable actions to prevent their son from committing such a heinous act.

In interpreting section 316 so narrowly, the North Carolina Supreme Court seems to have favored a parent-centered approach, rather than a victim-centered approach. While a plethora of cases have taken this approach,¹²² many have

117. *Id.* at 442 (expressing the limits of what the Crumptions could have done to prevent their son from destructive conduct).

118. *Id.*

119. *See id.* at 443 (describing the situation as a "family tragedy").

120. *Id.* at 442 (acknowledging that the parents did everything within reason to control their son).

121. *See id.* at 439 (recognizing that John, Jr.'s parents had knowledge of his drug abuse and chronicling his parents' attempts to obtain psychological services to address John, Jr.'s behavioral problems).

122. *See, e.g., Williamson v. Daniels*, 748 So. 2d 754, 760–62 (Miss. 1999) (holding that while the parent of the tortfeasor knew of her child's violent proclivities, it would not be reasonable to require the mother to take the additional precautions necessary to prevent the tort).

[The court found] it unreasonable to require parents to anticipate and guard against every logically possible instance of misconduct. Extending the zone of foreseeability so far as to include [the plaintiffs] claim would pose the risk of transforming parents from care givers and disciplinarians into the jailors and

criticized this narrow interpretation.¹²³ Consequently, some courts have chosen to interpret section 316, and the principles behind it, more broadly in order to protect the victims of juvenile tortfeasors.¹²⁴

3. *The Broad (Victim-Centered) Interpretation.*

a. *New York.* In *Linder v. Bidner*,¹²⁵ a New York trial court declared that for parental liability to arise, it must be demonstrated that the defendants had knowledge of their child's dangerous propensities and subsequently neglected to exercise reasonable control over the child's actions.¹²⁶ In *Linder*, action was taken against the parents of a minor child for injuries resulting from an assault by the defendants' son.¹²⁷ The plaintiffs alleged that the son "had a vicious and malignant disposition and had the habit of mauling, pummeling, assaulting, and mistreating smaller children when they were lawfully playing or walking upon the streets."¹²⁸ The plaintiffs also alleged that the parents encouraged their son's violent conduct by "resenting any resistance or admonition made by other persons whose children [were] beaten by him."¹²⁹ The plaintiffs contended that Bidners continuously failed and neglected to exercise the reasonable care

insurers of their minor children. We think this is a role most parents are ill equipped to take on.

Id. at 762; *Lott v. Strang*, 727 N.E.2d 407, 409 (Ill. App. Ct. 2000) (declaring that parents knowledge of their child's "accident one year earlier did not constitute knowledge of prior conduct sufficient to put [parents] on notice that collision with [plaintiffs] was likely to occur"); *Chandler v. Coleman*, 759 So. 2d 459, 463 (Miss. Ct. App. 2000) (holding that a parent could not be held liable for damage caused by a child who took the parent's car without the parent's knowledge); *Durkan v. Vaughan*, 609 N.W.2d 358, 362 (Neb. 2000) (holding that the victim failed to show the son engaged in prior violent behavior sufficient to establish a parental duty to control his behavior).

123. See, e.g., *Lott*, 727 N.E.2d at 411-13 (Cook, P.J., dissenting) (criticizing the majority for its disinterest in the fact that "[p]arents clearly have a responsibility . . . to supervise their children" and for promulgating the message that "parents do not need to concern themselves with their children's driving habits"); *Caldwell v. Zaher*, 183 N.E.2d 706, 707 (Mass. 1962) (finding that parents' negligence can be based on "allegations that they knew of their child's propensity toward assaulting other children and 'did nothing' to halt it" (emphasis added)); *Williamson*, 748 So. 2d at 762-63 (McRae, J., dissenting) (stating that the evidence showing the defendant failed to take reasonable steps to control her child's past violent behavior was sufficient to satisfy part (b) of the Restatement).

124. Refer to Part III.B.3 *infra*.

125. 270 N.Y.S.2d 427 (N.Y. Sup. Ct. 1966).

126. *Id.* at 430 (explaining that many courts have held that "a parent who knows of the dangerous propensities of his child is bound to use reasonable care to control the child so as to prevent the indulgence in [his past dangerous] propensities").

127. *Id.* at 428.

128. *Id.* (quoting the plaintiffs complaint).

129. *Id.* (quoting the plaintiff's complaint).

necessary to keep their son from intentionally harming others and, eventually, the plaintiff.¹³⁰

The court stated that, under the allegations contained in the complaint, it was obvious there was enough evidence to establish a sufficient ability “on the part of the parents to control their child” under section 316 of the Restatement.¹³¹ Moreover, the allegations demonstrated that the parents were on notice of their child’s dangerous tendencies and failed to restrain him from harmful conduct which, by reason of his prior destructive acts, could reasonably have been anticipated.¹³² Accordingly, the court denied a motion to dismiss the complaint of negligent parental supervision under section 316.¹³³

In its ruling, the court held that parents who are aware of their child’s dangerous propensities must use reasonable care to control or discipline their child so as to prevent him from continuing to harm others.¹³⁴ Thus, by construing section 316 broadly, this court—unlike the North Carolina Supreme Court—reasoned that parents are negligent when they fail to adopt reasonable measures to prevent their child from engaging in harmful conduct, even if that conduct is not the specific conduct alleged in the cause of action.¹³⁵

b. *California*. In *Ellis v. D’Angelo*,¹³⁶ a California Court of Appeals also broadly interpreted the principles behind section 316 so as to punish parents for their negligence in controlling their children.¹³⁷ In *Ellis*, a babysitter filed a cause of action against the parents of a four-year-old boy for injuries sustained when the boy “violently” attacked her.¹³⁸ The plaintiff was asked to babysit the defendants’ son for the first time.¹³⁹ The complaint alleged that, when requesting her to babysit, the parents failed to notify the babysitter that their son had habitually engaged in violent physical attacks.¹⁴⁰

130. *Id.* (explaining that the defendants failed to curb their son’s consistent and violent proclivities).

131. *Id.* at 429.

132. *Id.* at 430 (finding that the parents had a duty to monitor their son to ensure that he did not engage in violent behavior).

133. *See id.* at 438–40.

134. *See id.* at 440.

135. *Id.*

136. 253 P.2d 675 (Cal. Dist. Ct. App. 1953).

137. *See id.* at 679 (stating that parents may be held liable for injuries caused by their child if the parents’ negligence allowed the child to inflict the injury).

138. *Id.* at 676.

139. *Id.* at 679.

140. *Id.* (describing the son’s violent behavior).

In its holding, the court recognized that various cases had determined that parents are liable for their minor child's "intentional acts of violence . . . if, knowing of the child's vicious or destructive tendencies or acts, [they fail] to exercise reasonable measures to restrain or discipline the child."¹⁴¹ Accordingly, summary judgment was not granted because there was sufficient evidence to demonstrate the defendants were aware of their son's violent tendencies and still failed to control his behavior or warn the plaintiff.¹⁴² By construing section 316 broadly, the *Ellis* court ensured that parents who fail to fulfill their parental duty will be held financially responsible for the consequences, even if they did not have the opportunity to prevent their child from committing the specific tort in question. Many other jurisdictions have interpreted section 316 similarly and, consequently, have provided victims of juvenile torts a greater chance of recovery.¹⁴³

c. *Kansas*. Recently the Supreme Court of Kansas adopted this broad interpretation of section 316. In *Wood v. Groh*,¹⁴⁴ the court held that mere knowledge of a single act indicating a child's propensity for violence may be enough to place a parent on notice that there is a "necessity and opportunity" to control that child's behavior.¹⁴⁵ In *Wood*, a minor shooting victim and her parents brought a personal injury action against a gun owner and his wife after their son accidentally shot the victim at a late-night party.¹⁴⁶ The court found the jury instruction on negligent

141. *Id.* (quoting 155 A.L.R. 87 at note).

142. *See id.* at 679–80.

143. *See, e.g., Mitchell v. Wiltfong*, 604 P.2d 79, 80, 82 (Kan. Ct. App. 1979) (finding a viable complaint upon accepting as true allegations that a child repeatedly beat other children and that his parents not only did nothing to discipline but "incited" and "encouraged" him); *Condel v. Savo*, 39 A.2d 51, 52–53 (Pa. 1944) (holding against the parents of a boy who assaulted a younger child and threw him down an embankment, where the boy was in the habit of attacking younger children and the parents, with knowledge of such conduct, failed to exercise reasonable care to control him); *Johnson v. Glidden*, 76 N.W. 933, 933, 935 (S.D. 1898) (affirming trial court judgment against a father where evidence showed the father permitted his son to continue possessing a gun even though the father knew the son was using the gun negligently); *Norton v. Payne*, 281 P. 991, 992 (Wash. 1929) (finding the parents liable because they were aware of previous malicious conduct and failed to take steps to correct the child's behavior); *Hoverson v. Noker*, 19 N.W. 382, 382–83 (Wis. 1884) (finding that evidence, proving liability where two young boys were in the habit of shooting guns and shouting at passersby, should be admitted, and that the father, with knowledge of these acts, took no care to prevent their conduct).

144. 7 P.3d 1163 (Kan. 2000).

145. *See id.* at 1172–73 (stating that the child of the defendant "had only one previous run-in with the law").

146. *Id.* at 1166–67 (explaining that the gun accidentally fired, striking the plaintiff in her left buttock).

parental supervision to be proper under section 316.¹⁴⁷ The court acknowledged that, while the evidence at trial revealed the defendants' son had only one previous encounter with the law, the parents were aware that their son "had a curfew and that it was a violation of his probation to possess a gun without the permission of his probation officer."¹⁴⁸ Consequently, the court found that, while the defendant's parents may not have been aware that their son would specifically steal his father's gun and accidentally discharge it, they were aware of his propensity to misuse guns.¹⁴⁹ Accordingly, they could be found guilty of negligent parental supervision for failing to take proper action to control or prevent this type of behavior.¹⁵⁰ Using section 316 of the Restatement as a guide, the *Wood* court found that the tort of negligent supervision required "parent[s] . . . to exercise reasonable care to control their minor child . . . from intentionally harming others . . . if the parents know or have reason to know that they have the ability to control their child and know or should know of the necessity and opportunity for exercising such control."¹⁵¹ Under this strict application of the section 316 requirements, the jury found that the Grohs were negligent in fulfilling their duty of parental supervision, and the supreme court affirmed the lower court's instruction.¹⁵²

Many jurisdictions continue to struggle with different interpretations of section 316 of the Restatement.¹⁵³ While the narrow approach incorporates the view that parents cannot be omnipresent, the broad view is more victim-friendly and provides victims of torts by minors a greater chance of redress. This struggle over how much liability parents should have for the torts of their children has continued with the promulgation of parental liability statutes. Throughout the twentieth century, almost every state has abrogated the common law by enacting statutes that place various amounts of financial responsibility on parents for the torts of their children.¹⁵⁴ While these statutes

147. *Id.* at 1172.

148. *Id.* at 1172–73.

149. *See id.* at 1173 (explaining that testimonial evidence supported the fact that the defendant knew his son occasionally took his gun from the cabinet to shoot it).

150. *See id.* (noting that, despite the parents' decision to keep the gun in a locked cabinet, it was still a relatively easy task for their son to obtain access to the firearm).

151. *Id.* at 1172 (following the requirements of section 316 specifically).

152. *See id.* at 1173.

153. Refer to Part III.B *supra* (documenting how various jurisdictions have interpreted and applied section 316 of the Restatement).

154. *See* Scott, *supra* note 21, at 87–91 (listing those states that have parental liability statutes and the amounts of financial responsibility placed on parents in each state).

differ in the type of parental liability imposed,¹⁵⁵ all of them reflect society's growing concern for the safety of children and the need to hold parents liable for controlling the actions of their children.¹⁵⁶

IV. THE PROMULGATION OF PARENTAL LIABILITY STATUTES

A. *History of Parental Liability Statutes*

"In an effort to compensate the victims of the torts of children, and perhaps to encourage parents to better discipline their children," various states have enacted laws to hold parents liable for property damage caused by their children.¹⁵⁷ In 1846, Hawaii became the first state to pass a statute recognizing parental civil liability.¹⁵⁸ Decades later, in the 1930s, Louisiana also passed its first statute imposing civil liability upon parents for the torts of their minor children.¹⁵⁹ "Under the Louisiana statute, the parents could be held liable, regardless of whether they had knowledge of the child's vicious tendencies."¹⁶⁰ "Critics of this vicarious liability pointed out that the Louisiana statute created a no-fault situation in civil law, which had been expressly rejected at common law."¹⁶¹ Despite these concerns, legislatures across the United States began enacting similar statutes that imposed liability upon the parent.¹⁶² Several states enacted these parental liability statutes to curb juvenile crime¹⁶³ and others to simply expand options for recovery for damages caused by minors.¹⁶⁴

155. See *id.*

156. See generally Laura Beresh-Taylor, *Preventing Violence in Ohio's Schools*, 33 AKRON L. REV. 311 (2000) (describing the intense debate America has about the safety of children and the varied laws that are passed to preserve their safety).

157. See Adams, *supra* note 19, at 688–89 (documenting the history of parental liability statutes).

158. Jason Emilios Dimitris, Comment, *Parental Responsibility Statutes—And the Programs that Must Accompany Them*, 27 STETSON L. REV. 655, 661–62 (1997). Hawaii's statute is unusual because it does not place monetary restrictions on recovery by victims. *Id.* at 662.

159. See Scott, *supra* note 21, at 72.

160. *Id.*; see also LA. REV. STAT. ANN. § 14:92.2 (West 1996) (stating that when parents are found guilty of "[i]mproper supervision of a minor," they can be "fined not less than twenty-five dollars and not more than two hundred fifty dollars for each offense, or be imprisoned for not more than thirty days, or both").

161. Scott, *supra* note 21, at 72–73.

162. *Id.* at 73.

163. *Id.*; see also Stang v. Waller, 415 So. 2d 123, 124 (Fla. Dist. Ct. App. 1982) (holding that the state statute was aimed at decreasing juvenile delinquency).

164. See Scott, *supra* note 21, at 73 (explaining that the common law "left innocent victims with no way to recover for their injuries caused by a child").

In 1951, Nebraska was one of the first states to enact such legislation.¹⁶⁵ Fifty years later, all states, except New Hampshire, have similar laws on their books.¹⁶⁶ “Slightly more than half of these laws permit recovery both for property damage and personal injury; the remainder restrict recovery to property damage.”¹⁶⁷ Moreover, the majority of these statutes only impose liability for the willful and malicious destruction of property by the child.¹⁶⁸ State legislatures have also placed various limits on the recovery range of parental liability statutes from \$250 in Vermont to \$25,000 in Texas.¹⁶⁹

While courts have addressed the constitutionality of state parental liability statutes,¹⁷⁰ they have consistently failed to address whether the original intent of such statutes is being fulfilled.¹⁷¹ For example, in *Vanthournout v. Burge*,¹⁷² an Illinois appellate court did not give deference to the sociological studies cited by the defendant which demonstrated that peers and social institutions also have a role in fostering or controlling juvenile behavior.¹⁷³ While critics have derided parental liability statutes as pointless and misguided,¹⁷⁴ others have promoted the idea as a

165. Gilbert Geiss & Arnold Binder, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 303, 310 (1991) (discussing the history of parental liability statutes in the United States).

166. *Id.*; see also Scott, *supra* note 21, at 87–91 (citing parental liability statutes).

167. Geiss & Binder, *supra* note 165, at 310; TEX. FAM. CODE ANN. § 41.001 (Vernon 1996) (recognizing liability only in regards to property damage).

168. Adams, *supra* note 19, at 689.

169. Geiss & Binder, *supra* note 165, at 311; TEX. FAM. CODE ANN. § 41.002 (Vernon 1996 & Supp. 2001); see also Scott, *supra* note 21, at 87–92. It should be recognized that scholars have suggested that the “existence of such limits strongly supports the conclusion that the primary purpose of these laws is juvenile crime control, not restitution.” Geiss & Binder, *supra* note 165, at 311.

170. See Geiss & Binder, *supra* note 165, at 311 (stating that “with all but one exception,” the parental civil liability statutes have been found to be constitutional). Texas’s original parental liability statute was found constitutional in 1961. See *Kelly v. Williams*, 346 S.W.2d 434, 437 (Tex. Civ. App.—Dallas 1961, writ ref’d n.r.e.). Texas’s current parental liability statute was declared constitutional in 1980. See *Buie v. Longspagh*, 598 S.W.2d 673, 676 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.).

171. Geiss & Binder, *supra* note 165, at 311 (suggesting that appellate courts should consider whether parental liability laws are decreasing juvenile delinquency).

172. 387 N.E.2d 341 (Ill. App. Ct. 1979).

173. See *id.* at 343 (finding that, despite the sociologist reports, the Parental Responsibility Act fulfilled its legislative purpose).

174. See, e.g., Pamela K. Graham, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1728–29 (2000) (stating that the increase in juvenile delinquency since the promulgation of parental civil liability statutes seems to suggest the statutes are not fulfilling their purpose); Courtney L. Zolman, Comment, *Parental Responsibility Acts: Medicine for Ailing Families and Hope for the Future*, 27 CAP. U. L. REV. 217, 232–33 (1998) (highlighting the various criticisms of civil parental liability statutes); Michelle L. Casgrain, Note, *Parental Responsibility Laws: Cure for Crime or Exercise in Futility*, 37 WAYNE L. REV. 161, 186 (1990) (concluding that parental

fair and just way to compensate the victims of minor tortfeasors.¹⁷⁵ Despite this debate, the movement to increase parental liability has gradually strengthened over the years.¹⁷⁶

B. Don't Mess with Texas Property: The Texas Statute

In 1957, Texas enacted a vicarious liability statute in the form of article 2923-1.¹⁷⁷ “This statute imposed liability upon parents for the wilful [sic] and malicious destruction of property by their child.”¹⁷⁸ The statute’s original limitation of \$300 was later raised to \$5,000 in 1965.¹⁷⁹ In 1974, this statute was repealed and replaced by Chapter 33 of Title II of the Texas Family Code.¹⁸⁰

Chapter 41 of the Texas Family Code provides in pertinent part that:

A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by:

1. the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other persons to exercise that duty; or

liability statutes are ineffective and that “no evidence exists [that these laws even have an] impact on parental or juvenile behavior”); Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 672 (1997) (concluding that the enactment of parental liability statutes is not a particularly effective solution to the problem of juvenile delinquency because children are often beyond their parents’ control).

175. See *Kelly*, 346 S.W.2d at 437 (stating that many scholars have endorsed parental liability statutes and have praised the benefits accomplished by their enactment).

The Civil Codes of Europe, Central and South America, Quebec, Louisiana, Hawaii and Puerto Rico have always provided for parental liability for the torts of children. Now . . . [various] legislatures . . . have decided that in all fairness, it is better that the parents of these young tortfeasors be required to compensate those who are damaged, even though the parents be without fault, rather than to let the loss fall upon the innocent victims.

Id. at 437–38 (internal quotation marks omitted). See also Abraham Abramovsky, *Bias Crime: Is Parental Liability the Answer?*, in 1992/1993 ANN. SURV. AM. L. 533, 539 (1993) (arguing that “[c]ivil damages would encourage parents to restrain their children’s violent inclinations”).

176. See Casgrain, *supra* note 174, at 165–70 (chronicling the growing movement of enacting state laws holding parents responsible for the actions of their children).

177. Adams, *supra* note 19, at 689; see also TEX. REV. CIV. STAT. ANN. art. 5923-1 (Vernon 1962).

178. Adams, *supra* note 19, at 689.

179. *Id.* at 689 n.22.

180. *Id.* at 689 (stating that \$5000 was the maximum amount for actual damages that could be recovered). In 1997, the Texas state legislature raised this limit to \$25,000. TEX. FAM. CODE ANN. § 41.002 (Vernon 1996 & Supp. 2001).

2. the willful and malicious conduct of a child who is at least 12 years of age but under 18 years of age.¹⁸¹

As is evident from the text of section 41.001, the statute authorizes a cause of action against a parent or other person responsible for the child for property damage caused by the negligent conduct of a child, if the child's conduct was a result of the supervisor's negligence in controlling the child.¹⁸² While this paragraph is extremely similar to the "opportunity and necessity to control" requirement of section 316, this provision only applies to property damage, not personal injury.¹⁸³ Thus, it would seem that Texas parents should be more concerned with their child's propensity to commit arson¹⁸⁴ than his propensity to commit assault.¹⁸⁵

Paragraph two of section 41.001 also seems to be more focused on preventing minors from committing property damage than personal injury. This paragraph permits a property owner to sue the parents or managing conservator of a child of at least twelve, but no more than eighteen years of age, for damages which result from the child's malicious and willful acts against property.¹⁸⁶ Section 41.001 has no express requirement that the parent have prior knowledge of the child's dangerous propensities before liability can be established.¹⁸⁷ Indeed, unlike section 316 of the Restatement, section 41.001 of the Texas Family Code creates strict liability for a parent who fails to control his child's willful and malicious behavior.¹⁸⁸

This statute also requires a child to be at least twelve years of age before vicarious liability may be imposed on his or her parents.¹⁸⁹ Thus, unlike section 316 of the Restatement,¹⁹⁰ section

181. TEX. FAM. CODE ANN. § 41.001 (Vernon 1996).

182. *Id.*

183. See *Amarillo Nat'l Bank v. Terry*, 658 S.W.2d 702, 704 (Tex. App.—Amarillo 1983, no writ) (stating that "[b]y the terms of . . . [section 41.001 of the Texas Family Code], liability is imposed on the parent or other person for [only] 'property damage'").

184. See, e.g., *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 285–86 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (affirming trial court judgment that the parents of a minor who willfully and maliciously set fire to the property of the insured could have been held financially liable for the damage if the cause of action had been timely filed).

185. See, e.g., *Childers v. A.S.*, 909 S.W.2d 282, 289 (Tex. App.—Fort Worth 1995, no writ) (affirming summary judgment which found that no claim could arise for negligent parental supervision even though the parents were aware of their minor child's previous inappropriate sexual acts with her minor friends and failed to take reasonable actions to control this behavior).

186. TEX. FAM. CODE ANN. § 41.001.

187. See *id.*

188. See *id.*; cf. RESTATEMENT (SECOND) OF TORTS § 316 (1965).

189. TEX. FAM. CODE ANN. § 41.001.

41.001 of the Texas Family Code does not seem to be concerned with the fact that parents may not have the ability or opportunity to control their older children.¹⁹¹ While the comments to section 316 of the Restatement seem to imply that a parent has less control as his child matures,¹⁹² section 41.001 of the Texas Family Code places liability on the parent for his child until that child turns eighteen.¹⁹³ Applying this statutorily-created strict liability to parents of older children¹⁹⁴ seems extremely harsh considering that older children are more likely than younger ones to demonstrate malignant behavior.¹⁹⁵ Given this fact, one could argue that Texas law imposes a higher standard for parental supervision than section 316 of the Restatement. Yet those who share this view would be mistaken as section 41.001 of the Texas Family Code only punishes parental negligence when it affects one thing—property.¹⁹⁶

Because section 41.001 only applies to property damage, parents in Texas who negligently fail to control their child's propensity to harm people remain unpunished in tort.¹⁹⁷ Thus, victims of personal injury perpetrated by minors in Texas continue to be unable to seek fair and just compensation for their injuries. Yet, instead of attempting to rectify this injustice, Texas courts have consistently refused to adopt section 316 of the Restatement.¹⁹⁸ Consequently, it appears that Texas civil law currently deems the property of citizens more worthy of protection from juvenile tortfeasors than the personal safety of its citizenry.

190. RESTATEMENT (SECOND) OF TORTS § 316 cmt. c (stating that “the very youth of the child is likely to give the parent more effective ability to control its actions and to make it more often necessary to exercise it”).

191. See TEX. FAM. CODE ANN. § 41.001 (creating strict vicarious liability for property damage proximately caused by the willful and malicious conduct of a child between the ages of twelve and eighteen).

192. See RESTATEMENT (SECOND) OF TORTS § 316 cmt. c.

193. TEX. FAM. CODE ANN. § 41.001(2).

194. *Id.*

195. HOWARD M. SNYDER & MELISSA SICKMUND, NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE 3 (1995) (reporting that in 1992, “juveniles accounted for 13% of all violent crimes reported to law enforcement agencies and 18% of all violent crime arrests” (internal quotation marks omitted)).

196. See *Buie v. Longspaugh*, 598 S.W.2d 673, 675 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (stating that the legislative intent of the predecessor statute to section 41.001 “is to protect and compensate *property owners* from the wilful [sic] and malicious destruction of their property by minors” (emphasis added)).

197. See *id.*

198. See *Childers v. A.S.*, 909 S.W.2d 282, 287 (Tex. App.—Fort Worth 1995, no writ) (declining to adopt section 316 of the Restatement); *Rodriguez v. Spencer*, 902 S.W.2d 37, 43 (Tex. App.—Houston [1st Dist.] 1995, no writ) (stating that no Texas court has expressly adopted section 316 of the Restatement).

V. THE STATUS OF PARENTAL CIVIL LIABILITY IN TEXAS

As previously noted, the Texas state legislature has been protecting its citizens' property from the harm of minors for over forty years.¹⁹⁹ Moreover, since its inception, Texas courts have held the Texas parental liability statute to be constitutional,²⁰⁰ and have even broadened its interpretation to ensure victims receive their full compensation.²⁰¹ Yet, when confronted with minors who intentionally cause personal injury, Texas courts have consistently resorted to the common law rule that liability does not arise out of the mere parent-child relationship.²⁰² Indeed, even when confronted with victims whose only chance of redress is in tort, Texas courts have declined to find the parents liable under Texas law²⁰³ and have refused to adopt section 316 of the Restatement.²⁰⁴ The injustice this has created is evident through an examination of recent Texas case law.

In the 1995 case of *Rodriguez v. Spencer*, the First District Court of Appeals of Texas reinforced limits on parental liability based solely on parental status.²⁰⁵ In *Rodriguez*, Paul Broussard was beaten and stabbed to death as the result of a "gay bashing" incident in Houston committed by a minor, Brian Spake.²⁰⁶ Broussard's mother, Nancy Rodriguez, brought a negligence suit

199. See Adams, *supra* note 19, at 689 (stating that article 5923-1, which first assigned liability to parents for the torts of their children, was passed in 1957).

200. See Kelly v. Williams, 346 S.W.2d 434, 437-38 (Tex. App.—Dallas 1961, writ ref'd n.r.e.). The current parental liability statute in Texas was declared constitutional in 1980. *Buie*, 598 S.W.2d at 676.

201. See *Buie*, 598 S.W.2d at 676 (refusing to limit a parent's liability to \$5,000 per act, as opposed to limiting liability for several malicious acts in one episode to a total of \$5,000). The court further noted in its holding that "[w]hile we appreciate the possibility of financial hardship on parents of particularly destructive children, any further limitation of liability must be made by the legislature rather than by the courts." *Id.*

202. See, e.g., *Prather v. Brandt*, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, no writ) ("As a general rule, minors are civilly liable for their own torts."); *Williams v. Lavender*, 797 S.W.2d 410, 412 (Tex. App.—Fort Worth 1990, writ denied) (noting that Texas courts generally hold minors to be severally liable for their own torts); *Brown v. Dellinger*, 355 S.W.2d 742, 746 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (acknowledging that minors in Texas are normally civilly liable for their own torts); *Moody v. Clark*, 266 S.W.2d 907, 912 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.) (finding that "the mere fact of paternity does not make a parent liable for the torts of her or his minor child").

203. See, e.g., *Rodriguez*, 902 S.W.2d at 43, 45 (granting summary judgment for the defendant because Texas does not recognize the tort of negligent parental supervision). This judgment prevented the mother of the victim from receiving any compensation for her loss. See *id.* at 45-46.

204. *Id.*

205. See *id.* at 43.

206. *Id.* at 39-40 (explaining that, in addition to Spake, four adults and four other minors participated in the attack on Broussard).

against Spake's mother, Mary Anne Spencer, claiming the parent-child relationship imposed a parental duty to supervise, control, and discipline her child.²⁰⁷ The trial court granted summary judgment for the defendant, and Rodriguez appealed.²⁰⁸

In her appeal, Rodriguez first asked the court to acknowledge a duty to third parties arising from a statute in the Texas Family Code which states that a parent has "the duty of care, control, protection, and *reasonable discipline* of the child."²⁰⁹ Because the Texas state legislature focused solely on property damage in section 41.001 of the Texas Family Code and, because the provision relied upon by Rodriguez in her appeal is usually cited only in criminal actions against parents for harming their own children, the court of appeals held that the statute she cited "[did] not establish a parent's duty to control or discipline children for the benefit of third parties."²¹⁰

"Alternatively, Rodriguez asked the court to extend [the] common law duty" because the "parent-child relationship alone is not enough to render a parent liable for the child's torts."²¹¹ Rodriguez suggested that the court adopt the Restatement position that a parent is liable for failing to exercise reasonable control of a child when that parent knows or should know of the necessity and opportunity for exercising such control.²¹² Although the court acknowledged that section 316's analysis was beneficial, it declined to adopt it.²¹³ The court was reluctant to create "a duty on parents to supervise their children when they *should know* of the necessity for doing so."²¹⁴

The court's reasoning indicates that it believed such a standard would broaden parental liability in Texas to a level it was unwilling to broach.²¹⁵ Rather, the court concluded that a "parent's duty to protect third parties from the acts of the parent's minor children depends on whether the injury to the third party is reasonably foreseeable under the circumstances as evidenced by the parent's knowledge, consent, sanction, or

207. *Id.*

208. *Id.*

209. *Id.* at 40 (quoting TEX. FAM. CODE ANN. § 151.003(2) (Vernon 1996)) (emphasis added by the court).

210. *Id.* at 40-41.

211. James W. Paulsen, Annual Survey of Texas Law, *Family Law: Parent and Child*, 49 SMU L. REV. 1063, 1067-68 (1996).

212. *Id.*

213. *Rodriguez*, 902 S.W.2d at 43.

214. *Id.*

215. *See id.* (retaining the much narrower common law standard for parental liability).

participation in the child's activities."²¹⁶ Arguably, under this holding, a parent who did not take an active role in his child's life would not be found liable if he was unaware of his child's malignant proclivities.

Thus, unlike section 316, which has a "reasonable man" standard,²¹⁷ the *Rodriguez* standard only asks if the parent did in fact have knowledge of his child's destructive tendencies.²¹⁸ As such, it arguably rewards absent or neglectful parents. Notwithstanding these concerns, Texas's loyalty to its common-law roots was again reinforced in *Childers v. A.S.*²¹⁹

In *Childers*, the defendant, A.S., and her parents, the Miksells, were neighbors of the plaintiffs, Merryl Childers and her daughter, J.C.²²⁰ In her deposition, J.C. testified that A.S. frequently came to the Childers' house with a third little girl and played sexual games.²²¹ J.C. claimed that if she did not play the games with A.S. and the other girl, they would get other girls to beat her up.²²² The games were always played in the Childers' home and often with J.C.'s parents at home.²²³ A.S. testified that J.C.'s mother discovered the girls' activities and phoned A.S.'s mother to discuss the situation.²²⁴ After questioning A.S. about the games, her mother told her not to go to the Childers' house or to play the games anymore.²²⁵ A.S. testified that she defied her mother's instructions and continued to go to the Childers' house without her mother's knowledge.²²⁶

The Childers sued the Miksells for five specific allegations of negligence.²²⁷ Among them, the Childers alleged that the Miksells failed to adequately supervise the activities and conduct of A.S. or to provide her with necessary medical treatment when they

216. *Id.*

217. See RESTATEMENT (SECOND) OF TORTS § 316(b) (1965). The Restatement position asserts that a parent is liable for failing to exercise reasonable control of a child when that parent "knows or should know of the necessity and opportunity for exercising such control." *Id.*

218. *Rodriguez*, 902 S.W.2d at 43 (upholding summary judgment for the defendant because the mother of the tortfeasor did not have *sufficient knowledge* of her son's violent, homophobic behavior).

219. 909 S.W.2d 282 (Tex. App.—Fort Worth 1995, no writ).

220. *Id.* at 285–86.

221. *Id.* at 285.

222. *Id.* (recounting J.C.'s deposition testimony that J.C. did not enjoy the sexual games but was threatened by A.S. with a butcher knife if J.C. refused to play).

223. *Id.*

224. *Id.* at 286.

225. *Id.*

226. *Id.* (explaining that A.S. claimed she returned to J.C.'s house because J.C. had a video game she wanted to play).

227. *Id.* (detailing each of the five accusations appearing in the plaintiffs' complaint).

knew of her proclivity to engage in sexual games.²²⁸ The Miksells moved for summary judgment on the ground that they owed no duty to appellant or her daughter under the theory of negligent parental supervision.²²⁹ The trial court granted the summary judgment, and the Childers appealed.²³⁰

The court of appeals, utilizing the *Rodriguez* standard, affirmed the lower court and held that the Miksells owed no duty to the Childers.²³¹ Likewise, it declined to adopt section 316 of the Restatement.²³² In doing so, the court noted that because the Miksells were not specifically aware that A.S. continued to play sexual games with J.C. after they had told her to cease this behavior, they could not be liable under Texas law.²³³ Arguably, if this court had adopted the Restatement, summary judgment would not have been appropriate because there would have been a genuine issue of material fact as to whether the Miksells undertook reasonable steps to prevent A.S. from engaging in further sexual games with J.C.²³⁴ However, because Texas had not adopted section 316 of the Restatement, no duty had arisen, and the court granted summary judgment for the Miksells.

Rodriguez and *Childers* clearly demonstrate how victims of minor tortfeasors in Texas continue to be unable to seek redress in tort.²³⁵ Accordingly, by retaining the common law doctrine pertaining to parental negligent supervision, the state of Texas has arguably prevented the victims of a sexual molestation,²³⁶ a deadly, hate-driven assault,²³⁷ and a drive-by shooting²³⁸ from

228. *Id.*

229. *Id.*

230. *Id.* at 285–86.

231. *Id.* at 287, 293 (stating that the trial court correctly granted summary judgment on appellants' negligence causes of action against A.S. and the Miksells).

232. *Id.* at 287 (noting that the *Rodriguez* court also declined to adopt section 316 of the Restatement).

233. *Id.* at 289.

234. *See id.* (stating that the parents of the minor tortfeasor warned her not to continue her malignant behavior, and yet she proceeded again to approach the victim and play sexual games with her); *cf.* *Wood v. Groh*, 7 P.3d 1162, 1172 (Kan. 2000) (holding that, under section 316 of the Restatement, summary judgment should not be granted if there is a genuine issue of material fact of whether the parents of the minor tortfeasor took reasonable steps to prevent their child's dangerous tendencies).

235. Refer to Part IV *supra* (demonstrating the limited redress victims of juvenile tortfeasors have in Texas).

236. *Childers*, 909 S.W.2d at 293.

237. *Rodriguez v. Spencer*, 902 S.W.2d 37, 39–40, 43 (Tex. App.—Houston [1st Dist.] 1995, no writ).

238. *Prather v. Brandt*, 981 S.W.2d 801, 811 (Tex. App.—Houston [1st Dist.] 1998, no writ) (affirming summary judgment which prevented the plaintiff from demonstrating that the defendants failed to take reasonable steps to prevent their son from engaging in a drive-by shooting and injuring the plaintiff).

seeking compensation, retribution, and economic justice in a court of law. However, to lay fault for this injustice on the Texas courts seems wrong and misguided.

In 1957, the Texas state legislature thought highly enough of property owners to protect them from the dangerous proclivities of minor tortfeasors.²³⁹ It is time the legislature thought that highly of its citizenry. It is time for the Texas state legislature to adopt section 316 of the Restatement. By doing so, the new tort standard would allow victims of juvenile tortfeasors a chance to seek economic justice in a court of law and would arguably encourage parents “to train and discipline their children through the imposition of . . . liability.”²⁴⁰

The legislative limits upon parental liability provided in sections 41.001 through 41.003 of the Texas Family Code, while well founded, now seem antiquated in light of the level of responsibility our tort law currently demands. Thus, in order for Texas to provide the same economic justice many other states provide, it must adopt section 316 of the Restatement in the next legislative session.

VI. CONCLUSION

No one can argue that parenthood is not difficult. The level of responsibility it requires knows no bounds. Moreover, with the bombardment of sexual, violent, misogynistic, and hate-inspired messages that children now receive, it is arguable that parenthood in the twenty-first century is much more difficult than in years past. Yet, even with these difficulties, parents cannot neglect their responsibility to care, provide, and, most importantly, guide their offspring. Thus, our laws must hold parents accountable when they neglect their most profound duty—that of being a parent.

Parents must be found accountable when they neglect and ignore their child's dangerous and violent propensities, especially when these propensities harm, and even kill, innocent civilians. Our society cannot function if we continue to permit parents to neglect their role in society. Thus, with great care and consideration, state legislatures, if they have not done so already, should pass statutes which hold parents accountable when they knew or should have known of their child's destructive behavior

239. Adams, *supra* note 19, at 689 (stating that Texas passed its first parental civil liability statute in 1957).

240. Buie v. Longspagh, 598 S.W.2d 673, 676 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

and fail to take reasonable steps to prevent it.²⁴¹ While such statutes may increase the price of parenthood, we cannot afford the alternative.

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241. See RESTATEMENT (SECOND) OF TORTS § 316 (1965).