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Where Are the Parents? Parental Criminal Responsibility For the Acts of Children

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COMMENT

WHERE ARE THE PARENTS? PARENTAL CRIMINAL RESPONSIBILITY FOR THE ACTS OF CHILDREN

I. INTRODUCTION

On April 20, 1999, Dylan Klebold, age seventeen and Eric Harris, age eighteen, walked into their high school in Columbine, Colorado and opened fire on fellow students and faculty.[1] Armed with a handgun, two shotguns, and a rifle, they killed twelve students, one teacher, and wounded twenty-three others.[2] This was not just an impromptu spree.[3] Before committing the massacre Klebold and Harris copied school keys, acquired guns, kept a diary describing their plans, made bombs and planted them in the school, and even warned a student to leave the school before they began shooting.[4] Then, after their homicidal acts, both Klebold and Harris committed suicide.[5]

The two killers plotted their attack on Columbine High School for more than a year.[6] They planned when they would

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[1] *See* John Cloud, *Just a Routine School Shooting*, TIME, May 31,1999, at 36-37.

[2] *See id.*

[3] *See* Nancy Gibbs and Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, at 43.

[4] *See* Bill Dedman, *Secret Service Is Seeking Pattern for School Killers*, N.Y. TIMES, June 21, 1999, at A-12.

[5] *See* Cloud, *supra* note 1.

[6] *See* Gibbs, *supra* note 3, at 45.

strike and where they would place the pipe bombs used in the massacre.[7] Harris also maintained a website that brazenly described the dimensions and "nicknames" of his homemade bombs, the targets of his wrath, and his dark philosophy of life.[8] Even more chilling, the two made five home video tapes before the massacre.[9] The tapes were meant by the killers to describe how and why they acted.[10] What the tapes reveal, however, is their indiscriminate hatred of others and their desire to be famous for their intended crimes.[11]

There were significant warning signs, like flashing red lights, that apparently no one, not even their parents, paid any attention to.[12] The police recovered two sawed off shotguns and bomb materials from Harris' bedroom that had been left in plain sight.[13] Several months prior to the massacre, Harris' father discovered and disarmed a bomb Harris had made.[14] It is rumored that Mr. Harris did not report this because his son was already on probation for an attempted car theft,[15] committed with Klebold, a year before.[16] Additionally, a teacher at

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[7] *See id.* at 44.

[8] *See id.* at 46.

[9] *See id.* at 40. The tapes were made in the basement of the Harris home, after the parents went upstairs to bed and were asleep. The "secret tapes" were made known to the public approximately eight months after the tragedy. *Id.*

[10] *See* Gibbs, *supra* note 3 at 44.

[11] *See id.* Klebold discusses their hatred "all niggers, spics, Jews, gays, fucking whites," and others that they believed had abused them or who had failed to defend them. Their hope was to kill as many as 250 people. *Id.* at 42. Klebold and Harris wanted movies to be made about their lives and actions and discussed the Hollywood names who might best represent them on film. "Directors will be fighting over this story . . . Spielberg . . Tarantino." *Id.*

[12] *See id.* at 45.

[13] *See* Cissy Taylor, *Parental Liability Can't Be Criminal Under New Hampshire's Laws,* THE UNION LEADER, Apr. 28, 1999, at A-1.

[14] *See Good Morning America: Home Videos of High School Killers* (ABC Television broadcast, May 24, 1999) (interview with Nate Dykeman, friend of Eric Harris) [hereinafter *Good Morning America*].

[15] *See NBC Nightly News: Background into Trenchcoat Mafia Suspects and Their Crime* (NBC television broadcast, Apr. 21, 1999) [hereinafter *NBC Nightly News*].

[16] *See Good Morning America, supra* note 14.

Columbine High School had warned the parents that the boys' class essays included graphic descriptions of killings.[17] The killers' parents may have turned a blind eye to these signs; however, before the boys turned the guns on themselves and while the attack on Columbine was still being played out on TV, Mr. Harris called his wife, then his attorney.[18] For months thereafter, the Harris' were silent to police questioning while they sought immunity from criminal prosecution.[19]

One year earlier, on May 20, 1998, in Springfield, Oregon, fifteen-year old Kipland Kinkel killed both of his parents as they arrived home from work.[20] The next morning, as his parents lay dead, Kinkel armed himself with a .22 caliber semi-automatic rifle and two pistols and went to Thurston High School, where he shot and killed two students and wounded twenty others.[21] Like Columbine, there were warning signs that pointed to a very troubled youth.[22] Kinkel got caught shop lifting in 1996 and in January 1997 he was arrested for throwing rocks off a freeway overpass and hitting passing cars.[23] His parents knew of his obsession with guns and explosives and were concerned for his safety and the safety of others.[24] Consequently, they sought counseling for their son through a psychologist, who, subsequently prescribed Prozac for Kinkel's depression.[25] In April 1997, Kinkel was suspended from school for kicking another student in the head after the student pushed him.[26] In September 1997, Kinkel gave an in-

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[17] *See* James Brooke, *Teacher of Colorado Gunmen Alerted Parents*, N.Y. TIMES, May 11, 1999, at A-14.

[18] *See* Gibbs, *supra* note 3 at 49.

[19] *See id.* at 50.

[20] *See Frontline: The Killer At Thurston High; School Shooters* (PBS television broadcast, January 21, 2000) [hereinafter *Frontline: School Shooters*].

[21] *See* Cloud, *supra* note 1.

[22] *See Frontline, supra* note 20.

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

structional speech at school about how to make a bomb.[27] Finally, in December 1997, Kinkel's father talked with a stranger he had met at the airport and confided that his son had a troubled past, was playing with explosives, and was becoming increasingly difficult to control.[28] Despite all of this, Kinkel's father purchased two guns for him, but only on the condition that he not use them unsupervised.[29] That "condition" was obviously, and perhaps forseeably, breached.

These incidents reveal an alarming pattern of violence by children. Over the last three years children have killed or wounded students, faculty, and others in eight school shootings.[30] On February 2, 1996, fourteen-year old Barry Loukaitis killed one teacher, two students and wounded one student with a .30-30 caliber rifle taken from his home in Moses Lake, Washington.[31] On October 1, 1997, sixteen-year old Luke Woodham killed two students and wounded seven others with a .30-.30-caliber rifle taken from his home in Pearl, Mississippi.[32] He also stabbed his mother to death.[33] On December 1, 1997, fourteen-year old Michael Carneal killed three students and wounded five others with a .22 caliber Ruger pistol stolen from his neighbor's father in West Paducah, Kentucky.[34] On March 24, 1998, in Jonesboro, Arkansas, eleven-year old Andrew Golden and thirteen-year old Mitchell Johnson killed one teacher and four students and wounded ten others in a sniper attack on their school.[35] The two boys were armed with three rifles and seven handguns stolen from relatives' homes.[36] On

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[27] *See Frontline: School Shooters*, *supra* note 20.

[28] *See id.* The stranger happened to be an Oregon University professor who specialized in juvenile violence. *See id.*

[29] *See id.*

[30] *See* Cloud, *supra* note 1.

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See* Cloud, *supra* note 1.

[36] *See id.*

May 20, 1999, exactly one month after the Columbine shootings, fifteen-year old Thomas Solomon wounded six students at Heritage High School in Conyers, Georgia with a .22 caliber rifle taken from a cabinet in his home.[37] Evidence found in the boy's bedroom included printouts of bomb making instructions, notes on where to plant explosives at the school, and diaries recording his despair.[38] He is currently being detained at a juvenile detention center.[39]

The last school shooting of the twentieth century occurred in Fort Gibson, Oklahoma, on December 6, 1999.[40] There, a seventh grader walked into his middle school armed with a semi-automatic handgun and opened fire, wounding four students.[41] The boy was described as a popular honors student from a good family who had just celebrated his thirteenth birthday.[42] When police asked him why he did it, he replied "I don't know."[43]

Society grieves over the extraordinary violence of its children, while professionals and parents struggle to understand the reasons for such actions.[44] One response to the rash of school shootings has been an attempt to psychologically "profile" potentially violent children so that parents, teachers, and

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[37] *See id.*

[38] *See id.* at 35.

[39] *See id.* at 36-37.

[40] *See* Lois Romano, *4 Hurt in School Shooting*, S.F. CHRONICLE, December 7, 1999, at A3.

[41] *See id.* at A3.

[42] *See id.*

[43] *Id.*

[44] *See* Jeff Kass, *Portrait of Two Teens Reveals a lot of Gray*, THE CHRISTIAN SCIENCE MONITOR, May 3, 1999, 3; *Frontline: School Shooters*, *supra* note 20; *Mother Questions Who Her Son Was, Everyone is Trying To Figure Out Why Teens Went on a Rampage*, CHARLESTON DAILY MAIL, Apr. 26, 1999, at 7A; Tom Mashberg, *Violence May Be a Gender Issue; Experts Fret That Boys are Being Raised to Explode*, THE BOSTON HERALD, May 23, 1999, at 007.

professionals can identify them before the violence occurs.[45] Another response to the shootings has been to characterize the perpetrators in a sociological context to better understand the causes of their anger.[46] Some researchers and psychologists believe that such violence may be a gender issue, since none of the assailants in these school shootings have been female.[47] While others agree that such violence may, in fact, be a gender issue, they are angry that youth violence is only now being taken seriously.[48] They argue that youth violence has been occurring in urban areas involving minorities[49] since the late 1980's,[50] but because such violence has now involved white, suburban youth, it is receiving more media and professional attention.[51] Thus, while we search for understanding and ways to prevent future acts of youth violence, the warning signs may have always been there, but not taken seriously by those who might have been able to make a difference.[52]

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[45] Dedman, *supra* note 4. *See also Frontline: School Shooters, supra* note 20. The year following the Springfield, Oregon school shooting, the American Psychological Association issued "22 Warning Signs" that might indicate the possibility of violence. Additionally, the National School Safety Center issued "Checklist of Characteristics of Youth Who Have Caused School-Associated Violent Deaths" and the National Center for the Prevention of Crime issued a list of "Signs That Kids Are Troubled." Such lists of early warning signs for potentially violent children have become extremely popular. *See id.*

[46] *See* Mashberg, *supra* note 44, at 007. *See also* Stephanie Salter, *'Blinded By Love' and By Stereotyping,* THE PALM BEACH POST, May 1, 1999, at 15A.

[47] *See* Mashberg, *supra* note 44, at 007. *See also* Cloud, *supra* note 1 (identifying the school shooters of the last three years as young, white males, some clinically depressed, with access to weapons from either their homes or from friends and neighbors).

[48] *See* Michael Romano, *'No One Seems to Recognize' Urban Violence - Minority Students See Double Standard after Columbine,* THE ROCKY MOUNTAIN NEWS, July 16, 1999, at 32A.

[49] *See id.*

[50] *See* Linda A. Chapin, Note, *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 (1997) (citing Williams v. Garcetti, 853 P.2d 507, 510 (Cal. 1993)).

[51] *See* Romano, *supra* note 48.

[52] *See id.*

Not only does society want to know why such violence occurs, but it also wants to know who to blame for it. Consequently, victims and their families are seeking legislative reform[53] and new civil remedies.[54] For example, the availability of guns has sparked much discussion about limiting the sale of firearms, a solution that is gaining support in our state and federal legislatures.[55] Until these tragedies occurred, such attempts had long languished on the legislative floor.[56] In addition, victims and their families are increasingly seeking justice in civil lawsuits against those that they believe are responsible for infusing youthful killers.[57] In most cases, it is the parents that are being sued civilly for failing to control their children.[58] However, lawsuits are now being brought against non-traditional defendants, such as gun makers, the media, and web sites for their roles in inducing violence.[59]

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[53] *See* Mike Allen, *Gun Owners Fear Connecticut Bill on Gun Seizures*, N.Y. TIMES, May 31, 1999, at A9; Frank Bruni and James Dao, *Gun Control Bill Rejected In House Bipartisan Vote*, N.Y. TIMES, June, 19, 1999, at A1; Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1; *Guns in the House*, N.Y. TIMES, May 27, 1999, at A30; Alison Mitchell, *Politics Among Culprits In Death of Gun Control*, N.Y. TIMES, June 19, 1999, at A19; Sam Howe Verhorvek, *Firearms Limits Gaining Support in Legislatures*, N.Y. TIMES, May 31, 1999, at A1.

[54] *See Frontline: School Shooters, supra* note 20.

[55] *See supra* note 53.

[56] *See id.*

[57] *See Frontline: School Shooters, supra* note 20.

[58] *See id.* The parents of one of the students injured in the Springfield, Oregon shooting filed a $14.5 million lawsuit against Kip Kinkel and the estate of his parents. The parents of Columbine victim Isaiah Shoels filed a $250 million wrongful death suit against the parents of Eric Harris and Dylan Klebold. The families of five of the Jonesboro, Arkansas victims filed a lawsuit against the two shooters and their parents, claiming negligent training and supervision. The parents of the victims in Paducah, Kentucky filed suit against the shooter, his parents, students who had seen the shooter with a gun on previous occasions, and the neighbor from whom the shooter took the gun. The mother of one of the Pearl, Mississippi victims filed a lawsuit against the school district and the parents of six of the students, claiming that the six students were part of a cult-like group and that the parents could have taken steps to prevent the shooting. *See id.*

[59] *See id.* As of the time of this writing the Shoels family may also add two gun manufacturers to their wrongful death lawsuit. Twenty Columbine families have filed "intent to sue" notices against local government agencies, and the school district. The parents of the Paducah, Kentucky victims filed suit in federal court against twenty-

A significant question that has yet to be answered is that of parental criminal liability. Since the goals of a peaceful society are best promoted by the prevention of crime, there is an expectation that parents be responsible for the violence of their own children. In the absence of such prevention, however, is it legally possible to hold parents criminally responsible for the violence of their children?[60] In the Columbine massacre, for example, many people continue to question whether the Klebold and Harris families knew of their sons' elaborate and deadly plans.[61] Did the parents of these two boys see the warning signs of the coming tragedies, yet fail to act to protect others?[62] The role that the parents of these young men played in this tragedy, if any, is still being investigated.[63] The District Attorney, however, has not ruled out bringing charges, but

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five media companies, including Time Warner, for making violent films. They are also suing eleven video game companies. The five Jonesboro, Arkansas families are also suing gun manufacturers for not manufacturing guns with trigger locks. *See id.*

[60] Some have suggested that parents should be held criminally liable for their roles in their child's criminal behavior. *See* Kathy Kiely and Gary Fields, *Colorado Killers' Last Days Gave No Hint of Plans,* USA TODAY, May 3, 1999, at 7A. *See also* Fox Butterfield, *A Friendly Game Leads To A Charge of Murder*, N.Y. TIMES, August 5, 1999, at A12. Dr. Stephen Hartgarten, director of the Firearm Injury Center at Medical College of Wisconsin in Milwaukee, stated in his discussion about the use and availability of firearms to children, "[t]o cast the blame on the people who pull the trigger does not address the question of how we can reduce the number of these shootings. . . . [t]here should be more punishment of adults who allow children access to firearms." *Id.*

[61] *See* Jim Hughes and Jason Blevins, *Father Had Hunch Son Was Involved,* THE DENVER POST, Apr. 22, 1999, at A-14; *Mother Questions Who Her Son Was, Everyone Is Trying To figure Out Why Teens Went On A Rampage,* CHARLESTON DAILY MAIL, Apr. 26, 1999, at 7A; Kiely, *supra* note 60; Karen Lowe, *As Shock Of Shooting Wanes, Search For Blame Picks Up,* AGENCE PRESS FRANCE, Apr. 26, 1999.

[62] *See* James Brooke, *Teacher Of Colorado Gunmen Alerted Parents,* The N.Y. TIMES, May 11, 1999, at A-14; *Parents Of Teen Killer Noticed "Tension" Before School Rampage,* AGENCE PRESS FRANCE, Apr. 26, 1999; NBC *Nightly News, supra* note 13; Lynn Bartels, *Klebolds Never Knew, Friend Says*, ROCKY MOUNTAIN NEWS, Apr. 26, 1999, at 5A; *Good Morning America, supra* note 14.

[63] *See* Lowe, *supra* note 61. *See also* Gibbs, *supra* note 3 at 50.

currently lacks sufficient evidence of wrongdoing against them.[64]

A finding of liability for wrongdoing will generally begin under the premise that individuals whose actions result in the death of another may be criminally responsible under different homicide theories.[65] Unquestionably, individuals, including children, may be held criminally responsible when their *direct* acts result in the death of another person.[66] The criminal law has, however, taken this one step further so that individuals may be held criminally responsible when their *indirect* acts, or their failures to act, result in the death of another person.[67] So long as these acts or omissions meet the definition of "grossly negligent,"[68] they will result in second-degree murder or involuntary manslaughter charges.[69] Consequently, individuals can be criminally responsible for another person's death even when they do not actually deliver the deathblow to the victim.[70]

This Comment will examine the legal possibility of imposing parental criminal liability for the crimes committed by the direct acts of their children. Part II of this article will describe

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[64] *See* Gibbs, *supra* note 3 at 50. The Klebolds met with investigators to answer questions within ten days of the shootings. The Harris', however, did not speak with investigators for months because they were seeking immunity. *See id.*

[65] *See generally* SANFORD H. KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES, 385 - 545 (6th ed. 1995).

[66] *See* WAYNE R. LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 3.7, at 231-32 (2d ed. 1986).

[67] *See id.*

[68] Fitzgerald v. State, 20 So. 966 (Ala. 1896). The court reversed an involuntary manslaughter conviction because the trial court instructed the jury that ordinary negligence constituted manslaughter. *See id.* at 968. The death occurred as a result of an unintended shooting when the victim asked the defendant to hand him a pistol from behind the counter and the gun went off. *See id.* at 966. The court stated that criminality is predicated "not upon mere negligence or carelessness, but upon that degree of negligence or carelessness which is denominated as 'gross' and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which in some offenses takes the place of criminal intent." *Id.* at 967.

[69] *See* LAFAVE, *supra* note 66, § 3.7, at 234.

[70] *See id.* § 3.3, at 210.

the elements required to impose criminal liability, specifically for the convictions of involuntary manslaughter and murder by depraved indifference. These elements are then juxtaposed against those required in civil tort law, which are substantially similar and therefore must apply to hold parents responsible for the deaths of third parties.[71] Next, because parental criminal liability cases have not yet occurred, Part III will investigate cases in which the elements required for criminal conviction were satisfied and that are analogous to situations in which a prosecutor might bring a homicide charge against parents for the criminal acts of their child. Part IV will then explain the reasons for the lack of parental criminal convictions despite the application of a strict legal analysis, the result of which does not preclude a homicide charge for the acts or omissions of a parent. Rather, criminal law suggests that liability may be imposed based on the independent conduct of the parent that ultimately resulted in the death of another, not because of the person's status as parent. Finally, Part V will argue that legislators should develop minimum reasonable standards for parental negligence, and will propose that specific negligent homicide statutes be enacted if parents are to be held liable for their own negligent actions.

II. BACKGROUND

A person who is responsible for the death of another may be liable under civil law, criminal law, or both.[72] In the civil liability context, the basis of which is tort law, [73] parental liability for the acts of minor children takes two forms: vicarious tort liability[74] and, of particular interest to this Comment, pa-

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[71] *See infra* note 309 and accompanying text, discussing the similarities between civil and criminal law.

[72] *See* LAFAVE, *supra* note 66, § 1.3, at 14.

[73] *See* DAN B. HOBBS AND PAUL T. HAYDEN, TORTS AND COMPENSATION, at 2 (3d. ed. 1997). A tort is defined as a civil wrong in which a remedy may be obtained, usually damages, through a lawsuit. *See* BLACK'S LAW DICTIONARY, 1496 (7th ed. 1999).

[74] *See* W. PAGE KEETON, et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 123, at 913 (5th ed. 1984).

rental negligence.[75] Vicarious liability imputes the liability of one person to another by reason of a special relationship that exists between the two.[76] Vicarious tort liability did not exist under the common law, but today it is imposed by statute and exists in most states.[77] Parental negligence, however, has developed under the common law and is such that one family member may be responsible for the torts of another through his or her own acts or failure to act.[78] Under this theory, a person may be liable for his or her negligent acts when that person has a duty to another, breaches that duty, and that breach causes another person's injury or death.[79]

In the criminal context, parents can be found liable in two ways: under the classifications of homicide[80] and under parental responsibility statutes.[81] The categories for traditional homicide are murder and manslaughter.[82] While murder requires a showing of malice through an intentional, knowing, or consciously reckless act or omission that causes another person's death,[83] involuntary manslaughter generally requires only criminally negligent conduct.[84] Under the second method

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[75] *See id.*

[76] *See id.* § 12, at 499. *See* BLACK'S LAW DICTIONARY 927 (7th ed. 1999). Vicarious Liability is "liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties." *Id.*

[77] *See* KEETON, *supra* note 74, § 123, at 913.

[78] *See id.*

[79] *See id.* § 30, at 164-65.

[80] *See* KADISH, *supra* note 65 at 385. Homicide is the unlawful killing of a human being by another human being. *See id.*

[81] *See e.g.*, CAL. PENAL CODE § 272 (Deering 1999). This section was enacted in 1988 in reaction to gang violence and authorizes jail terms and criminal fines for negligent supervision and control of a child which causes, encourages, or contributes to the delinquency of a minor. *See also* ALA. CODE § 12-15-13 (1999); IOWA CODE ANN. § 709A.1 (1997); KAN. STAT. ANN. § 21-3612 (1998); KY. REV. STAT. ANN. § 530.060(1) (1998); MO. ANN. STAT. § 568.050 (1999); N.H. REV. STAT. ANN. § 169-B: 41 (1999); N.Y. PENAL LAW § 260.10(2) (1999); N.C. GEN. STAT. § 14-316.1 (1999).

[82] *See* KADISH, *supra* note 65, at 385-86.

[83] *See* LAFAVE, *supra* note 66, § 7.1, at 190.

[84] *See supra* note 66, § 7.9, at 251.

of liability, parental responsibility statutes hold parents criminally liable when their children commit acts of juvenile delinquency while in possession of a firearm, while operating a vehicle, for violating truancy and curfew laws, or other specific violations.[85] These statutes, either by judicial interpretation or by express language, require the element of criminal intent,[86] or criminal negligence[87] by the parent, as well as requiring the parent's act or failure to act to be the proximate cause of the child's act.[88]

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[85] *See generally* Eunice A. Eichelberger, Annotation, *Criminal Responsibility of Parents for Act of Child*, 12 A.L.R. 4th 673 (2000) (chronicle of criminal parental liability cases and analysis). *See also* CAL. PENAL CODE § 272 (Deering 1999). Section 272 provides that every person who commits any act or omits any duty causing, encouraging, or contributing to the dependency or delinquency of a minor is guilty of a misdemeanor. A 1988 amendment to the section provides that parents or guardians have the duty to exercise reasonable care, supervision, protection, and control over their children. *See id. See also* St. Clair Shores, Mich., Parental Responsibility Ordinance 20.560-20.563 § 3b (1994), which reads:

> Included (without limitation) in this continuous duty of reasonable parental control are the following parental duties:
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> To keep illegal drugs or illegal firearms out of the home and legal firearms locked in places that are inaccessible to the minor.
>
> To know the Curfew Ordinance of the City of St. Clair Shores, and to require the minor to observe the Curfew ordinance . . .
>
> To require the minor to attend regular school sessions and to forbid the minor to be absent from class without parental or school permission.
>
> To arrange proper supervision for the minor when the parent must be absent.
>
> To take the necessary precautions to prevent the minor from maliciously or willfully destroying real, personal, or mixed property which belongs to the City of St. Clair Shores, or is located in the City of St. Clair Shores.
>
> To forbid the minor from keeping stolen property, illegally possessing firearms or illegal drugs, or associating with known juvenile delinquents, and to seek help from the appropriate governmental authorities or private agencies in handling or controlling the minor, when necessary. *Id.*

[86] *See* LAFAVE, *supra* note 66, § 3.4, at 212.

[87] *See id.* § 3.7, at 234.

[88] *See e.g.*, Seleina v. Seleina, 93 N.Y.S.2d 42 (N.Y. Fam. Ct. 1949) (contributing to the delinquency of a minor); McCollester v. City of Keene, 514 F. Supp. 1046 (N.H. 1981) (curfew); In re Jeanette L., 523 A.2d 1048 (Md. Ct. Spec. App. 1987) (truancy).

A. PARENTAL TORT LIABILITY FOR VIOLENT ACTS OF THE CHILD

The most widely used method for imposing civil liability on parents when their children cause injury or death to another person is to bring an action under tort law for either vicarious liability or civil negligence.[89] These theories are favored because they allow the wronged parties to obtain monetary compensation for damages suffered.[90] At common law, parents were not liable under the civil negligence theory for the tortious acts of their children simply because they were parents.[91] Rather, parents were only liable when their acts or omissions were negligent in relation to the child's acts.[92] For example, a parent could be liable under general tort principles when the parent aided or encouraged his or her child's tortious conduct.[93] The common law courts also did not hold parents vicariously liable based solely on the relationship between parent and child;[94] rather, parents were vicariously liable only when the child acted as the parent's "agent" or "employee" and within the scope of such agency or employment.[95]

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[89] *See supra,* note 54.

[90] *See* Hobbs, *supra* note 73.

[91] *See* KEETON, *supra* note 74, § 123, at 913.

[92] *See id.* §123, at 913-914.

[93] *See* Trahan v. Smith, 239 S.W. 345 (Tex. Civ. App. 1922). In *Trahan,* the father was held liable for death of neighbor's pig because his sons acted under his direction. The court stated "As a general rule to hold a parent liable for the tortious act of his minor child, it must appear that the tort was committed at the direction of the parent, express or implied, or within the scope of duties imposed on the minor by the parent." *Id.* at 347. *See also* Condel v. Savo, 39 A.2d 51 (Pa. 1944) (holding parents liable when they failed to exercise due care to control their child knowing of his vicious disposition); Stewart v. Swartz, 106 N.E. 719 (Ind. Ct. App. 1914) (holding that father was negligent when he permitted child to stretch a rope across the road, injuring plaintiff); Smith v. Jordan, 97 N.E. 761 (Mass. 1912) (holding that father was negligent when son, acting on his instructions, injured another in an automobile accident).

[94] *See* Linder v. Bidner, 50 Misc. 2d. 320, 270 N.Y.S. 2d 430 (N.Y. 1966).

[95] Graham v. Page, 132 N.E. 817 (Ill. 1922) (holding that daughter acted as father's agent while driving vehicle in course of his business and injuring plaintiff); McCrossen v. Moorehead, 142 N.E. 318 (N.Y. 1922) (holding that daughter acted as father's agent while driving vehicle in compliance with his request to assist her mother); Zeidler v. Goezler, 211 N.W. 140 (Wis. 1921) (stating that son took father's automobile at father's request and for his benefit); Smith v. Jordan, 97 N.E. 761 (Mass. 1912).

1. Parental Civil Liability Is Imposed Vicariously By Statute

The limited common law liability of parents has been extended by statute in most states.[96] Although the vicarious liability statutes vary, their general purpose is to provide damages for victims when children are not, or cannot be, financially responsible.[97] Another purpose is to encourage parents to better supervise their children so as to prevent increased acts of juvenile delinquency.[98] Monetary recovery under these statutes, however, is limited,[99] and predicated on a showing of willful or wanton conduct of the child.[100]

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[96] ALASKA STAT. § 34.50.020 (Michie 1999), limit $2,000; ARIZ. REV. STAT. § 12-661 (1999), joint and several liability; CAL. CIV. CODE § 1714.1 (Deering 1999), limit $25,000; COLO. REV. STAT. § 13-21-107 (1998), limit $3,500; CONN. GEN. STAT. § 52-572 (1999), limit $5,000; DEL. CODE ANN. tit. 10 § 3922 (1999), limit $5,000; FLA. STAT. ch. § 741.24 (1999), actual damages; HAW. REV. STAT. ANN. § 577-3 (Michie 1999), joint and several liability; IDAHO CODE § 6-210 (1999), limit $2,500; ILL. COMP. STAT. ANN. 740 115/1 (West 1999), no limit; KAN. STAT. ANN. § 38-120 (1998), limit $1,000; KY. REV. STAT. ANN. § 405.025 (Michie 1998), limit $2,500, cumulative total $25,000 per child; LA. CIV. CODE ANN. art. 2318 (West 1999), no limit; MD. CODE ANN., CTS. & JUD. PROC. § 3-829 (1999), limit $10,000; MASS. ANN. LAWS ch. 231 § 85G (Law. Co-op. 1999), limit $5,000; MISS. CODE ANN. § 93-13-2 (1999), limit $5,000; MONT. CODE ANN. § 40-6-237 (1999), limit $2,500; NEB. REV. STAT. ANN. § 43-801 (Michie 1999), limit $1,000; N.M. STAT. ANN. § 32A-2-27 (Michie 1994), limit $4,000; N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 1999), limit $5,000 in some instances; OHIO REV. CODE ANN. § 3109.09 (Anderson 1999), limit $5,000 in some instances; OKLA. STAT. tit. 23 § 10 (1999), limit $2,500; OR. REV. STAT. § 30.765 (1997), limit $7,500; 23 PA. CONS. STAT. § 5505 (1999), limit $1,000 per person, $2,500 per tort; R.I. GEN. LAWS § 9-1-3 (1999), limit $1,500; S.D. CODIFIED LAWS § 25-5-15 (Michie 1999), limit $1,500; TENN. CODE ANN. §37-10-101 (1999), limit $10,000; TEX. FAM. CODE ANN. § 41.001 (West 1999), limit $25,000; UTAH CODE ANN. § 78-11-20 (1999), limit $2,000; VT. STAT. ANN. tit. 15 § 901 (1999), limit $5,000; VA. CODE ANN. § 8.01-44 (Michie 1999), limit $2,500; WASH. REV. CODE § 4.24.190 (1999), limit $5,000; WIS. STAT. § 895.035 (1998), limit $2,500; WYO. STAT. ANN. § 14-2-203 (Michie 1999), limit $2,000.

[97] *See* KEETON, *supra* note 74, §123, at 913.

[98] *See* Chapin, *supra* note 50 at 631 & n.57 (citing Richard G. Kent, *Parental Liability for the Torts of Children*, 50 CONN. B.J. 452, 465 (1976).

[99] *See supra,* note 96 for the monetary limits for each state's statute.

[100] *See* ARIZ. REV. STAT. § 12-661 (1999) ("any act of malicious or willful misconduct of a minor. . . shall be imputed to the parents or legal guardian having custody or control . . . "); CAL. CIV. CODE § 1714.1 (Deering 1999) ("Any act of willful misconduct of a minor . . . shall be imputed to the parent or guardian having custody or control . . ."); ILL. COMP. STAT. ANN. 740 115/1 (West 1999) ("The legislative purpose of this Act is . . . to compensate innocent victims of juvenile misconduct that is willful or mali-

Most of these vicarious liability statutes have survived constitutional challenges. For example, in *Watson v. Gradzik*,[101] parents challenged a Connecticut statute holding parents liable for a child's tort, claiming that the statute violated a parent's fundamental rights to bear and raise children.[102] The court upheld the statute on the grounds that it furthered the state's interest of controlling juvenile delinquency and compensating victims for damages caused by minors.[103] Accordingly, the court stated, "with the right to bear and raise children comes the responsibility to see that one's children are properly raised so that the rights of other people are protected."[104]

A North Carolina statute was similarly challenged and upheld by the state Supreme Court in *General Insurance Company of America v. Faulkner*.[105] In this case, a child set fire to school property, the damage from which was paid by the school's fire insurance policy.[106] The insurance company then sought reimbursement from the parents under the state's vi-

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cious; and . . . to place upon the parents the obligation to control a minor child . . ."); N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 1999) ("The parent or legal guardian, other than the state, a local social services department or a foster parent, of an infant over ten and less than eighteen years of age, shall be liable . . . where such infant has willfully, maliciously, or unlawfully damaged . . . "); TEX. FAM. CODE ANN. § 41.001 (West 1999) ("A parent or other person who has the duty to control . . . the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent . . . or . . . the willful and malicious conduct of a child who is at least 12 years of age but under 18 years of age.")

[101] 373 A.2d 191 (Conn. Super. Ct. 1977).

[102] *See id.* at 192. Section 52-572 of the General Statute provided that parents of an unemancipated minor who willfully or maliciously caused damage to any property were liable for the damage up to $1,500. *See id.*

[103] *See id.* at 195.

[104] *See id.*

[105] 130 S.E.2d 645 (N.C. 1963). The statute made parents liable up to $500 for the malicious or willful acts of their children resulting in damage to property. *See id.* at 647.

[106] *See id.* at 645.

carious liability statute.[107] Subsequently, the parents challenged the statute, claiming it violated their rights to due process and equal protection under both the state and federal constitutions.[108] After examining the statute's language, the court found that its purpose was to deter parental indifference and the failure to supervise children.[109] Thus, because these were legitimate state purposes, the court upheld the statute to have been enacted within the state's police powers and not in violation of either the state or federal constitution.[110]

2. Parental Civil Liability As Imposed Under General Negligence Theories

In addition to vicarious liability, parental liability for the torts of children may also be based on the parent's own negligence.[111] For example, a parent may be liable if he or she negligently entrusts a child with a dangerous instrumentality[112] or negligently entrusts an item to a child who has the propensity, because of the age or temperament of the child, to make the item dangerous.[113] To prove such liability, the plaintiff must show that the parent owed him or her a duty, that the parent breached that duty, and that the breach caused the injury or death.[114]

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[107] *See id.* The insurer paid damages to the school board in the amount of $2,916.50. The statutory limitation for recovery against the parents under the vicarious liability statute was $500. *See id.*

[108] *See General Ins. Co. of Am.*, 130 S.E.2d at 648-49.

[109] *See id.* at 650.

[110] *See id.*

[111] *See* KEETON, *supra* note 74, § 123, at 914.

[112] *See id.* at 913-14. For example, a gun is a "dangerous instrumentality." Matches and automobiles are also given as examples of items that can be become dangerous in the hands of a child with a dangerous propensity. *See id.*

[113] *See id. See also* Allen v. Toledo, 167 Cal. Rptr. 270 (1980) (holding parents civilly liable when father negligently entrusted son with his truck when he knew, or should have known, that son was a reckless driver).

[114] *See* KEETON, *supra* note 74, § 30, at 164-65.

a. The Duty to Control the Acts of Others: Parental Duty to Protect Others From Their Children

To establish parental negligence there must be a showing that the parent has a legally recognized duty to protect others against harms caused by the child.[115] Generally, there is no duty to control the actions of another to prevent harm to a third person.[116] An exception to this rule exists, however, when there is a special relationship between the parties, such that one person is expected to exercise control over the other's behavior.[117] For example, an employer has a duty to prevent his or her employees from injuring others during the course of business.[118] Similarly, a bar owner has a duty to prevent intoxicated patrons from causing injuries to other patrons while occupying his or her establishment.[119]

This exception is commonly applied in cases involving children because of the special relationship that exists between a parent and child.[120] A parent's duty to protect others applies when the parent one, knows or should know of his or her ability to control the child, and two, knows or should know of the

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[115] *See id.* "The word 'duty' . . . denote[s] the fact that the actor is required to conduct himself in a particular manner . . . " *See* RESTATEMENT (SECOND) OF TORTS, § 4 (1965).

[116] *See* RESTATEMENT (SECOND) TORTS, §315 (1978). "There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection." *Id.*

[117] *See id.*

[118] *See* Palmer v. Keene Forestry Ass'n., 112 A. 798 (N.H. 1921) (holding that an employer cannot send an employee on the road when employee is intoxicated).

[119] *See* McFarlin v. Hall, 619 P.2d 729 (1980); Slawinski v. Mocettini, 403 P.2d. 143 (Cal. 1965).

[120] *See* KEETON, *supra* note 74, § 56, at 384-85. A parent's duty to their children is actually twofold. Aside from exercising reasonable care to protect others from their child's conduct, a parent also has a duty to protect their child from harm. The duty to protect a child appears more commonly in the criminal context. However, it is suggested that as inter-family tort immunities are nullified, the duty to aid your child will more commonly appear in the civil context. *See id.* at 377.

necessity of such control.[121] Two cases illustrate the nature of this exception. In *Linder v. Bidner,*[122] parents allowed their son to play unsupervised with another child, knowing their son had the habit of "mauling, pummeling, assaulting, and mistreating" other children when playing.[123] Furthermore, the parents ignored and resented any admonitions or interference by others.[124] The New York Supreme Court, in examining whether the parents had a duty to protect the injured child from their son, stated "[i]t has uniformly been 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 those propensities."[125] The court thus held the parents liable in tort for breaching that duty.[126] In the second case of *Howell v. Hairston,*[127] the South Carolina Supreme Court applied a similar rationale. When reviewing a case in which an eleven-year old boy shot another boy in the eye with a BB gun, the court found that the parents knew the boy was a "bully," yet did not stop him from taking the gun to a local playground where small children regularly played.[128] Accordingly, the court found the parents negligent, having breached their duty to control the child because they knew of his reckless and malicious nature.[129]

This duty to control a child's behavior, although obvious in some cases, is limited. Even when a duty is found, a parent is only required to exercise *reasonable care* in controlling the child.[130] Furthermore, the duty only applies to the child's *spe-*

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[121] RESTATEMENT OF (SECOND) TORTS, §316 (a) and (b) (1965).

[122] 50 Misc. 2d. 320, 270 N.Y.S. 2d 430 (N.Y. 1966).

[123] *Id.* at 320.

[124] *See id.*

[125] *See id.* at 322.

[126] *See id.*

[127] 199 S.E.2d 766 (S.C. 1973).

[128] *See id.* at 767-68.

[129] *See id.* at 768.

[130] *See* KEETON, *supra* note 74, § 56, at 384-85.

cifically known dangerous habits or disposition, not to *any* dangerous propensities that the child may exhibit.[131] Two cases illustrate this distinction. In the first case, *Parsons v. Smithey*,[132] a fourteen-year old boy broke into a house and used a hammer to viciously attack a single mother and her two daughters.[133] The mother sued the parents for negligence in failing to control their son.[134] Prior to this incident, the boy had attacked a woman in the street, had followed a classmate and attacked her in her home, and had been moved from his seat at school because he was "poking and pummeling" other children.[135] In addition, he had been arrested twice for arson, three times for joyriding, and once for theft of his father's watch.[136] The trial court refused to allow the boy's previous criminal or school records into evidence, claiming that the prior acts and statements of school officials were not specifically similar to the acts complained of and thus had no relevance in establishing whether the parents had knowledge sufficient to exercise reasonable control.[137] The Arizona Supreme Court disagreed, stating "to adopt the stringent rule of excluding all but specific similar acts to prove knowledge would most often leave the first of the most violent and vicious acts uncompensated."[138] The court thus emphasized that acts of prior violence are relevant to establish parental knowledge of specifically known dangerous habits or propensities and so held as admissible all evidence that would indicate the boy's propensity for the violence he ultimately committed.[139]

The second case, in contrast, demonstrates that absent prior violent acts or prior use of dangerous weapons, parental

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[131] *See id.*

[132] 504 P.2d. 1272, (Ariz. 1993).

[133] *See id.* at 1273.

[134] *See id.*

[135] *Id.* at 1275.

[136] *See id.* at 1276.

[137] *See Parsons*, 504 P. 2d. at 1276.

[138] *Id.* at 1277.

[139] *See id.*

knowledge of specifically known dangers can not be established. In *Hall v. McBryde,*[140] a boy exchanged gunfire with a passing car, unintentionally hitting an innocent bystander.[141] Although the boy was living away from home to avoid gang contact, he had never been a gang member, had never been arrested prior to the shooting, and had no history of violent behavior or use of dangerous weapons.[142] Furthermore, the parents, whose gun he used, had taken reasonable steps to hide the gun from him and only allowed him limited access to their home.[143] The Colorado Court of Appeals reasoned that, in general, parents are not liable for the torts committed by their children simply because of the parent-child relationship, but rather are only held liable when they fail in their duty to use reasonable care to prevent their child from causing harm.[144] Because the McBrydes had no knowledge of their son's propensity for violence through prior violent acts, the court held they did not breach their duty of supervision and control.[145]

In some instances the duty to protect others, arising out of a special relationship, has been greatly expanded to include an affirmative duty to warn others of impending harm.[146] This duty to warn potential victims of violence has most notably been imposed upon psychotherapists.[147] In *Tarasoff v. Regents of University of California,*[148] an outpatient of a student health facility sought psychiatric help and confessed that he intended to kill his girlfriend.[149] After the psychotherapist requested that the campus police detain him, they did so for a short time,

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[140] 919 P.2d. 910 (Colo. Ct. App. 1996).

[141] *See id.* at 912.

[142] *See id.* at 913.

[143] *See id.*

[144] *See id.* at 912.

[145] *See Hall*, 919 P.2d. at 913.

[146] *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d. 334 (Cal. 1976).

[147] *See id.* at 344.

[148] 551 P.2d. 334 (Cal. 1976).

[149] *See id.* at 339.

but then released him.[150] Two months later he killed his girlfriend, the plaintiff's daughter.[151] In analyzing whether the psychotherapist had a duty to warn the girlfriend, the court focused on the special relationship between the therapist and patient and found it sufficient to create such a duty.[152] Although the court recognized the difficulty in predicting either future violent episodes or intended victims, the court held that the imposition of such a duty was imperative in keeping the public safe from potential violence.[153] "The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved."[154] Accordingly, the Court held that psychotherapists have an obligation to take reasonable steps to protect a third party when the therapist knows or, based on professional standards, should know, that his or her patient presents a serious risk of physical harm to the third party.[155]

Although the duty to warn is most commonly applied in the psychotherapist-patient relationship, at least one pre-*Tarasoff* case imposed such a duty on the parents of a potentially dangerous child.[156] In *Ellis v. D'Angelo*,[157] the parents of a four-year old boy hired a baby-sitter for their son without telling her that he habitually threw himself against others and forcibly knocked them down.[158] Consistent with this habit, the son violently attacked the sitter by throwing her to the floor.[159] After citing the duty to control rule contained in section 316 of

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[150] *See id.* at 339-40.

[151] *See id.* at 339.

[152] *See id.* at 343.

[153] *See Tarasoff*, 551 P.2d. at 345.

[154] *See id.* at 346. In contrast, the court found that the police who detained the assailant had no special relationship with him, even though they had the ability to physically control him. *See id.*

[155] *See id.*

[156] *See* Ellis v. D'Angelo, 253 P.2d. 675 (Cal. Ct. App. 1953).

[157] 253 P.2d. 675 (Cal. Ct. App. 1953).

[158] *See id.* at 676.

[159] *See id.* at 679.

the Restatement of Torts,[160] the court found that, in general, parents have a duty to exercise reasonable care to control their child when they know of the child's violent nature through episodes of past violence.[161] The court extended this duty to control by rationalizing that "reasonable care" included the duty to warn others of their child's dangerous propensities.[162] Thus, the court found that the parents were negligent in failing to warn or inform the baby-sitter of their child's habit of violent attacks.[163] The *Tarasoff* court cited the *Ellis* decision when reasoning that there is a duty to warn even in cases in which the defendant is in a special relationship *only* with the person whose conduct creates the possible danger and *not* with the victim of that possible danger.[164] Thus, using the *Ellis-Tarasoff* rationale, parents, like psychotherapists, must know of their child's propensity for violence and have a duty to warn *any* potential victim.[165]

b. Breach of Parental Duty: Parental Duty and the Reasonable Care Standard

Parents breach their parental duty when they do not exercise reasonable care to control their child.[166] The duty to exercise "reasonable care" is a subjective duty, such that it requires conduct that a fictional "reasonable person" would exercise given the circumstances.[167] In the context of parental duty, for example, the *McBryde* court ruled that the boy's parents did, indeed, have a duty to control their son.[168] The court, however,

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[160] *See supra,* note 121 and accompanying text.

[161] *See Ellis,* 253 P.2d. at 677.

[162] *Id.*

[163] *See id.* at 675. *See also* Zuckerberg v. Munzer, 197 Misc. 791, 95 N.Y.S.2d 856 (1950) (holding parents negligent for failing to warn a household employee that young son had a well known and established tendency to assault people).

[164] *See Tarasoff,* 551 P. 2d. at 344.

[165] *See id.*

[166] *See* KEETON, *supra* note 74, § 32, at 173-74.

[167] *Id.*

[168] *See Hall,* 919 P.2d at 912. *See also supra,* note 140 and accompanying text.

found that Mr. McBryde exercised reasonable care under the circumstances by concealing from his son the fact that he owned a gun.[169] The court further found that the McBrydes acted reasonably by limiting their son's access to their home to only during the day and only to pick up some of his clothes and other belongings.[170] Because their son demonstrated no prior history of violent behavior or use of a dangerous weapon, the McBrydes took reasonable precautions to meet the required standard of care.[171] In contrast, the *Ellis* court found that the parents of a four-year old boy who attacked his baby-sitter did not exercise reasonable care.[172] The court held that because the parents knew of their son's habit of violently knocking people down, they breached their duty to control when they left the child in the sitter's care without warning her of his violent disposition.[173]

c. Fulfilling the Legal Causation Requirement to Impose Parental Civil Liability

In addition to establishing that a parent has a duty to control a child, and has breached his or her duty, parental tort liability also requires that there be a reasonable connection between that parent's failure to control a child and the victim's injury or death.[174] Courts generally have easily found such causation, particularly in cases involving children with guns. In *Olson v. Hemsley*,[175] for example, a thirteen-year old boy

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[169] *See id.* at 913.

[170] *See id.*

[171] *See id.*

[172] *See Ellis*, 253 P.2d. 678.

[173] *See id.* at 677.

[174] *See* KEETON, *supra* note 74, § 41, at 263-65. The concept of legal causation requires both actual causation and proximate causation. An act or omission is not considered the actual cause of the victim's injury or death unless the injury or death would not have occurred without it. Actual causation is sometimes called the "but-for" rule: the defendant's actions or failure to act is the cause of the event if the event would not have occurred "but-for" his or her actions. *See id.* at 266. Proximate cause is established when a person's injury or death is a foreseeable consequence of another person's actions. *See id.*, §41, at 273.

[175] 187 N.W. 147 (N.D. 1922).

shot and killed a sixteen-year old co-worker after retrieving a gun from the store's cash drawer.[176] In analyzing the store-owner's negligence in keeping the gun accessible, the court found that the defendant knew the thirteen-year old to be reckless.[177] The court thus held that even though the defendant did not fire the gun, his negligence caused the sixteen-year old boy's death.[178]

The Supreme Court of Pennsylvania's decision in *Kuhns v. Brugger*[179] involved a similar situation where a third party left a gun accessible to children. In *Kuhns,* two cousins were playing in their grandfather's bedroom when one of them took a loaded gun from a dresser drawer and, while playing with it, shot the other.[180] This result was, or should have been, forseeable to the grandfather after he negligently left a dangerous instrumentality in an unlocked drawer in a room where the children had access to play.[181] In holding the grandfather liable, the court noted that the child's removal of the weapon from the drawer was not an intervening act and thus it did not break the chain of causation between the grandfather's negligence and the child's injury.[182]

From the above discussion it is apparent that parental civil liability in a negligence action rests on several elements. The first is the special relationship between a parent and child that imposes a legal duty on the parent to control his or her child's behavior.[183] The second is an act or omission by the parent

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[176] *See id.* at 148.

[177] *See id.* at 150.

[178] *See id.* Civil law recognizes equally the parent-child and the employer-employee relationships as special relationships that give rise to a duty to control and to protect. *See* KEETON, *supra* note 74, § 56 at 376-77. Thus, the parent-child relationship is at least as strong, if not stronger because of parental controls, as the relationship discussed in *Olson.*

[179] 135 A.2d 395 (Pa. 1957).

[180] *See id.* at 399.

[181] *See id.* at 404.

[182] *See id.*

[183] *See supra,* notes 115-165 and accompanying text.

that fails to control the child.[184] Finally, the breaching act or omission must be the legal cause of the harm.[185] Once all of the elements are met, the parent is civilly liable for any resulting harm.

B. PARENTAL CRIMINAL LIABILITY FOR VIOLENT ACTS OF THE CHILD

Parental liability for the death of another may not only be imposed civilly, but criminally as well.[186] In the criminal realm, a parent can be liable under the different homicide theories or under parental responsibility statutes.[187] Although the homicide theories include varying degrees of murder,[188] voluntary manslaughter,[189] and involuntary manslaughter,[190] the discussion below is limited to the homicide theories that explore parental negligence as a basis for holding parents

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[184] *See supra,* notes 166-173 and accompanying text.

[185] *See supra,* notes 174-182 and accompanying text.

[186] *See* WAYNE R. LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 1.3, at 14 (2d ed. 1986). The basic elements of a crime are an act or failure to act, the mental state that accompanies the act, and that the act or omission be the legal cause of the crime. *See id.* § 3.2, at 193-94.

[187] *See supra* note 81 for parental responsibility statute citations.

[188] *See* LAFAVE, *supra* note 186, § 7.1, at 605. Murder requires the intentional or knowing killing of another. *See id,* § 7.2, at 612.

[189] *See id.* § 7.10, at 653. Manslaughter requires the reckless killing of another. It is divided into two branches, voluntary and involuntary. *See id.* § 7.9, at 654. Voluntary manslaughter is an intended homicide that arises during the heat of passion upon reasonable provocation. *See id.* § 712, at 669. The most common example of reasonable provocation is when a person finds his or her spouse or significant other in bed with another person. *See* State v. Thornton, 730 S.W.2d 309 (Tenn. 1987) (holding that adequate provocation existed to sustain manslaughter conviction and not murder when husband heard wife having sex with another man in defendant's bedroom). *See id.* at 312.

[190] *See* LAFAVE, *supra* note 186, § 7.13, at 675. Involuntary manslaughter is an unintended homicide, and is divided into criminal negligence manslaughter and unlawful act involuntary manslaughter. *See id.* § 7.12, at 668. Criminal negligence manslaughter requires the unlawful killing of another while engaged in a lawful activity without exercising due care. *See id.* § 7.12, at 668. Unlawful-act involuntary manslaughter is an unlawful killing in the commission of an unlawful act. *See id.* § 7.13, at 675.

criminally responsible for acts committed by their children.[191] Consequently, only negligent involuntary manslaughter and murder by depraved indifference are discussed below.

Negligent involuntary manslaughter and murder by depraved indifference were developed over time as courts began to see a pattern of conduct, which resulted in a homicide, but which did not meet the traditional elements of common law murder.[192] For murder by depraved indifference, courts still require an intent to kill, but this is typically manifested in an extreme recklessness that reflects a total indifference to human life.[193] For negligent involuntary manslaughter, however, no intent is necessary; rather, some heightened degree of negligence is sufficient to obtain a conviction.[194] It is under these two theories, with their lessened intent requirements, where, under a strict legal analysis, some parents may find themselves criminally liable for the violence of their children.

1. Imposition of Parental Criminal Liability For Involuntary Manslaughter Under The Theory of Negligence

Although most jurisdictions recognize involuntary manslaughter, the statutory definitions vary.[195] The Alaska statute, for example, does not distinguish between voluntary and

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[191] Unquestionably, if a parent intended to kill someone and put a gun in the hands of a two-year old and instructed him or her to pull the trigger, the parent could be guilty of murder by using the child as a dangerous instrumentality. *See id.* § 6.6, at 571, discussing aiding and abetting criminal activity, either as a principal party or an accessory before the fact. Such is not the subject of this article.

[192] *See* LAFAVE, *supra* note 186, § 7.1, at 606. The common law definition of murder is the unlawful killing of another human being with "malice aforethought." Malice aforethought is an elaborate term used to describe the alternative mental states required to establish common law murder and can be established by showing an intent to kill, intent to cause serious bodily harm, extreme recklessness manifesting in a total indifference to human life, or the intent to commit a felony. *See id.*

[193] *See id.* § 7.1, at 605.

[194] *See id.* § 7.12, at 668.

[195] *See* ALASKA STAT. § 11.41.120 (Michie 1999); CAL. PENAL CODE § 192 (West 1999); MASS. ANN. LAWS ch. 265 § 16 (Law Co-op. 1999); MINN. STAT. ANN. § 609.205 (West 1999); TEX. PENAL CODE ANN. § 19.04 (West 1999); UTAH CODE ANN. § 76-5-206 (1999).

involuntary manslaughter and defines manslaughter as the intentional, knowing, or reckless killing of another under circumstances not amounting to murder in the first or second degree.[196] In contrast, the California statute defines voluntary and involuntary manslaughter separately.[197] While voluntary manslaughter is the unlawful killing of another person upon a sudden quarrel or in the heat of passion, involuntary manslaughter is the unlawful killing of another person while in the commission of an unlawful act or without due care or circumspection.[198] Despite such statutory differences, negligent involuntary manslaughter generally requires some minimum level of grossly negligent conduct that results in the death of another.[199] Furthermore, it requires either a failure to act when action is required, or by acting when it is not.[200] This is different from the common law, which only recognized affirmative acts, but not omissions, as a basis for liability due to criminal negligence.[201] This common law exclusion of liability, however, was rejected by the Model Penal Code, which recommended imposing liability for omissions that are either expressly defined within the statutory offense or otherwise imposed by law.[202] Thus, because most states have adopted some form of the Model Penal Code, it is generally recognized that criminal liability may be imposed for a failure to act when there is a duty to do so.[203]

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[196] *See* ALASKA STAT. § 11.41.120 (Michie 1999).

[197] *See* CAL. PENAL CODE § 192 (West 1999).

[198] *See id.*

[199] *See* LAFAVE, *supra* note 186, § 7.12, at 668.

[200] *See id.* § 7.12, at 673.

[201] *See id.* § 7.12, at 674.

[202] *See* MODEL PENAL CODE § 201(3) (1985).

[203] For example, the California involuntary manslaughter statue requires an unlawful killing that occurs "without due care and circumspection." *See id.* CAL. PENAL CODE § 192 (West 1999). *See also* Jones v. United States, 308 F.2d 307 (1962): Defendant was found guilty of involuntary manslaughter for failing to provide food and necessities to a ten-month old baby left in her care, resulting in the child's death. *See id.* at 309. The court enumerated that there are at least four situations in which the failure to act may constitute a breach of a legal duty: 1) where a statute imposes a

a. The Duty to Control the Acts of Others: Parental Duty to Protect Others From Their Children

As with the duties recognized in civil tort law,[204] criminal law imposes a duty on parents, as a result of the parent-child relationship, to act with regard to the conduct of the child.[205] Commonly, this duty requires a parent to act to protect the child.[206] However, parents also have a duty to protect third parties from the acts of their children, but like civil tort liability, the duty is not absolute.[207] Rather, it only requires that the parent exercise reasonable control to ensure the safety of others.[208]

b. Breach of Parental Duty: Criminal Negligence or Recklessness

To hold a parent criminally negligent, a greater degree of fault is required than the fault that is required to be civilly negligent.[209] At common law, criminal liability was not imposed merely because a person failed to exercise due care under the circumstances, or was ordinarily negligent.[210] The prevailing rationales for the common law rule were twofold: first that criminalizing ordinary negligence would not deter the behavior and second, that carelessness was not considered suffi-

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legal duty of care, 2) where a person stands in a special relationship to another, 3) where a person has assumed a contractual obligation of care for another, and 4) where a person has voluntarily assumed the care of another which results in the seclusion of the person to prevent others from giving assistance. *See id.* at 312.

[204] *See supra,* notes 115-165 and accompanying text.

[205] *See* LAFAVE, *supra* note 186, § 3.3, at 203-207.

[206] *See generally* State v. Deskin, 731 P.2d 104 (Ariz. Ct. App. 1987) (holding parents criminally liable for endangering health of their children); State v. Walden, 293 S.E.2d 780 (N.C. 1982) (finding a mother criminally liable for failing to prevent an assault on her child); State v. Williquette, 385 N.W.2d 145 (Wis. 1986) (holding a mother criminally liable for failing to protect her two children from abuse by husband).

[207] *See* LAFAVE, *supra* note 186, § 3.3, at 206.

[208] *See id.*

[209] *See id.* § 3.6, at 232.

[210] See *id.*

ciently blameworthy to impose criminal sanctions.[211] These rationales still hold true today; thus, the majority of states view ordinary negligence as insufficient to hold someone liable for involuntary manslaughter.[212] A minority, however, allow such ordinary negligence to sustain an involuntary manslaughter action, particularly where a dangerous instrumentality, such as a gun, is involved.[213]

The meaning of "more than ordinary negligence" can vary. Some statutes may require that the defendant's conduct involve a higher degree of risk, over and above the unreasonable risk necessary for ordinary tort negligence.[214] Others may require a higher degree of risk coupled with a subjective awareness of the risk created.[215] Generally, however, most can agree that "gross negligence" encompasses varying degrees of "more than ordinary" negligence.[216] Accordingly, parental criminal liability may be imposed when the parents' failure to control the conduct of the child rises to the level of criminal or gross negligence. In such cases, parents may be liable for involuntary criminal negligence manslaughter.

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[211] See *id.*

[212] *See* LAFAVE, *supra* note 186, § 7.12, at 672.

[213] *See generally* State v. Jenkins, 294 S.E.2d 44 (S.C. 1982) (stating that the crime of unlawful neglect of a child requires only ordinary negligence); State v. Hedges, 113 P.2d 530, 536 (Wash. 1941) (stating that ordinary negligence sustains a manslaughter conviction where defendant shot companion while deer hunting); State v. Tucker 68 S.E. 523, 527 (S.C. 1910) (stating that a person who causes the death of another by the negligent use of a gun is guilty of manslaughter, unless the negligence is so reckless as to make it murder).

[214] *See* Commonwealth v. Welansky, 55 N.E.2d 902, 909 (Mass. 1944) (finding a nightclub owner is guilty of manslaughter when he created a "grave danger" to patrons for failing to provide adequate fire escapes, even if defendant is "so stupid [or] heedless that he did not realize the danger"); State v. Gooze, 81 A.2d 811, 816 (N.J. Super. Ct. App. Div. 1951) (holding subjective standard is apparent from the word "conscious" in the statute; high risk implied from the wording "injury will likely or probably result.").

[215] *See* Bussard v. State, 288 N.W. 187 (Wis. 1939) (holding that although the defendant was "negligent in a high degree," he is not guilty of gross negligence manslaughter because he was not subjectively aware of the high risk of his actions).

[216] LAFAVE, *supra* note 186, § 2.7, at 235.

c. Fulfilling the Legal Causation Requirement to Impose Parental Criminal Liability

Like the causation requirement for tort liability, all homicide theories require legal causation.[217] Accordingly, the defendant's negligent or reckless conduct must be the "legal cause" of death for a conviction.[218] Criminal causation, however, can be difficult to prove in cases where death is the result of negligent or reckless acts or omissions; as such, the conduct that resulted in death may not have been intended to cause a serious result.[219] Thus, the victim or manner of death may not have been foreseeable.[220] Nevertheless, where the victim and the manner of death is forseeable, the causation element may be satisfied for crimes involving gross negligence.[221]

2. Imposition of Parental Criminal Liability For Murder Under Theory of Depraved Indifference (Conscious Disregard for Human Life)

As a general rule, murder requires a greater culpability than manslaughter, thus murder by depraved indifference requires that the defendant act in an *extremely* reckless manner.[222] This recklessness must be such that the person's actions reveal a total indifference to the possibility that someone could be killed or seriously injured.[223] It requires conduct that is so wanton or reckless that it demonstrates malice in the mind of the killer.[224] The degree of recklessness required for murder, as opposed to that required for manslaughter, was distinguished by the Pennsylvania Supreme Court in *Com-*

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[217] *See id.* § 3.3, at 209.

[218] *Id. §* 7.12, at 670.

[219] *See id.* § 3.12, at 283.

[220] *See id.* § 3.12, at 293.

[221] *See id.* § 7.12, at 673.

[222] *See* LAFAVE, *supra* note 186, § 7.4, at 617.

[223] *See id.* § 7.4, at 618.

[224] *See* Commonwealth v. Malone, 47 A.2d 445, 447 (Pa. 1946).

monwealth v. Malone.[225] In *Malone*, a young boy put one bullet in a gun, spun the chamber, pointed it at the victim's head and pulled the trigger three times, fatally wounding him.[226] With one bullet loaded in the chamber and three attempts to fire, the boy had at least a sixty percent chance that the bullet would leave the gun and enter the victim's head, one of the most vital areas of the body.[227] With these odds, it was more than reasonable to anticipate that death would result from these actions.[228] Thus, the court found that the boy showed a "wickedness of disposition and hardness of heart."[229] Furthermore, the court found the actions far exceeded the gross negligence requirement for involuntary manslaughter; in fact, the acts demonstrated an extreme recklessness sufficient to sustain a murder by depraved indifference conviction.[230]

In conclusion, if parents were to be held criminally liable for a death caused by their child, several elements must be shown. For negligent involuntary manslaughter, a parent's failure to control a child's conduct must rise to the level of gross or criminal negligence.[231] For murder by depraved indifference, the failure to control must be evidenced by extremely reckless conduct, a higher standard than gross negligence.[232] In addition to conduct that is grossly negligent or extremely reckless, there must be a causal connection between the parent's failure to control the acts of the child and the death of a third party.[233] While there are currently no cases resulting in such parental

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[225] *See id.* at 445.

[226] *See id.* at 446. "Russian poker" is a game of chance in which each participant puts a bullet in one of the five revolver chambers, spins the chambers and then puts the muzzle of the gun to his or her head and pulls the trigger. Each participant takes the chance of being killed or injured by a bullet. *See id.* at 447.

[227] *See id.* at 447.

[228] *Malone*, 47 A.2d at 447.

[229] *See id.*

[230] *See id.* at 449.

[231] *See supra*, notes 209-216 and accompanying text.

[232] *See supra*, notes 222-230 and accompanying text.

[233] *See supra*, notes 217-221 and accompanying text.

liability, the facts in school shootings or other similar acts of violence may provide the elements necessary to impose criminal negligence involuntary manslaughter or murder by depraved indifference charges.

III. DISCUSSION

A. HOMICIDE PRINCIPLES CREATE A BASIS TO HOLD PARENTS CRIMINALLY LIABLE FOR THE CRIMINAL ACTS OF THEIR CHILDREN

The law holds persons responsible for active, secondary criminal participation, such as aiding and abetting an independent criminal act, but only when that person intended to participate in the primary crime.[234] A person can also be held criminally responsible for the acts of a third party when that person's acts or omissions rise to a level of criminal negligence.[235] The elements necessary for such a conviction are twofold. First, an act or failure to act must rise to the level of gross negligence or intentional recklessness.[236] Second, that gross negligence or recklessness must cause the death of another.[237]

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[234] Modern statutes typically treat people who are accomplices of another person as accountable for that person's conduct and define accomplices as people who solicit another to commit an offense or aid another in planning or committing it. *See e.g.*, 18 U.S.C.S. § 2 (1999) (holding person liable as "principal" actor when he or she aids or abets in the commission of a crime against the United States); CAL. PENAL CODE § 31 (West 1999); N.J. STAT. ANN. § 2c: 2-6 (1999). Thus, the parent actions will rise to that of principal actor in a crime actually committed by the child. *See e.g.*, Commonwealth v. Keenan, 25 N.E. 32 (Mass. 1890) (reversing conviction of father for keeping a common nuisance and intent to sell liquor illegally, where evidence showed son did not sell liquor at father's direction); Commonwealth v. Slavski, 140 N.E. 465 (Mass. 1923) (affirming conviction of father for the illegal sale of liquor, where evidence showed son sold liquor in the home "under control" of father); State v. Resnick, 17 86 A.2d 143 (N.J.Super. Ct. 1952) (affirming conviction of father for driving without a license, where he was a resident of New York and allowed son to drive in state of New Jersey without proper license).

[235] *See* WAYNE R. LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 7.12, 673 (2d ed. 1986).

[236] *See supra*, notes 209-216 and accompanying text.

[237] *See supra*, notes 217-221 and accompanying text.

To date, there are no such cases holding parents criminally liable for the homicides executed by their children;[238] however, if there were, involuntary manslaughter or murder by depraved indifference theories would be the most likely methods for criminal convictions.[239] Nevertheless, proving either case would raise significant evidentiary problems.[240] The key element of proof lies in the level of knowledge the parents have, or should have had, with regard to their children's criminal plans.[241] Thus, for example, although there may have been a number of signs leading to the Columbine massacre[242] and other school shootings,[243] the evidence must show that the parents had specific knowledge of the contemplated acts sufficient to show that their failure to act to protect the victims was negligent or reckless.

1. Parents Cannot Be Held Criminally Liable Based Solely On Their Status As Parents

Although a special relationship exists between parents and their children, courts have consistently stated that parents should not be held criminally responsible for their children's acts simply because they are parents.[244] In *State v. Akers*,[245] a New Hampshire statute held parents responsible for their child's illegal conduct of operating "off highway recreation vehicles" on public roads.[246] The court acknowledged that the

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[238] *See infra* notes 344-381 and accompanying text, discussing the reasons for lack of such convictions.

[239] *See infra* notes 329-343 and accompanying text.

[240] *See* William Glaberson, *Charging Parents of Gunmen Is Tough*, N.Y. TIMES, Apr. 26, 1999, at A-1.

[241] *See* LAFAVE, *supra* note 235, § 3.7, at 232.

[242] *See infra,* notes 336-384 and accompanying text.

[243] *See supra*, notes 1 – 71 and accompanying text.

[244] *See* State v. Akers, 400 A.2d. 38 (N.H.1979). The defendants were the fathers of two minor sons who were found guilty of driving snowmobiles in violation of a state statute that prohibits operation of the vehicles on public roadways or at unreasonable speeds. *See id.* at 39.

[245] *See id.* at 38.

[246] *Id.*

legislature clearly intended to make parents liable for their children's acts under the statute.[247] However, the court found that a voluntary act or omission, of which the accused is physically capable of committing, was a necessary prerequisite to the finding of criminal liability.[248] The statute lacked this prerequisite because it did not require an act or omission by the parent, rather only by the child.[249] Thus, the court held the statute unconstitutional because it violated the parents' due process rights by criminalizing the status of parenthood.[250]

Similar challenges have been made to parental responsibility statutes.[251] Critics argue that parental responsibility statutes are designed to punish "bad parenting," rather than impose criminal liability based solely on the independent conduct of the parent.[252] These criminal statutes, however, have withheld constitutional challenges.[253]

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[247] *See id.* at 39-40.

[248] *See Akers*, 400 A.2d. at 40.

[249] *See id.*

[250] *See id.*

[251] *See generally* Linda A. Chapin, Note, *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 (1997); S. Randall Humm, Comment, *Criminalizing Poor Parenting Skills as a Means to Contain Violence By and Against Children,* 139 U. PA. L. REV. 1123 (1991); Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children,* 44 VAND. L. REV. 441 (1991); Tami Scarola, Note, *Creating Problems Rather than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice,* 66 FORDHAM L.REV. 1029 (1997); Paul W. Schmidt , Note, *Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws,* 73 N.Y.U. L. REV. 667 (1998); Toni Weinstein, *Visiting The Sins of The Child On The Parent: The Legality of Criminal Parental Liability Statutes,* 64 S. CAL. L. REV. 859 (1991).

[252] *See id.*

[253] *See* Williams v. Garcetti, 853 P.2d 507 (Cal. 1993). *See infra* Part V.B. for further discussion of Williams v. Garcetti.

2. Courts Impose a Legal Duty to Protect Others Where the Relationships are Similar To or More Remote Than the Parent-Child Relationship

Although parents are not liable for the acts of their children simply because they are parents, they may be criminally liable for failing to exercise reasonable control over their children.[254] This is because the criminal system, due to the custodial nature of the parent-child relationship, imposes a duty on parents to control their children for the safety of others.[255] Despite this fact, the parental duty to control has not yet been tested in any case where parents were charged with the involuntary manslaughter or murder by depraved indifference that resulted from negligently controlling their children. Courts have, however, imposed criminal liability on others in both similar or more attenuated custodial relationships than the parent-child relationship.[256]

One example of a custodial relationship similar to that between a parent and a child is that between a business owner and his business. For example in *Commonwealth v. Welansky,*[257] several hundred patrons and employees died during a fire in a nightclub after a busboy carelessly lit a match and ignited some of the decorations.[258] The Supreme Judicial Court of Massachusetts looked extensively at the construction of the building and the availability of emergency exits when determining the requisite duty of care.[259] The court found that the defendant, as the owner of the nightclub, was in control of the building's construction and maintenance and thus had a duty of care to ensure the safety of his patrons.[260] The court also found that by failing to install fire doors and

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[254] *See* LAFAVE, *supra* note 235, § 3.3, at 203-07.

[255] *See* id.

[256] *See infra*, notes 254-274.

[257] 55 N.E.2d 902 (Mass. 1944).

[258] *See id.* at 907.

[259] *See id.* at 906.

[260] *See id.* at 907.

maintaining proper exits, the defendant showed a wanton and reckless conduct and so held him guilty of numerous counts of involuntary manslaughter.[261] The court reasoned that:

> [t]he Commonwealth was not required to prove that [the accused] caused the fire by some wanton or reckless conduct. Fire in a place of public resort is an ever present danger. It was enough to prove that death resulted from [the accused's] wanton or reckless disregard of the safety of patrons in the event of fire from any cause.[262]

Another example of a similar custodial relationship was found in *Sea Horse Ranch, Inc. v. Superior Court,*[263] where the California Court of Appeals held a corporation and its president liable for involuntary manslaughter after allowing a horse to escape from the ranch onto an adjacent highway where it collided with a car, killing its passenger.[264] In so holding, the court examined the ranch facilities and found the corral fence to be in such a dilapidated condition that the lack of maintenance constituted criminal negligence.[265]

In *Sea Horse Ranch,* the court not only found the corporation liable,[266] but the corporate president personally liable as well.[267] To find the corporation liable, the court merely stated, "the criminal negligence of corporate officers or agents may be imputed to the corporation to support a charge of involuntary manslaughter."[268] In holding the president liable, however, the

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[261] *See id.*

[262] *Welansky*, 55 N.E.2d at 912.

[263] 30 Cal. Rptr. 2d 681 (1994).

[264] *See id.* at 683.

[265] *See id.* at 687.

[266] *See id.* at 688.

[267] *See id.* at 690.

[268] *Sea Horse Ranch*, 30 Cal. Rptr. 2d at 688. "California corporations can form intent, be reckless and commit acts through their agents." *Id.* (citing Granite Constr. Co. v. Superior Court, 149 Cal. App. 3d 465, 467 (1983)).

court found that he had the requisite knowledge and awareness of the risks created by the ranch's horses to be criminally negligent.[269] He not only knew of the dilapidated condition of the corral fences and of the prior instances where horses escaped onto the highway, but he failed to install a safer fence.[270] The court emphasized that the president was not personally liable solely because of his status as corporate president, but because he had knowledge and control of the risks created by the horses and had failed to act under his statutory duty to control the livestock.[271] In articulating the controlling standard, the court ruled that no single omission by the defendant amounted to negligence, but that the defendant's collective omissions, in the context of the circumstances, constituted criminal negligence.[272]

A custodial relationship that gave rise to a duty of care was also found in a more attenuated situation than either the parent-child or the business owner-business relationship when prosecutors charged a *fictitious entity* with criminal negligence.[273] Cited as the first criminal case of its kind, prosecutors filed third degree murder and manslaughter charges against Valu-Jet, an aircraft maintenance company, after a 1996 airplane crash that resulted in the death of 110 people.[274] Prosecutors contended that the corporation breached its duty to protect the people it served by illegally transporting hazardous materials on an aircraft.[275] The prosecutors also claimed that for the deaths resulting from this breach, the corporation

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[269] *See id.* at 689.

[270] *See id.* at 690.

[271] *See id.*

[272] *See Sea Horse Ranch*, 30 Cal. Rptr. 2d at 687.

[273] *See When a Crash Became a Crime*, N.Y. TIMES, July 15, 1999, at A-24. At the time of this writing, the court's opinion is currently unpublished.

[274] *See id.*

[275] *See* Deborah Sharp, *Indictment Labels Jet Crash Murder,* USA TODAY, July 14, 1999, at 5-A.

should be criminally punished for gross negligence.[276] A case such as this suggests that liability could be imposed against a fictitious entity for breaching the duty to control its operations in a way that failed to protect its customers.

In all three cases the courts found a duty to protect others from harm and imposed criminal liability on the defendants because their acts or omissions rose to the level of criminal negligence. However, in all three cases, the ability of the defendants to control that which caused harm to others is not as strong as the ability of a parent to control the acts of their child. The special relationship between a parent and a child, which gives rise to a duty to protect others from the child, is at least as strong, if not stronger than the relationships and subsequent duties imposed in *Welansky,* the *Sea Horse Ranch* decision, and the pending 1996 Valu-Jet criminal charge. Parents are expected to exercise authority over, carefully supervise, and teach their own children, certainly to the same degree, or to a greater degree, then an employer to an employee or an owner to an animal. Thus, because the stronger parental duty is already recognized in criminal law,[277] and may be far less tenuous, a parent's acts or omissions as reflected in a child's deadly behavior should therefore be legally subject to the same type of analysis as that used in the cases above.

3. Parents' Acts Or Omissions May Be Sufficient To Find Legal Causation For Homicide

The actions of children involved in school shootings may be so extraordinary that they are unforeseeable and, therefore, break the causal connection between the parents' acts or omissions and the death of another.[278] However, two compelling cases hold that the defendant's acts or omissions are suffi-

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[276] *See id.* Prosecutors filed the criminal charges claiming they are necessary where conduct is so grossly negligent, despite the fact that the only criminal punishment against a fictitious entity such as a corporation is a criminal fine. *See When a Crash Became a Crime*, N.Y. TIMES, July 15, 1999, at A-24.

[277] *See* LAFAVE, *supra* note 235, § 3.3, at 203-07.

[278] *See id.* § 3.12, at 293.

ciently direct to sustain a criminal charge, even though another person actually executed the deathblow.[279] In *Commonwealth v. Atencio*,[280] three men were playing Russian Roulette.[281] The first two players each aimed the gun at their heads and pulled the trigger without incident.[282] The third player, however, pulled the trigger and was killed.[283] The Massachusetts Supreme Court rejected the two defendants' argument that the victim's willingness to play the game was an intervening act that broke the chain of causation.[284] The court reasoned that although the defendants may not have had a duty to prevent the deceased from playing the game and that they need not even have suggested that he play, the defendants nevertheless had a duty to not participate or join in the game.[285] The court affirmed the involuntary manslaughter convictions holding that by merely playing the game the defendants' actions could be seen as "mutual encouragement in a joint enterprise."[286]

Similarly, in *People v. Hansen*,[287] a California Appellate court upheld the involuntary manslaughter conviction of a thirty-five year old defendant who initiated a game of Russian Roulette in which a fourteen-year old boy was killed.[288] The court found that the lower court was correct in refusing to instruct the jury on an intervening cause by stating:

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[279] *See* Letner v. State, 299 S.W. 1049 (Tenn. 1927). The defendant was found guilty of involuntary manslaughter when he recklessly fired a shot into the river scaring the occupants of a boat so that they caused it to capsize. *See id.* at 1049. The court held that the act of victims in capsizing the boat was not a superseding cause sufficient to break defendant's liability for the death of two of the passengers. *See id.* at 1052.

[280] 189 N.E.2d 223 (Mass. 1963).

[281] *See id.* at 224.

[282] *See id.*

[283] *See id.* at 225.

[284] *See id.*

[285] *See Atencio*, 189 N.E.2d at 225.

[286] *Id.*

[287] 59 Cal. App. 4th 473 (Cal. Ct. App. 1997).

> [A] defendant may be liable for a [criminal homicide] when his or her acts were the 'proximate cause' of the death of the victim, even though he did not administer the fatal wound...[I]n homicide cases a 'cause of the [victim's death] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [death] and without which the death would not occur.'[289]

The court thus held that a person can be criminally liable for the result caused by his conduct even if the victim's actions were a contributing cause.[290]

Under the reasoning of *Atencio* and *Hansen*, parents are not required to participate or even suggest to their children that they act violently. Their mere presence and knowledge of their children's obsession with guns or other potentially dangerous behaviors may be enough to prove parental criminal negligence. This argument may be particularly convincing in cases where the parents have stored loaded firearms in the home or have supplied guns to their children.[291]

B. EXPANDING LEGAL DUTIES OF THOSE RESPONSIBLE FOR THE ACTIONS OF OTHERS

1. The Tarasoff Duty to Warn And Parents As Criminal Defendants

Parents, because of their special relationship with their children, may have a duty to warn others of impending vio-

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[288] *See id.* at 476.

[289] *See id.* at 479.

[290] *See id.* at 481-82.

[291] *See* People v. Deskin, 13 Cal. Rptr. 265 (1992). The court in finding no unforeseeable intervening cause stated "the number and kind of situations where a child's life or health may be imperiled are infinite . . . [t]he statute condemned the intentional placing of a child, or permitting him or her to be placed, in a situation in which serious physical danger or health hazard to the child is reasonably forseeable." *Id.* at 393. *See also* People v. Odom, 277 Cal. Rptr. 265 (1991).

lence, similar to the duty recognized in *Tarasoff*.[292] The *Tarasoff* court established that psychotherapists, because of the special therapist-patient relationship, have a duty to warn third parties of the dangerous propensities of their patients.[293] In so holding, the court partially relied on the Restatement of Torts "duty-to-control provisions,"[294] which state, "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."[295]

The *Tarasoff* decision has been criticized for unduly expanding the duty of control rationale articulated in the Restatement.[296] The patient in *Tarasoff* was an outpatient, which, according to critics, makes the therapist's degree of control limited.[297] Without this control, there is no special relationship to give rise to such a duty and, therefore, there can be no duty to warn.[298] However, the *Tarasoff* court did not base its holding on the degree of control a therapist has over patients.[299] Rather, the court imposed a duty based on the fact that *some* control existed and that the public interest required the therapist to breach the confidential nature of the relationship to prevent violence from occurring in the future.[300]

The court's rationale regarding the degree of control thus makes the scope of the *Tarasoff* decision unclear. For example,

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[292] *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 343-44 (Cal. 1976).

[293] *See id.*

[294] *See id.* at 343.

[295] *See* RESTATEMENT (SECOND) OF TORTS, § 319 (1965).

[296] *See* Walter E. Johnson, *Tort Liability in Georgia for the Criminal Acts of Another*, 18 GA. L. REV. 361, 378-79 & n.103 (1984) (citing Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 365-66 (1976)).

[297] *See id.*

[298] *See id.*

[299] *See Tarasoff*, 551 P.2d at 342.

[300] *See id.* Emphasis added.

commentators have proposed an extension of the *"Tarasoff* duty to warn" to attorneys with clients who are potentially dangerous and who have made specific threats of violence.[301] The professional standards of the therapist, however, as relied upon by the *Tarasoff* court, may not apply to others who may be less capable of assessing a person's potential for violence.[302] Nonetheless, the court's reliance on the Restatement of Torts duty-to-control provisions could be applied to any person who has responsibility for, knowledge of, or control of another person and who knows, or should know of the person's propensity for causing harm to others.[303] Parents have such a duty to control their children, and typically should know of their child's propensity to harm. Furthermore, the special parent-child relationship may be greater than that between a therapist and patient or an attorney and client because a parent's control is full-time, not merely limited to timed sessions or appointments. Thus, it would seem justified to extend the *Tarasoff* duty to warn to parents for the acts of their children.

2. Civil Liability Imposed On Gun Suppliers and Manufacturers Provides Link to the Imposition of Criminal Liability

Like parents, the duty of gun suppliers and manufacturers to protect third persons is on the verge of expanding.[304] Historically, gun suppliers and manufacturers have only been criminally liable for supplying guns to minors.[305] To this end, both federal and some state laws prohibit the sale, delivery, or transfer of a gun to a juvenile.[306] It was under these laws that

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[301] Johnson, *supra* note 292 at 378-79 & n. 125 (1984) (citing Patterson, *Legal Ethics*, 34 MERCER L. REV. 197, 217 (1982)). Patterson states that if one accepts the validity of the duty imposed on psychiatrists, it is a small step to recognize an attorney's duty to warn a client's intended victim of possible harm. *See id.*

[302] *See id.*

[303] *See id.*

[304] *See infra* notes 309-324 and accompanying text.

[305] *See infra* notes 306-307 and accompanying text.

[306] 18 U.S.C.S. § 922(x) (1999) states:

> It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile (A) a handgun; or (B) ammunition that is suitable

the police, within days of the shootings at Columbine, arrested the man suspected of supplying the TEC-DC9 assault weapon to Dylan Klebold and Eric Harris.[307] This arrest, however, does not mean that the supplier may be guilty of the Columbine homicides.[308] The laws only hold gun suppliers criminally liable for making the gun available to a minor, not for any

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for use only in a handgun. (2) It shall be unlawful for any person who is a juvenile to knowingly possess (A) a handgun; or (B) ammunition that is suitable for use only in a handgun. *Id.*

18 U.S.C.S. § 922(c) (1999):

> In any case not otherwise prohibited by this chapter [18 U.S.C.S. §§921 et. seq.], a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if (1) the transferee submits to the transferor a sworn statement in the following form: "subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; . . . *Id.*

See also FLA. STAT. ch. 790.17 (1999):

> [A] person who sells, hires, barters, lends, transfers, or gives any minor under 18 years of age any dirk, electric weapon or device, or other weapon, other than an ordinary pocketknife, without permission of the minor's parent or guardian, or sells, hires, barters, lends, transfers, or gives to any person of unsound mind an electric weapon or device or any dangerous weapon, other than an ordinary pocketknife, commits a misdemeanor of the first degree, punishable as provided in § 775.082, or § 775.083. A person may not knowingly or willfully sell or transfer a firearm to a minor under 18 years of age, except that a person may transfer ownership of a firearm to a minor with permission of the parent or guardian. *Id.*

See also NEB. REV. STAT. § 28-1204.01(1) (1999):

> [A]ny person who knowingly and intentionally does or attempts to sell, provide, loan, deliver, or in any other way transfer the possession of a firearm to a juvenile commits the offense of unlawful transfer of a firearm to a juvenile . . . Unlawful transfer of a firearm to a juvenile is a Class IV felony. *Id.*

[307] *See CNN The World Today: Arrest Made in Columbine School Shooting* (CNN television broadcast, May 4, 1999). The broadcast named twenty-two year old Mark Manes as the person suspected of supplying one of the four guns used in the attack on Columbine High School. The Jefferson County District Attorney said the nature of the charges was the possible violation of a statute that prohibits the sale or transfer of guns to juveniles. *See id.*

[308] *See CNN Gun Provider Sentenced to 6 Years in Columbine Case* (Nov. 13, 1999) <http://www.cnn.com/US/9911/13/columbine.manes.01>. Manes was sentenced to six years in prison, on November 12, 1999, for supplying the TEC-DC9 to Eric Harris and Dylan Klebold. In the videotapes made by Harris and Klebold, they both thanked Manes for supplying the weapon that was later used in their shooting rampage. *See id.*

deaths that result from the minor's use of the gun.[309] This limitation exists because the causal connection required for a homicide conviction is often very difficult to prove.[310] For example, in *Ayers v. Supreme Court of Iowa,*[311] the court reversed an involuntary manslaughter conviction of a defendant who had sold a stolen gun to a minor for five dollars.[312] The court held that although the defendant acted recklessly, a criminal conviction required a more "direct and specific" forseeability.[313] The court also stated that although a defendant need not actively participate in the immediate cause of death in order to be criminally liable, proximity to the harm beyond the sale of the gun is required.[314]

While criminal liability has not yet been established, at least two courts have found legal causation sufficient to hold gunmakers *civilly* liable for the criminal use of their weapons.[315] Such decisions may eventually provide a bridge leading to *criminal* liability.[316] In the first case, *Merrill v. Navegar,*[317] a disgruntled client walked into a law office and

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[309] *See* 18 U.S.C.S. § 922(1)(q)(1)(B) (1999) ("The Congress finds and declares that . . .crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs . . .").

[310] *See supra* note 300 for Florida and Nebraska statutes.

[311] 478 N.W.2d 606 (Iowa 1991).

[312] *See id.* The minor took the gun to a party and was showing it off to the other guests. The gun went off and killed the minor's girlfriend. The defendant did not know of, and was not at the party. *See id. at 607.*

[313] *Id.* at 608.

[314] *See id.*

[315] *See infra* notes 313-323 and accompanying text.

[316] Criminal law and tort law are related branches of law. For example, both crimes and torts impose liability where there is a duty to act. *See* LAFAVE, *supra* note 235, § 3.3, at 282-89. Additionally, crimes such as murder and manslaughter require causation as an element to be satisfied, similar to the causation requirements for negligence. *See id.* § 3.12, at 277. Whereas the criminal law has been slower to borrow from civil law absent legislative mandate, particularly where no criminal liability previously existed, civil statutes have been influential in the development of criminal law. *See id. §* 1.3, at 12. This is because civil law, like criminal law, serves to shape people's conduct for the benefit of society by holding individuals' accountable for their actions. *See id.* § 1.3 at 13.

[317] 89 Cal. Rptr. 2d 146.(Cal. Ct.App. 1999).

opened fire, killing eight people and wounding six others before committing suicide.[318] One of the weapons used was a TEC-DC9 automatic assault weapon manufactured by Navegar.[319] The victims and their families sued the gun manufacturer for negligent marketing practices but the gun manufacturer claimed that the suit was improper.[320] In analyzing whether such a suit could be brought, the California Court of Appeal stated,

> "Navegar had a substantial reason to foresee that many of those to whom it made the TEC-DC9 available would criminally misuse it to kill and injure others. Its targeted marketing of the weapon 'invited or enticed' persons likely to so misuse the weapon to acquire it."[321]

The court imposed on gun manufacturers a new duty to exercise care not to increase or encourage the risk of foreseeable injuries, and ruled that the families could sue the manufacturer of the TEC-DC9 under a negligent marketing theory.[322]

This decision is similar to a New York court's ruling against gun manufacturers for their negligent marketing and distribution practices in *Hamilton v. Accu-Tek*.[323] In this case, relatives of six of the people killed by handguns, and one injured survivor and his mother sued twenty-five gun manufacturers for negligence.[324] They claimed that the indiscriminate marketing and distribution practices created an underground market in handguns that provided youths and violent criminals, like the shooters in these instances, with easy access to

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[318] *See id.* at 152.

[319] *See id.*

[320] *See id.*

[321] *Id.* at 165.

[322] See *Merrill*, 89 Cal. Rptr.2d at 146. Gun manufacturer civil liability may still be an open question in California. The California Supreme Court granted review of *Merrill* in 2000. 991 P.2d 775 (2000).

[323] 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

[324] *See id.* at 808.

deadly instruments.[325] The federal district court found that the defendant gun manufacturers had a special duty to the public not only because of the significant dangers posed by their products, but because the defendants knew of and did not prevent the large scale diversion of their weapons to an illegal market.[326] Through the defendants' inaction, the criminal misuse of handguns by third parties was not only a forseeable consequence of their negligent marketing practices, but it was the expected consequence of their conduct.[327]

These cases illustrate that under the theory of negligent marketing, gun manufacturers may now be held civilly liable for selling assault weapons that may forseeably be used in shooting rampages.[328] Such decisions effectively impose a duty on defendants previously not considered to have a special relationship of care under the law. These cases also provide a causal link between these defendants and innocent victims of crime.[329] Thus, as public attention turns to the causes of teenage violence, the duty to protect and the causal link established in the gun manufacturer cases could be applied in criminal cases,[330] particularly where the relationship is less attenuated than that between a manufacturer and a purchaser, as in the parent-child relationship.

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[325] *See id.*

[326] *See id.* at 827.

[327] *See id.* at 839.

[328] *See* Viveca Novak, *Enter the Big Guns: The Feds Threaten Gunmakers with a Huge Lawsuit, and Most Can't afford Not to Talk Settlement,* TIME, Dec. 20, 1999, at 59. Twenty-nine cities and counties are suing gunmakers on behalf of the countries 3,191 public housing authorities. They are seeking to recover the public costs of gun violence. The federal government is threatening to join the suit if the gunmakers do not agree to new marketing and manufacturing procedures. *See id.*

[329] *See* Harriet Chiang and Kevin Fagan, *Gunmakers Can Be Sued By Victims*, S.F. CHRON., Sept. 30,1999, at A-1.

[330] *See supra* note 309 discussing the similarities between civil and criminal liability.

3. Criminal Parental Responsibility: The Enforcement of Truancy Laws

More tangible results in holding parents criminally responsible for the conduct of their children can be seen in a new wave of enforcement of anti-truancy laws.[331] The reason for such enforcement is the belief that truancy leads to juvenile crime.[332] These statutes, generally called "delinquency statutes" or "parental responsibility statutes," often can, and do, encompass anti-truancy measures as a means of ensuring that parents take responsibility for their children's behavior.[333] If a parent fails to do so, and the child does not attend school, the parent can be jailed or fined.[334] This trend in enforcing current

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[331] *See* Julian Guthrie, *Parents Face Jail Time if Kids Miss Class*, SAN FRANCISCO EXAMINER, Sept. 19,1999, at A-1. The penalties vary. In Ventura County, California, for example, school officials can fine parents $100 if their children are repeatedly absent, and could send parents to jail for a year. In Kern County, California, the fine can be as high as $2500 with the same threat of a year in jail. In Florida, parents of habitual truants face a $500 fine and the threat of sixty days in jail. *See id.* In Oklahoma, parents can face fines that range from $170 to $260 and have served as long as twenty-three days in jail. *See id.* at A-13.

[332] *See id.*

[333] *See e.g.*, CAL. PENAL CODE § 272 (Deering 1999) ("The purpose of the [former] statute was to safeguard children from those influences which would tend to cause them to become delinquent."). *See also* KY. REV. STAT. ANN. § 530.060(1) (1998) ("the obvious legislative policy is to encourage the proper and diligent raising of the child in order to prevent an ultimate or final social disaster, namely, the child's finally becoming a neglected, dependent, or delinquent child.").

[334] *See e.g.*, CAL. PENAL CODE § 272 (Deering 1999) (authorizes jail terms and criminal fines for negligent supervision and control of child which causes, encourages, or contributes to the delinquency of a minor). *See also* ALA. CODE § 12-15-13 (1999) (a parent or guardian cannot willfully aid or encourage acts of juvenile delinquency); IOWA CODE ANN. § 709A.1 (1999) (same); KAN. STAT. ANN. § 21-3612 (1998) (unlawful to contribute to a child's misconduct or deprivation); KY. REV. STAT. ANN. § 530.060(1) (1998) (criminalizing the endangerment of a child's welfare if parent fails or refuses to reasonably control child to prevent him from becoming delinquent); N.H. REV. STAT. ANN. § 169-B: 41 (1999) (criminalizing intentional contribution to delinquency of a minor when a parent or guardian knowingly encourages or aids delinquency); N.C. GEN. STAT. § 14-316.1 (1999) (parents are criminally liable when contributing to the delinquency and neglect of child); MO. ANN. STAT. § 568.050 (1999) (criminalizes endangering the welfare of a child); N.Y. PENAL LAW § 260.10(2) (West 1999) (criminalizing the endangerment of a child's welfare if parent fails or refuses to reasonably control child to prevent him from becoming delinquent). The Alabama Code specifically addresses truancy: " Failure on the part of any parent, guardian, or other person having custody of the child to cause such child to attend school as required by the

truancy statutes illustrates society's recognition of increasing juvenile crime and the desire to make parents responsible for such actions.[335]

IV. CRITIQUE

A. APPLICATION OF THE ELEMENTS FOR HOMICIDE PERMITS A CRIMINAL CONVICTION FOR PARENTS

Under a strict application of the law, a parent may be criminally liable for the homicides committed by his or her child based on the parent's independent conduct, which resulted in the failure to control the child, if that conduct rises to the level of gross or criminal negligence.[336] Likewise, a parent may be held criminally liable for homicides committed by his or her child if the parent's conduct is so reckless that it demonstrates a conscious disregard for human life.[337] Thus, even though parents may not have actually committed the homicide, their conduct preceding the crime may, in some circumstances, satisfy the required elements necessary for a conviction.[338] Nevertheless, to date, no court has held a parent liable under a manslaughter or murder by depraved indifference theory as a result of violent acts committed by their children. As public concern grows, however, particularly with regard to school

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compulsory attendance law shall be held to be encouraging, causing, and contributing to the delinquency, dependency or need of supervision of such child." ALA. CODE § 12-15-13(a) (Michie 1999).

[335] *See* Julian Guthrie, *Parents Face jail Time if Kids Miss Class*, San Francisco Examiner, Sunday September 19,1999, A-1, at A-13, citing Oakland school board president Noel Gallo, who stated: "I want to send a message that parents have to be responsible for their children. Parents blame us when their kids don't succeed in school. But I can't do anything to increase achievement if they don't get their gets to school, and on time." *Id.* at A-13.

[336] *See supra* notes 204-208 and accompanying text.

[337] *See supra* Part notes 209-216 and accompanying text.

[338] *See e.g.*, People v. Hansen, 59 Cal. App. 4th 473 (Cal. Ct. App. 1997). The *Hansen* court, citing People v. Gardner 37 Cal. App. 4th 473, 479 (Cal. Ct. App. 1995) stated, "It is therefore, clear that a defendant may be liable for [criminal homicide] for the killing when his acts were the were the 'proximate cause' of the death of the victim, even though he did not administer the fatal wound." *Id.* at 479.

shootings, courts are likely to be faced with the question of whether such violence is the result of a parent's actions or failures to act and may even hold that parent responsible for the homicide.[339]

In answering the question of whether the death of another was the result of a parent's failure to control, a court, following *Welansky,* need not require the failure to be the direct result of the death. The *Welansky* court, in finding a night club owner criminally liable for manslaughter, held that the state did not have to prove that the defendant's reckless acts actually caused the fire that killed so many people.[340] Instead, the state needed only to show that the defendant's conduct was so reckless as to jeopardize the safety of the patrons.[341] Thus, once his conduct became reckless, he was responsible for the outcome, regardless of its direct cause.[342] This distinction is important because it suggests that liability rests on whether the negligent acts or omissions endanger the public, not on proving that such negligence directly caused the result. Accordingly, parents may be criminally liable when the evidence shows that a parent's conduct in controlling his or her child was so reckless that it endangered the public, regardless of the specific action taken by the child.

Under the above rationale, the parents in the Columbine case could legally be held liable because there were a number of prior bad acts involving the two boys that suggested they were a danger to the public.[343] Many of Harris' neighbors claim to have known what was going on with Harris and Klebold and

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[339] *See* Karen Lowe, *As Shock of Shooting Wanes, Search for Blame Picks Up,* AGENCE PRESS FRANCE, Apr. 26, 1999. *See also* Nancy Gibbs and Timothy Roche, *The Columbine Tapes,* TIME, Dec. 20, 1999, 40-51, at 50. *See also* Michelle L. Maute, *New Jersey Takes Aim at Gun Violence by Minors: Parental Criminal Liability,* Note, 26 RUTGERS L. J. 431 (Winter 1995) (discussing parental responsibility statutes as a result of children and firearms).

[340] *See supra* note 258, and accompanying text.

[341] *See id.*

[342] *Id.*

[343] *See supra,* notes 1-19.

wondered why the parents did not.[344] If, for example, Mr. Harris did disarm one of his son's bombs without telling the police, and his son did keep a number of dangerous weapons in his room, and teachers did warn both the Harris and the Klebold families of their sons' gruesome writings, then the parents may have demonstrated a failure in their parental duty to control and warn sufficient to rise to a level of criminal negligence or willful disregard for human life.[345]

Similarly, because affirmative acts, such as supplying guns to depressed adolescent children,[346] may also amount to grossly negligent or reckless conduct, if Kip Kinkel's parents were alive, they too might have been criminally liable under a strict legal analysis. Kinkel's parents knew of his fascination with firearms.[347] In fact, Mr. Kinkel bought the guns for his son, the same guns used to both kill his parents and gun down his classmates.[348] They also knew he was depressed and was taking Ritalin, a drug prescribed for hyperactivity.[349] Furthermore, it is rumored that he bragged to classmates about torturing animals with firecrackers and knives.[350] If such allegations are true, Mr. Kinkel's act of giving his son the guns used to kill his parents and his classmates, in light of Kinkel's troubled past, ignores the clear signs pointing to Kinkel's potential for violence, and thus may very well fit the requirement of criminal negligence or willful disregard.

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[344] *See* Jim Hughes and Jason Blevins, *Father Had Hunch Son Was Involved,* THE DENVER POST, Apr. 22, 1999, at A-14; *Mother Questions Who Her Son Was, Everyone Is Trying To figure Out Why Teens Went On A Rampage,* CHARLESTON DAILY MAIL, Apr. 26, 1999, at P7A; Kathy Kiely and Gary Fields, *Colorado Killers' Last Days Gave No Hint Of Plans,* USA TODAY, May 3, 1999, 7A; Karen Lowe, *As Shock Of Shooting Wanes, Search For Blame Picks Up,* AGENCE PRESS FRANCE, Apr. 26, 1999.

[345] *See supra* notes 13-19, discussing possible warning signs.

[346] *See supra* notes 22-29. *See also* John Cloud, *Just a Routine School Shooting,* TIME, May 31,1999, at 36-37.

[347] *See* Cloud, TIME, May 31,1999, at 37.

[348] *See Frontline: The Killer At Thurston High; School Shooters* (PBS television broadcast, Jan. 21, 2000) [hereinafter *Frontline: School Shooters*].

[349] *See id.*

[350] *See* Dave Saltonstall, *Teen's House Bomb-Packed Searchers Discover an Arsenal,* NEW YORK DAILY NEWS, May 23, 1998.

B. SOCIETY'S RELUCTANCE TO HOLD PARENTS CRIMINALLY LIABLE

Even though a state could theoretically obtain a criminal conviction against a parent by demonstrating evidence of gross or reckless conduct, society may be reluctant to pursue such convictions because they are perceived as passing judgment on parenting decisions and interfering with the constitutional right to raise children.[351] As expressed by the New Hampshire Supreme Court in *Akers*, society sometimes views convictions of this sort as punishment for merely being parents.[352] The *Akers* court held that New Hampshire's motor vehicle statute was unconstitutional because it conferred criminal liability solely on the basis of parental status.[353] In support of its holding, the court stated:

Parenthood lies at the very foundation of our civilization. The continuance of the human race is entirely dependent upon it. It was firmly entrenched in the Judeo-Christian ethic when "in the beginning" man was commanded to "be fruitful and multiply." Considering the nature of parenthood, we are convinced that the status of parenthood cannot be made a crime. This, however is the effect of [the statute]. Even if the parent has been as careful as anyone could be, even if the parent has forbidden the conduct, and even if the parent is justifiably unaware of the activities of the child, criminal liability is still imposed under the wording of the present statute. There is no

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[351] *See* Stephanie Salter, *Blinded By Love - And By Stereotyping,* THE PALM BEACH POST, May 1, 1999, at 15A. "Sooner or later, the rabid blame-layers will no doubt find something wrong with the Klebolds' and Harrises' parenting; the couples are human, after all, which means they make mistakes. But will it be enough to explain the enormity of their boys crimes?" *Id;* Kiely, USA TODAY, May 3, 1999, at 7A. " So normal that now, after almost two weeks of public outrage about warning signs that many say were ignored by the parents, school officials and police, more and more friends and classmates of the two gunmen say that no one could have seen it coming." *Id.;* Gibbs, TIME, Dec. 20, 1999, at 50. The district attorney is not sure it would "do any good" to charge the parents. *Id.*

[352] *See* State v. Akers, 400 A.2d 38, 40 (N.H. 1979).

[353] *See id.* at 39-40. The court cited the relevant statute, RSA 269-C:24 IV, which provided that " the parents or guardians or persons assuming responsibility will be responsible for any damage incurred or for any violations of this chapter by any persons under the age of 18." *Id.*

other basis for criminal responsibility other than the fact that a person is the parent of one who violates the law.[354]

In drawing this conclusion, however, the court failed to read the motor vehicle statute in conjunction with the New Hampshire criminal code,[355] which requires a voluntary act or omission for any criminal conviction.[356] When read together, the motor vehicle statute can impose parental liability only when the parent acted in a way to further the wrongful conduct, failed to act in controlling the child's conduct, or negligently entrusted a minor to operate an off-highway vehicle.[357] Thus, the focus is not on the relationship, but on the act or omission of the parent, which is the traditional prerequisite to imposing criminal liability.[358]

The New Hampshire Supreme Court decided *Akers* in 1979, before the growing rash of violence perpetrated by children sparked public concern.[359] Since this outbreak, specifically in response to the Columbine massacre, the New Hampshire Legislature introduced a bill that would make parents, based on their own acts or omissions, criminally liable for the acts of their children under a criminal negligence theory.[360] The bill,

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[354] *See id.* at 40.

[355] *See id.* at 40-41. Justice Bois dissenting, cited RSA 626:8 (Criminal Liability of Conduct of Another), which provides that " a person is legally accountable for the conduct of another person when he is made accountable for the conduct of such other person by the law defining the offense." RSA 626:1 I of the Criminal Code provides that all criminal liability must be based on a voluntary act or omission. *Id.*

[356] *See Akers*, 400 A.2d at 40-41.

[357] *See id.* at 40.

[358] *See* WAYNE R. LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 3.3, 210 (2d ed. 1986).

[359] *See supra* notes 1-24.

[360] *See* Cissy Taylor, *Parental Liability Can't Be Criminal Under New Hampshire's Laws*, THE UNION LEADER, Apr. 28, 1999, at A-1. H.B. 721, 156th Leg., 1st Gen. Sess. (N.H. 1999). The bill would enact a parental responsibility statute: Consistent with the protection of the public interest, to promote the minor's acceptance of personal responsibility for delinquent acts committed by the minor, encourage the minor to understand and appreciate the personal consequences of such acts, and provide a minor who has committed delinquent acts with counseling, supervision, treatment, an rehabilitation, AND MAKE PARENTS AWARE OF THE EXTENT IF ANY TO WHICH THEY MAY

however, was sent to a study committee because "it had not been well thought out or researched."[361] New Hampshire officials, expressing their reluctance to enact such a measure, felt it was unlikely a parent should be held criminally liable, particularly when a civil remedy is available.[362]

The reluctance felt in New Hampshire is similar to that felt in other states where the constitutionality of parental criminal responsibility statutes have been upheld.[363] In these states, although the laws are on the books, they are not being enforced due to the perception that the laws target "bad parenting" instead of the acts or omissions by the parent that contribute to the violent acts of the minor.[364] California is one such state, and in *Williams v. Garcetti*,[365] the California Supreme Court upheld against a constitutional vagueness attack an amendment to the parental responsibility statute.[366] After noting that the amendment imposed a duty on parents and guardians to exercise reasonable care, supervision, and control over their minor children,[367] the Supreme Court held that the amendment was not vague because it incorporated definitions and parental duties that had long been part of California tort law.[368] The court thus found that the statute was not an attempt to punish parents for bad parenting, but rather was an attempt to im-

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HAVE CONTRIBUTED TO THE DELINQUENCY AND MAKE THEM ACCOUNTABLE FOR THEIR ROLE IN ITS RESOLUTION. *Id.*

[361] *See* Taylor, THE UNION LEADER, Apr. 28, 1999, at A-1.

[362] *See id.*

[363] *See* Williams v. Garcetti, 853 P.2d 507 (Cal. 1993).

[364] *See id.*

[365] *See id.* The amendment to § 272 states "for the purposes of this section, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child." *Id.* at 508. It was challenged by a taxpayer's suit, alleging that its enforcement as amended constituted a waste of public funds since the amended statute was unconstitutionally vague and overbroad on its face. *See id.* at 509. The suit also claimed that the amendment was an unconstitutional interference with the right to privacy under both the federal and state constitutions. *See Williams*, 853 P.2d at 508-09.

[366] *Id.* at 514.

[367] *See id.*

[368] *See id.*

pose criminal liability on parents for their *criminally negligent acts* in not controlling their children.

Despite the California Supreme Court's ruling in *Garcetti*, convictions under that statute, and similar statutes in other states, are rare.[369] Such parental responsibility statutes have, however, been used as threats to encourage parents to control their children.[370] This seems to be particularly true in California, where instead of criminal prosecution, the city attorney's office refers parents to parenting classes of a statutorily approved diversion program.[371] If the parents do not attend they are then threatened with criminal prosecution under the statute.[372] None of these threats, however, have been carried out.

Garcetti's affirmation of the statute and the lack of prosecution under it demonstrates the tension between society's desire to hold parents criminally responsible for acts committed by their children and its reluctance to interfere with family privacy or responsibility. The enactment of parental responsibility laws certainly demonstrates society's belief that parents' are responsible for juvenile delinquency, but the courts have been reluctant to actually enforce those laws.[373] Thus, when violent acts by children occur, such as the Columbine massacre, society expresses its dismay and anger through such

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[369] *See* Linda A. Chapin, Note, *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, 652-53 & n. 183 (1997) (citing Claire Safran, *Is It a Crime to be a Bad Parent? Holding Parents Responsible for Their Children's Delinquency & Crimes,* WOMAN'S DAY, May 1, 1990, at 64).

[370] *See id.*

[371] *See* Tami Scarola, Note, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice,* 66 FORDHAM L. REV. 1029, 1045 & n.156 (1997).

[372] *Id.*

[373] Unless the parent had actually encouraged or solicited the child's delinquent act. See *supra*, notes 222-233 and accompanying text.

measures that ultimately die in the Legislatures[374] or are so diluted they become empty threats of criminal prosecution.[375]

In addition to believing that parental criminal liability judges parental ability and interferes with a person's right to parent, society may also be reluctant to hold parents liable for their own negligence because parents may identify with the difficulties that other parents face. Imposing liability may be "too close to home" for parents who may have to sit on juries in parental criminal cases.[376] These juries may fear that imposing manslaughter or second-degree murder convictions on fellow parents may expose all parents to potential criminal liability for the acts of their children.[377] Similar fears have been shown in cases involving manslaughter charges for reckless driving.[378] Initially, the identification of and sympathy with fellow drivers, combined with the penalties associated with a manslaughter or murder conviction, led many juries to find the defendant not guilty.[379] In response, states enacted various homicide by automobile statutes, which carry lesser punishments for vehicular manslaughter and are specific to vehicle related conduct .[380] As a result, juries were less tentative in holding fellow drivers guilty. If the punishment for parental criminal responsibility statutes were similarly constructed the reluctance in convicting parents could likewise be lessened.

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[374] *See* Taylor, *supra* note 354.

[375] *See supra* notes 362 - 365 and accompanying text.

[376] *See* LAFAVE, *supra* note 350, § 7.12, at 674 (discussing statutory variations of involuntary manslaughter) (citing Robinson, *Manslaughter by Motorists*, 22 Minn.L.Rev. 755 (1938); Riesenfeld, *Negligent Homicide- A Study in Statutory Interpretation*, 25 Calif.L.Rev., 1, 5 (1936)).

[377] *See id.*

[378] *See id.*

[379] *See id.*

[380] *See* DEL.CODE ANN. tit. 11, § 630A (1999); HAW. REV. STAT ANN. § 707-703 (Michie 1999); KAN. STAT. ANN. 21-3405 (1998); MINN. STAT. § 609.21 (West 1999); N.J. STAT. ANN. § 2C:11-5 (West 1999); OHIO REV. CODE ANN. § 2903.06 (West 1999) (reckless), § 2903.07 (negligent); WIS. STAT. ANN. § 940.08 (West 1999).

The final reason for the reluctance to hold parents criminally liable is that the parents of the perpetrators have already been punished enough. For example, the District Attorney investigating the Columbine case, when asked about the investigation of the possible involvement of the parents of the two gunmen, stated that he was not sure that it would "do any good" to charge the parents, thus implying that they had suffered enough.[381] This idea, however does not conform to notions for imposing criminal liability, which are deterrence and retribution.[382] These purposes are achieved by punishing the undesirable behavior of failing to control children and failing in the duty to protect others.[383] Thus, exempting parental conduct from criminal punishment would not serve to deter bad behavior and, in fact, may promote continued lack of supervision since there is no likelihood of criminal liability.

This reluctance to hold parents criminally liable may reflect a reticence to accept the fact that escalating patterns of youth violence are no longer contained in inner cities and with minorities.[384] School shootings of the past four years have involved young, white males from both urban and rural areas.[385] Klebold and Harris, for example, come from "good homes, good families, and good schools" in an affluent Denver, Colorado suburb.[386] Yet despite the growing evidence to the contrary, most Americans may still believe that explosive teen violence and senseless destruction occurs in urban cities and not in middle class white neighborhoods.[387] The "it could never hap-

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[381] *See* Nancy Gibbs and Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, at 49.

[382] *See* LAFAVE, *supra* note 350, § 1.5, at 24-25.

[383] *See id.* at 22.

[384] *See* Michael Romano, *"No One Seems To Recognize' Urban Violence Minority Students See Double Standard After Columbine,* DENVER ROCKY MOUNTAIN NEWS, July 16, 1999, at 32A.

[385] *See* Cloud, *supra* note 340.

[386] Jim Avila and Tom Brokaw, *Background into Trenchcoat Mafia Suspects and Their Crime,* NBC Nightly News, Apr. 21, 1999.

[387] *See* Salter, THE PALM BEACH POST, at 15A.

pen here" mentality still prevails.[388] That mentality may fuel a pervasive lack of parental supervision of potentially violent children. Thus, as youth violence continues to escalate, it is more important than ever to identify and deter parental negligence that rises to a level of criminality.

V. PROPOSAL

Because of the inability to accept the apparent trend of youth violence, the identification of parents with others parents, and the perceived judgment of parenting in light of the harshness of manslaughter and murder by depraved indifference convictions, the creation of parental negligent homicide statutes may provide a viable alternative to convictions under traditional homicide theories. These new statutes should include specific standards designed to deter unacceptable failures by parents whose conduct already meets the established standards of criminal negligence or recklessness. Thus far, no statute has attempted to establish a bright line rule specific to parental negligence and the death of third parties perpetrated by their children.

Some juvenile delinquency statutes, however, come close. For example, the California juvenile delinquency statute holds parents criminally liable when their children have committed acts of juvenile delinquency, but only when the parent's own conduct, relative to the child, is criminally negligent.[389] To this end, the statute employs the definitions and parental duties that have long been part of California tort law; thus, it essentially requires parents to exercise reasonable care in controlling their children.[390] Like the California delinquency statute, the enactment of parental negligent homicide statutes would not interfere with the right to parent, nor would they judge

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[388] *See id.*

[389] *See e.g.* CAL. PENAL CODE § 272 (Deering 1999) ("Contributing to the Delinquency of a Minor," criminalizing such act or omission and defining parental duty as "the duty to exercise reasonable care, supervision, protection, and control over their minor child.").

[390] *See supra* notes 358-361 and accompanying text.

poor parenting skills. Instead, these statutes would impose a legal duty on parents to protect the public from acts of children, a duty already recognized in the criminal law[391] and employed in great measure in tort law.[392]

In addition to alleviating the reluctance caused by the view that the traditional homicide theories punish bad parenting, parental negligent homicide statutes would reduce the likelihood that parents, sitting as jurors, would identify and sympathize with the parents who sit as defendants. This would occur in the same way that homicide-by-automobile statutes have reduced the identification problem: by punishing less severely and requiring a lesser degree of negligence or recklessness that that required for ordinary criminally negligent involuntary manslaughter.[393] With this decrease in punishment and specificity to the negligent conduct, juries were less reluctant to convict fellow drivers. If the same were done with regard to parental negligent homicide statutes, society's reluctance to impose criminal liability on parents may also be reduced.

There are other statutes that provide different treatment for specific homicide situations, distinguishing them from general manslaughter statutes. For example, some states have enacted variations of homicide statutes which hold people criminally responsible for conduct that threatens public safety.[394] Also, the Model Penal Code has created a separate

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[391] *See supra* notes 204-208 and accompanying text.

[392] *See supra* notes 115-165 and accompanying.

[393] *See* CAL. PENAL CODE § 191.5, (Deering 1999) (gross vehicular manslaughter); CAL. PENAL CODE § 192 (Deering 1999) (gross negligence other than gross vehicular manslaughter); DEL. CODE ANN. TIT. 11, § 630A (1999) (guilty of vehicular homicide while driving under the influence); HAWAII REV.STAT. § 707-703 (Michie 1999) (negligence); KAN.STAT.ANN. § 21-3405 (1998) (creates an unreasonable risk of injury); MINN.STAT.ANN. § 609.21 (West 1999) (grossly negligent manner or negligent manner while under the influence); N.J.STAT.ANN. § 2C:11-5 (West 1999) (reckless); OHIO REV. CODE § 2903.06 (West 1999) (reckless), 2903.07 (negligent). In California the punishment for involuntary manslaughter is two, three, or four years. *See supra* notes 197-98. In contrast, the punishment for vehicular manslaughter without gross negligence is one year. *See supra* note 386.

[394] *See* MINN. STAT. ANN. § 609.025 (West 1999): A person who causes the death of another in any of the following situations is guilty of manslaughter in the second de-

crime called negligent homicide, which carries a lesser punishment.[395] Under the Model Penal Code, negligent homicide encompasses any special situation, not limited to automobiles, that causes death or serious bodily injury.[396] Like all of these negligent homicide statutes, the purpose of the new statutes would be to ensure the public's safety by criminalizing a parent's failure to control his or her child when that failure leads to the death of another.

The enactment of parental negligent homicide statutes would also remove some reluctance by dispelling the idea that the parents of violent children have already suffered enough. It would do so by carrying out the accepted purposes for imposing criminal liability on wrongdoers, which are to ensure public safety and to deter criminal behavior.[397] With society looking to the culpability of parents in the wake of the continuing trend of youth violence, the absence of specific statutes targeting parental criminal negligence undermines the purposes for imposing criminal sanctions on those who do not conform to societal standards. With the imposition of criminal liability on parents who fail to control their own children for the protection of others, however, the purposes for pursuing criminal convictions would certainly be accomplished. Moreover, the existence of such statutes would end society's inability to recognize that youth violence is a continuing trend, permeating all economic and social situations.

Admittedly, determining when the acts or omissions associated with parenting become criminally negligent is, and should

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gree: 1) the person creates an unreasonable risk of death or harm to another through his or her culpable negligence, 2) by negligently shooting another person while thinking that the victim is a deer or other animal, 3) by setting a spring gun or other trap, 4) by negligently or intentionally permitting an animal with known vicious propensities to run uncontrolled, or 5) by committing negligent endangerment of a child (excluding first, second, or third degree murder). *See also* WIS.STAT.ANN. § 940.08 (West 1999) (homicide by negligent handling of dangerous weapons).

[395] *See* MODEL PENAL CODE §210.4(1) (1962): criminal homicide constitutes negligent homicide when it is committed negligently.

[396] *See* id.

[397] *See* WAYNE R. LAFAVE & AUSTIN SCOTT, CRIMINAL LAW, § 1.2, 22-27 (2d ed. 1986).

be, difficult. Unlike drunk driving negligent homicide, where intoxication may be measured to impose vehicular homicide liability,[398] the standards for "unreasonable parenting" can be less clear. However, our legislatures already have experience criminalizing parental contributions to juvenile delinquency, civil liability, and other specific homicidal acts. Thus, if the courts are unwilling to impose criminal liability on parents under traditional homicide theories, then state legislatures, to give guidance to a troubled society, are quite capable of enacting negligent homicide statutes that encompass the negligent control of children by their parents.

VI. CONCLUSION

This Comment concludes that parental criminal liability is possible under current criminal law. Given the right circumstances, a parent may be criminally liable for the deaths caused by their children, through their own negligent or reckless acts when their acts breach the duty to control children and to protect third parties from their violence. Criminal liability may also result from the breach of the duty to warn others of their children's violent propensities. Although civil liability is the more common result in instances where parents have breached these duties, there are no criminal convictions that hold a parent responsible for deaths caused by their children.

The most likely homicide theories in which parents may be criminally liable in cases like the school shootings are criminal negligent involuntary manslaughter or murder by depraved indifference.[399] This is true because they only require an elevated degree of negligence or reckless disregard for human life, respectively, as opposed to the specific intent requirements of

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[398] Gross vehicular manslaughter under California Penal Code Section 191.5(a) incorporates California Vehicle Code Section 23152(b), Driving Under the Influence of Alcohol or Drugs. In so doing, the manslaughter code thus particularizes an established measurement of intoxication (.08) such that the defendant is presumptively intoxicated. *See* CAL. PENAL CODE § 191.5, (Deering 1999) (gross vehicular manslaughter).

[399] See *supra*, notes 186-233 and accompanying text.

first and second-degree murder.[400] Nevertheless, because criminal convictions under these homicide theories also require a showing that the parents' acts or omissions caused the deaths that occurred at the hands of their children, such convictions have been rare.[401] One step toward finding a conviction, however, may be found in civil cases where courts have established a new duty to not harm others on gun suppliers and manufacturers.[402] This duty may one day extend into the criminal realm if the actions that breach that duty are sufficiently egregious.[403]

This duty may be expanded sooner if parental negligent homicide statutes are enacted.[404] These statutes would provide an acceptable societal standard for imposing liability because the statutes would be specific to the conduct of negligent control by parents.[405] Such statutes would also encourage greater control of children.[406] More importantly, they would accurately reflect the purposes of imposing criminal punishment.[407] In the absence of convictions of parents under traditional homicide theories, it is the job of our legislatures to enact legislation that addresses parental failures in controlling or warning against the explosive violence of their children.[408]

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[400] *See id.*

[401] See *supra,* notes 234-335 and accompanying text.

[402] See *supra,* notes 304-330 and accompanying text.

[403] See *supra,* notes 336-350 and accompanying text.

[404] See *supra,* notes 389-398 and accompanying text.

[405] *See id.*

[406] *See id*

[407] *See id*

[408] *See id*

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