DEFINING THE DUTY OF RELIGIOUS INSTITUTIONS TO PROTECT OTHERS: SURGICAL INSTRUMENTS, NOT MACHETES, ARE REQUIRED

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I. INTRODUCTION

The well-publicized and sometimes shocking acts of some Roman Catholic priests have brought questions of tort law—long buried in scholarly texts—to the front pages of our newspapers.[1] What is the duty of churches and other religious institutions to protect their memberships or communities in general? When should religious institutions be responsible for the wrongful acts of priests, ministers, rabbis, or other religious leaders? When, if ever, should they be liable for the acts of members of their congregations? If a duty of care is to be imposed, what is its nature and extent?

Surprisingly, many of these fundamental questions have not been answered in judicial opinions. Media commentators have properly speculated about the results.[2] The reasons one cannot find answers in judicial opinions are complex.

First, and most importantly, issues arise because of a drastic change in

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1. *See, e.g.*, Wendy Davis, *Redemption Key to Church Defense*, BOSTON GLOBE, Mar. 24, 2003, at B1; Ashbel S. Green, *Archdiocese Near Top in Paying*, OREGONIAN, Feb. 28, 2004, at A1; Gregory D. Kesich, *High Court Upholds Barrier to Abuse Suits: It Will Remain Almost Impossible to Sue Churches in Maine over Alleged Abuse by Clergy Members*, PORTLAND PRESS HERALD, July 10, 2002, at A1; *Priest Not Liable for Seduction of Parishioner: C.A. Rules First District Panel Says Pastor Has No "Fiduciary Duty" to Refrain from Sex with Church Member*, METRO. NEWS CO. (Los Angeles), Feb. 18, 2003, at 1; Ralph Ranalli, *Some in Church Suits May Face Tax Bill*, BOSTON GLOBE, Sept. 21, 2003, at B1; *see also* Rev. Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 367–68 (2004) (discussing media coverage of sexual abuse of minors by Roman Catholic clergy).

2. *See, e.g.*, Sheryl S. Desrosiers, *Let Archdioceses Reorganize*, BROWARD DAILY BUS. REV., Mar. 3, 2003, at A6; Mark A. Sargent, *Legal Defense: When Sued, How Should the Church Behave?*, COMMONWEAL, June 14, 2002, at 13; *The Big Story with John Gibson:* Fox News Interview with Andrew Napolitano & John Allen, Jr. (Fox News television broadcast Apr. 23, 2002).

the scope of a religious institution's liability. For many decades, these institutions enjoyed blanket immunity from tort suits, called "charitable immunity."[3] Since religious institutions were immune from liability, courts were not called upon to shape the duty owed by religious institutions to protect other persons. Courts began to repeal charitable immunity in the mid-twentieth century, raising many unanticipated issues. The repeal of charitable immunity was not prompted by sex abuse or other modern cases involving complex questions of the duty owed by religious institutions to others. Instead, the focus was on rather simple, traditional tort cases, such as when a person was injured by a negligently driven church vehicle or after slipping in a cathedral.[4] Legislatures and some courts believed that churches and other charities could absorb these simple tort claims through liability insurance.[5] No thought was given to the duties of religious institutions in more complex social situations, such as whether a religious institution should ever have a duty to protect its own members or members of the public from a wrongful act of a member of its congregation.

A second question of a religious institution's duty to protect others crosses into an area of general tort law that has experienced ongoing tension for two centuries. In general, U.S. tort law begins with the premise that there is no duty to rescue or help others.[6] The exceptions to this rule are subtle, ever-changing, and filled with challenging public policy choices.

Finally, an even more complex issue is whether a religious institution's duty to protect others is limited by the First Amendment's Establishment and Free Exercise Clauses. In general, these First Amendment issues do not affect other tort defendants. But as this Article will show, many courts have been reluctant to act as supervisors in defining the duty of religious institutions toward their members and others, because the endeavor might require courts to become entangled

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3. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 636 n.1 (11th ed. 2005). In 1846, charitable immunity originated in England and, up until 1942, was followed in all but two or three U.S. jurisdictions. *Id.*

4. *See, e.g.*, President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 817–18 (D.C. Cir. 1942) (discussing charitable immunity only in the context of negligence and simple torts and noting charitable immunity cases include actions arising out of "driving an ambulance or a truck on the streets" or "running an elevator or pushing a cart in the corridors of the hospital").

5. *See, e.g.*, Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969); *Hughes*, 130 F.2d at 823–24.

6. *See* Jennifer L. Groninger, Comment, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will it Survive Unabated?*, 26 PEPP. L. REV. 353 (1999). *But see* SCHWARTZ ET AL., *supra* note 3, at 419 n.5 (describing how other countries provide for a duty to rescue when the person can act without fear of endangering himself or others).

in disputes over religious doctrines or to interfere in the internal ecclesiastical affairs of religious institutions.

Defining the duty of religious institutions to protect others is a subtle craft. Answers should be shaped with surgical precision, not crudely wrought by machetes. One must balance the interest of the religious institution and the people it serves against the interests of persons who might be harmed because of failures for which it should be deemed responsible.

This Article first discusses in Part II the rise and fall of the charitable immunity doctrine and the void it left in tort jurisprudence governing religious institutions. Next, to guide our analysis in considering tort duties faced by religious institutions, Part III discusses the general U.S. rule of no duty to rescue or protect and the exceptions to that rule. Next, setting aside constitutional issues, Part III analyzes whether these exceptions allow for claims against religious institutions. Part IV discusses the overlay of constitutional issues that arise when courts seek to impose tort duties on religious institutions, particularly those involving decisionmaking about standards of care. Finally, Part V identifies public policy issues that support drawing a line at the imposition of a duty of religious institutions to protect their members from each other.

II. THE CHARITABLE IMMUNITY DOCTRINE

A. *The Rise of the Charitable Immunity Doctrine*

Charitable organizations, both religious and secular, have historically held a unique status in society because of the services and benefits they bestow. To encourage altruistic behavior and preserve funds for charities to use in their missions, courts created the "charitable immunity" doctrine, which relieved charities of liability for tortious conduct.[7] This doctrine helped assure potential and current donors that their contributions would be used as they intended rather than for legal damages, and assuaged concerns that tort awards would bankrupt charitable institutions.[8] By 1938, at least forty states had adopted the

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7. *See* SCHWARTZ ET AL., *supra* note 3, at 636 n.1; RESTATEMENT (SECOND) OF TORTS § 895E (1965).

8. The concept of charitable immunity first arose in the English courts, primarily under the justification that using charitable funds to pay for tort damages would be against a donor's intentions. *See* Feoffees of Heriot's Hosp. v. Ross, 8 Eng. Rep. 1508, 1510 (1846) (stating in dictum that cases sought damages for wrongful exclusion from the benefits of the charity), *overruled by* Mersey Docks

doctrine.[9] At its inception, proponents of charitable immunity believed that the "purses of donors would be closed and the funds of charity depleted if these institutions were not granted immunity."[10]

B. The Demise of the Charitable Immunity Doctrine

Beginning in the 1940s and accelerating as liability insurance later became more available, courts began to dissolve charitable immunity.[11] First, they carved out exceptions to the broad immunity they had previously created.[12] Soon, the exceptions swallowed the rule and effectively abolished "charitable immunity."[13]

As early as 1942, the United States Court of Appeals for the District of Columbia Circuit ruled in a landmark opinion that a charitable hospital was not entitled to more immunity than any other business or entity, and rejected the charitable immunity doctrine.[14] In *President and Directors of Georgetown College v. Hughes*, a nurse was struck in the

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Trs. v. Gibbs, 11 Eng. Rep. 1500 (1866) (holding trustees liable for damages caused to a dock by employees' negligence); Duncan v. Findlater, 7 Eng. Rep. 934 (1839) (stating in dictum that trustees were not liable for the negligence of persons not shown to be their servants), *overruled by Mersey Docks Trs.*, 11 Eng. Rep. 1500; *see also* Holliday v. Parish of St. Leonard, 142 Eng. Rep. 769, 774 (1861) (holding that trustees were not liable for negligence of employees), *overruled by Mersey Docks Trs.*, 11 Eng. Rep. 1500. While English courts held for this reason that trust funds could not be subject to tort judgments, the courts did not go so far as to create a blanket charitable immunity rule. *See* Note, *The Quality of Mercy: "Charitable Torts" and their Continuing Immunity*, 100 HARV. L. REV. 1382, 1383 n.9 (1987). U.S. courts adopted the English justification for the charitable immunity doctrine and added other justifications for the doctrine. *See, e.g.*, Hearns v. Waterbury Hosp., 33 A. 595, 604 (Conn. 1895) (holding church not liable for torts committed by its employees under doctrine of respondeat superior since it does not profit from their services); Vermillion v. Woman's Coll. of Due W., 88 S.E. 649, 650 (S.C. 1916) (citing public policy consideration that requires charities to pay tort judgments would adversely impact their monies for charitable activities); *see also* RESTATEMENT (SECOND) OF TORTS § 895E, *supra* note 7, at cmt. c (enumerating justifications for the immunity); Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R.4th 517 § 2 (1983) (collecting cases).

9. Note, *supra* note 8, at 1383 n.9.

10. *Abernathy*, 446 S.W.2d at 603. Further, they believed "[t]o give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." *Ross*, 8 Eng. Rep. at 1510.

11. Note, *supra* note 8, at 1382.

12. *See* RESTATEMENT (SECOND) OF TORTS § 895E, *supra* note 7, at cmt. b. For example, courts carved out an exception to charitable immunity for everyone other than recipients of the benefits of the charity and limited immunity to instances where there would be a depletion of trust assets, allowing liability in instances where there was some other form of payment, such as liability insurance. *Id.*

13. *See id.* at cmt. d.

14. President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942). A few courts had rejected the doctrine of charitable immunity in earlier decisions. *See* Nicholson v. Good Samaritan Hosp., 199 So. 344 (Fla. 1940); Mulliner v. Evangelischer Diakonniessenverein, 175 N.W. 699 (Minn. 1920); Welch v. Frisbie Mem'l Hosp., 9 A.2d 761 (N.H. 1939); Sheehan v. N. Country Comm. Hosp., 7 N.E.2d 28 (N.Y. 1937).

back by a swinging door that was pushed open "suddenly and violently by a student nurse coming out from the ward."[15] She became permanently disabled as a result of her injuries.[16] Judge Rutledge reviewed the doctrine of charitable immunity at length, considering and then rejecting all the reasons previously advanced for it.[17] Judge Rutledge's opinion stated that:

> The rule of immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them.[18]

Judge Rutledge's rejection of the theories underlying charitable immunity was cited frequently for the next twenty-five years.[19] Subsequent cases abolishing charitable immunity similarly involved a plaintiff seeking recovery because of the affirmative actions of a worker at a charitable institution, not because of the institution's failure to act.[20] Judge Rutledge's language about "distributing losses" was also applicable; traditional liability insurance coverage was available and affordable.

This trend toward state court abrogation of complete charitable immunity accelerated after the American Law Institute's *Restatement of Torts (Second)* took the position in Section 895E that "[o]ne engaged in a charitable, educational, religious or benevolent enterprise or activity is not for that reason immune from tort liability."[21] The Institute's position was based on the public policy judgment that a person injured because of another's negligence should have the opportunity to obtain compensation from the person at fault.[22] The benefits of allowing recovery by a seriously injured person outweighed the need for protections that had been granted to charitable organizations.[23]

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15. *Hughes*, 130 F.2d at 811.

16. *Id.*

17. *Id.* at 822–27.

18. *Id.* at 827.

19. *See, e.g.*, Noel v. Menninger Found., 267 P.2d 934, 936 (Kan. 1954); Miss. Baptist Hosp. v. Holmes, 55 So. 2d 142, 143–44 (Miss. 1951); Flagiello v. Pa. Hosp., 208 A.2d 193, 194 (Pa. 1965).

20. For example, *Noel* is a truck accident case where a mentally ill patient sued his hospital after his nurse allowed him to cross a road and a truck struck him. 267 P.2d at 936. Similarly, *Flagiello* is a slip-and-fall case where a patient sustained injuries after a fall and sued the hospital for her injuries. 208 A.2d at 194.

21. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 895E.

22. *See Hughes*, 130 F.2d at 827.

23. A similar set of consequences unfolded in the collapse of family immunities, particularly between a parent and a child. While the collapse of parent-child immunity may have been due in part to the changing views of society, leading to the view that children are individuals with rights of their own,

This public policy trend coincided with the rising popularity and availability of liability insurance. The idea was that by buying liability insurance, charities could shift the risk of tort payments to insurance companies who assessed the risk and pooled funds to cover potential losses.[24] The belief that charitable organizations could, through insurance, absorb liability costs from automobile accidents, slips and falls, and ordinary torts based on negligence was an underpinning for the public policy decision to abrogate the charitable immunity doctrine.[25]

The *Restatement (Second)* explained that the justifications for the charitable immunity doctrine failed "when the charity can insure against liability."[26] Courts similarly assumed that insurance negated all of the concerns underlying the charitable immunity doctrine. For example, some courts opined that liability insurance would cover the cost of court judgments and prevent lawsuits from depleting charitable assets.[27] Others said that potential and existing donors would appreciate that liability insurance premiums were a legitimate operating expense for the charity and would not withhold contributions for fear of ordinary

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it also coincided with an increase in the availability of liability insurance and the resulting decrease in the financial strain a child's lawsuit placed on the family. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 503–08 (1982). The courts became willing to re-assess the scope of the immunity as the existence of liability insurance further undermined its rationale, which was to preserve family tranquility by protecting it from the financial loss of lawsuits. *See, e.g.*, Sorenson v. Sorenson, 339 N.E.2d 907, 913–14 (Mass. 1975). *See also* Hollister, *supra*, at 503. The availability of liability insurance led to the "interpretation, distinction and exception" of the immunity by judicial decisions and statutes and an eventual whittling away of the immunity. Falco v. Pados, 282 A.2d 351, 354 (Pa. 1971). *See also* Hollister, *supra*, at 509.

As insurance became more widely available, the parent-child immunity was abrogated in the context of automobile accidents. *See id.* at 510–11 n.141 (articulating a breakdown by jurisdiction). There was a belief that the drivers and passengers would be covered under automobile insurance policies, shielding the parent from having to pay the damages. There was also a recognition that it was socially unwise to deny a claim and leave a potential victim stranded. *Id.* at 511 n.142 (citing DEL. CODE ANN. tit. 21, §§ 2118, 2904 (1979) and MONT. CODE ANN. § 61-6-301 (1981)). No thought was given to suits about what duty a parent owes to a child, whether the parent had to provide for the child's education, or whether that should be a superior education. Courts wrestled with these difficult problems.

24. *See* Note, *supra* note 8, at 1395.

25. *See id.*; Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969) ("Today public liability insurance is available to charitable institutions to indemnify them against losses by way of damages for their negligence, and it is common knowledge that most charitable institutions carry such insurance and pay the premiums thereon as a part of their normal cost of operation."); *Hughes*, 130 F.2d at 823–24 ("Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums.").

26. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 895E cmt. e(5).

27. *See* Wendt v. Servite Fathers, 76 N.E.2d 342, 349 (Ill. App. Ct. 1947) (holding that where insurance exists and can cover tort liability so as not to diminish the trust fund, the charitable immunity defense is not available because otherwise upholding the absolute immunity rule "would seem a sheer waste of money for a charitable corporation to purchase insurance protection").

liability exposure.[28]

Some courts assumed that modern charities could afford insurance and that it was widely available.[29] Some jurisdictions were more guarded, limiting the abolition of the immunity to situations where liability insurance was clearly available.[30] Still other states passed legislation to limit the charity's liability to the extent that the insurance existed[31] or created a direct action against the charity's insurers who were not protected by the charitable immunity doctrine.[32] In any event, by the early 1980s, thirty-three jurisdictions had, either in whole or in part, abrogated the charitable immunity doctrine.[33]

C. *Implications for Today*

When the charitable immunity doctrine disappeared from the legal landscape, no thought was given to the duty of religious or secular charitable organizations beyond what was owed in common cases, such as negligence in automobile accidents and slips and falls.[34] Moreover, no thought was given to the constitutional issues potentially involved in the imposition of various tort duties on religious organizations, or if liability could be extended beyond these traditional tort actions.[35]

Clearly, courts had not considered the duty, if any, of a religious

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28. *See Abernathy*, 446 S.W.2d at 603; Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867, 871 (Ohio 1984).

29. *See Hughes*, 130 F.2d at 832–24; *Abernathy*, 446 S.W.2d at 603.

30. *See* Michard v. Myron Stratton Home, 355 P.2d 1078 (Colo. 1960) (holding that the charity was not granted immunity from suit nor non-liability, and that the trust funds themselves were protected and could not be taken, but non-trust funds, such as insurance coverage could be seized); Cox v. De Jarnette, 123 S.E.2d 16 (Ga. Ct. App. 1961); Howard v. Bishop Byrne Council Home, Inc., 238 A.2d 863 (Md. 1968) (noting that a hospital was not protected by the charitable immunity doctrine, and holding that if the hospital was insured for not less than $100,000, the liability was limited to the amount of the insurance policy); Rhoda v. Aroostook Gen. Hosp., 226 A.2d 530 (Me. 1967) (holding that a charity was fully immune beyond the extent of its insurance coverage); Eliason v. Funk, 196 A.2d 887 (Md. 1964); Myers v. Drozda, 141 N.W.2d 852 (Neb. 1966); Clontz v. St. Mark's Evangelical Lutheran Church, 578 S.E.2d 654 (N.C. Ct. App. 2003) (finding liability immunity defense waived to extent the charity has liability insurance).

31. *See, e.g.*, 14 MAINE REV. STAT. ANN. tit. 14 § 158 (2004) (creating partial immunity beyond what insurance covered by statute); N.C. GEN. STAT. § 1–539.10 (2004) (eliminating immunity to the extent a charitable organization has liability insurance).

32. *See, e.g.*, ARK. CODE ANN. § 66–3240 (1966) (providing an action against the insurer).

33. *See* Fairchild, *supra* note 8, § 2 (for history of charitable immunity decisions by jurisdiction). *See also* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 895E; Note, *supra* note 8, at 1385.

34. *See, e.g.*, *Hughes*, 130 F.2d at 817–18 (discussing charitable immunity only in the context of negligence and simple torts, noting charitable immunity cases include actions arising out of "driving an ambulance or a truck on the streets" or "running an elevator or pushing a cart in the corridors of the hospital").

35. *See, e.g.*, *id.* (abrogating charitable immunity without mentioning First Amendment issues).

institution to protect or rescue its members or others from acts of intentional wrongdoing such as child abuse.[36] The *Restatement (Second)* gave no guidance on the nature and extent of the duty of religious institutions to protect members or others from intentional wrongful acts of employees, parishioners, or other persons, nor did courts and legislatures when they repealed immunities.[37] Today, some religious organizations are concerned that courts could place new and unforeseen duties on them that could create a major financial crisis, one of the very concerns that led to the creation of charitable immunity in the first place.[38]

While charitable institutions are no longer protected by blanket immunity, sound public policy suggests that courts exercise care not to create duties that are inconsistent with the nature of religious institutions. Those institutions provide unique benefits to society, both in terms of tangible services and intangible but profoundly important aspects of religious life. Resolving this conflict between expanding tort duties and preserving the constitutional protections and financial viability of religious institutions requires careful consideration when shaping the duties and liabilities of religious institutions.

III. THE U.S. RULE OF NO DUTY TO RESCUE OR PROTECT

Given that charitable immunity is, for all practical purposes, gone, the question becomes as follows: When, if ever, does a religious institution have a duty to protect its members or the public from the intentional wrongful acts of its officials, employees, or members?

Generally, when U.S. courts take on the task of determining the existence and scope of a duty owed to others, they begin with a fundamental rule of U.S. tort law: there is no duty to rescue or protect.[39] A person is not responsible for any harm suffered by another and has no duty to step in and help when the person did not create the dangerous situation and did not take anything away from the person in danger.[40] In

36. *See, e.g.*, Noel v. Menninger Found., 267 P.2d 934, 936 (Kan. 1954) (abrogating immunity in truck accident case where hospital allowed mentally ill patient to cross the street); Flagiello v. Pa. Hosp., 208 A.2d 193, 194 (Pa. 1965) (abrogating immunity in slip-and-fall case).

37. *See generally* Fairchild, *supra* note 8, § 2 (discussing a history of charitable immunity decisions by jurisdiction).

38. Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089 (2003).

39. *See* SCHWARTZ ET AL., *supra* note 3, 412 n.2; RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314; Groninger, *supra* note 6, at 353. *But see* SCHWARTZ ET AL., *supra* note 3, 419 n.5 (describing that other countries provide for a duty to rescue when the person can act without fear of endangering himself or others).

40. Groninger, *supra* note 6, at 374. This rule derives from the common law's distinction

other words, the mere fact that one individual knows that a third party is or could be dangerous to others does not make that individual responsible for controlling the third party or protecting others from the danger. In adopting this rule, courts hold that it is not the place of the courts to decide this moral issue; it is better left to a person's own conscience.[41]

A. Exceptions to the No Duty to Rescue or Protect Rule

As with most rules, the "no duty to rescue or protect" rule has exceptions. There are four general instances in which a defendant, referred to as the "actor," has a duty to act.

The first two instances arise out of personal relationships. There is a duty to act when a special relationship exists between the actor and the perpetrator of the harm,[42] or when a special relationship exists between the actor and the injured party.[43] The next two instances arise out of the actor's conduct. There is a duty to rescue or protect when the risk was created by the actor's conduct, even if that conduct was not negligent.[44] The duty also exists where the actor voluntarily undertakes to rescue another, and through his lack of care puts the individual in a worse situation than before the rescue effort began.[45]

Cases against religious institutions arising out of sexual abuse often focus on whether a "special relationship" exists between the actor-institution and the perpetrator or the member of the religious institution. The other exceptions may be pleaded as well.

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between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 n.5 (Cal. 1976) (citing Fowler v. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934)).

41. *Tarasoff*, 551 P.2d at 374–75.

42. SCHWARTZ ET AL., *supra* note 3, at 420–25.

43. *Id.* at 420–22; Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 42 (2002).

44. SCHWARTZ ET AL., *supra* note 3, at 421–23; RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 322. *See also* Rustad & Koenig, *supra* note 43, at 42.

45. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, §§ 323–24. *See also* SCHWARTZ ET AL., *supra* note 3, at 423–24; President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 813 (D.C. Cir. 1942) ("One who undertakes to aid another must do so with due care. Whether the Good Samaritan rides an ass, a Cadillac, or picks up hitchhikers in a Model T, he must ride with forethought and caution."). This exception reflects that while there is no duty to aid a person in peril or difficultly, "there is at least a duty to avoid any affirmative acts which makes his [the injured person's] situation worse." Rustad & Koenig, *supra* note 43, at 41 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

1. The Special Relationship Exceptions

While the law generally imposes no duty to control the conduct of another or to prevent a person from doing harm to another, a duty to control may arise where:

> a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relation exists between the actor and the other which gives to the other a right to protection.[46]

Courts have recognized these relationships as special because the person who takes custody of another is in a superior position to control the perpetrator than the injured party and has a special responsibility to protect injured parties from foreseeable harm.[47] The duty to rescue is based on the party's superior control to perceive and protect the more susceptible party from danger.[48] In any "special relationship" under the *Restatement*, liability "exists only if the resulting harm is within the risk created by the defendant's negligent conduct in acting or in failing to control."[49]

a. Special Relationship with the Perpetrator

The *Restatement (Second)* imposes liability on a defendant for a plaintiff's injuries where the defendant "controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the control."[50] Under these circumstances, if a risk exists, an actor must take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring. But if the actor neither knows nor should know of a risk of harm, no action is required.[51]

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46. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, §§ 315 (a)–(b), 877. *See* SCHWARTZ ET AL., *supra* note 3, at 420–25; Groninger, *supra* note 6, at 353.

47. KEETON ET AL., *supra* note 45, § 33, at 202.

48. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320.

49. *Id.* § 877 cmt. b. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 41 (Tentative Draft No. 4, Apr. 1, 2004) ("An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship."); *id.* § 42 ("An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.").

50. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 877(d). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42. *But see* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 cmt. d (when sheriff or law enforcement officer takes a person into custody there may arise a duty to anticipate danger).

51. *See generally* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 877(d) cmt. c. *See also*

The types of relationships that fall under this rule include a prison guard over a prisoner,[52] a parent over a minor child,[53] and a therapist over a patient.[54]

i. Custodians and People in Custody

Custodians of people who pose risks to others have long owed a duty of reasonable care to prevent the person in their custody from harming others. The classic custodian is a jailer of a dangerous criminal; other well-established examples include hospitals for the mentally ill and for those with contagious diseases.[55] Custodial relationships imposing a duty of care are limited to the period of actual custody[56] and also are limited to relationships that exist, in significant part, to protect others from risks posed by the person in custody.[57] A custodial relationship that exists solely for rehabilitative purposes, such as an in-patient clinic treating an individual with a gambling addiction, does not have a special relationship with the patient that creates a duty of reasonable care to third parties.[58]

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. c. *But see* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 cmt. d (when sheriff or law enforcement officer takes a person into custody there may arise a duty to anticipate danger).

52. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 (stating that a prison guard has custody or a duty to control prisoners who the guard has reason to know will cause injury if they escaped); *id.* § 319 (describing duty of someone in charge of a person having dangerous propensities); *see, e.g.*, Morgan v. County of Yuba, 41 Cal. Rptr. 508 (Cal. Ct. App. 1964) (holding that the police had a duty to help a person avoid harm when a released prisoner threatened to kill him).

53. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 316 (describing duty of a parent to control the conduct of a child). *See also id.* § 877(d) cmt. e (where a child has shown dangerous propensities, the parents have a duty of care to prevent the child from harming someone). *See, e.g.*, Linder v. Bidner, 270 N.Y.S.2d 427 (N.Y. Sup. Ct. 1966) (holding that where parents knew of son's violent propensities, they had a duty to render aid when the boy assaulted another child).

54. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that a therapist had an obligation to prevent possible harm to the victim where his patient threatened to, and did, kill a specific third party). *But see* D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of* Tarasoff, 24 PAC. L.J. 1165, 1188 (1993) (a duty for therapists to rescue potential victims conflicts with doctor-patient confidentiality and could lead to a breach of confidentiality).

55. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt f. *See, e.g.*, Shepherd v. Wash. County, 962 S.W.2d 779 (Ark. 1998) (reaffirming the duty of jailers to third persons); Cansler v. State, 675 P.2d 57 (Kan. 1984) (same); Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975) (reaffirming the duty of hospitals that have custody of those with mental illnesses); Bradley Ctr., Inc. v. Wessner, 287 S.E.2d 716 (Ga. Ct. App.), *aff'd*, 296 S.E.2d 693 (Ga. 1982).

56. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. f.

57. *See id.*

58. *See id.*

ii. Parents and Children

Parents owe third parties a duty of reasonable care for the acts of their minor children when—and only when—they are minors. This duty arises out of the parents' control over their children, their responsibility for child rearing, and the incapacity of some children to understand or engage in appropriate conduct.[59]

The *Restatement (Second)* ratified a parents' duty to use reasonable care to control a child's conduct where the parent "knows or has reason to know that he has the ability to control his [servant] child, and knows or should know of the necessity and opportunity for exercising such control."[60] Absent such notice and knowledge, a parent has no duty to exercise reasonable care in preventing the child from harming a third party.[61] Where a duty exists, a number of factors go into deciding what constitutes reasonable care. For example, as children reach adolescence, "courts recognize that the process of gaining independence is an important consideration in determining what constitutes reasonable care."[62] Parents often will have no reasonable warning that their children are about to engage in physically harmful conduct. Even parents of children who have shown propensities toward dangerous conduct may have no reasonable or practical way to ameliorate the dangers.[63]

iii. Mental Health Professionals and Patients

The most far-reaching extension of a special relationship creating a

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59. *See id.* § 42 cmt. d. When children reach the age of majority, parents no longer have control over them and the duty no longer exists.

60. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 316(a)–(b). In a case where a minor child assaulted a babysitter, for example, the court allowed the babysitter to bring a negligence action against the parents for failure to warn of the child's violent tendencies and their failure to exercise reasonable measures to control or restrain him. Ellis v. D'Angelo, 253 P.2d 675, 679 (Cal. Ct. App. 1953). The court found evidence to demonstrate that it was necessary to control the child and that the parents had the knowledge, ability, and opportunity to do so. *Id.* The facts were sufficient to shift liability from the innocent babysitter to the negligent parents, who were in the best position to prevent the babysitter from being hurt. *Id.* *See also* Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 EMORY L.J. 877, 904 (2002) (explaining that the Restatement's approach united the duty and foreseeability requirements of a negligence claim with the control requirement in a vicarious liability action).

61. Mazzilli v. Selger, 99 A.2d 417, 422 (N.J. 1953) (holding that a jury could find that there was a duty to control a child by the child's mother, but not father, when the child threw a gun from his window and his mother had custody and control over him but the father lived in a different house).

62. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 42 cmt. d.

63. *See id.*

duty to third parties exists between mental health professionals and their patients. In the very controversial decision of *Tarasoff v. Regents of the University of California,* the Supreme Court of California recognized this "special relationship" and the corresponding duty to third parties whom the patient might harm.[64] In this case, the court found a psychotherapist liable for failure to warn a specific and readily identifiable victim of a patient's intentions to kill her. The court held the therapist had an obligation to use reasonable care to protect the intended victim when the therapist determined, or according to professional standards should have determined, that his patient posed a serious threat of harm to another specific person.[65] The court explained that two aspects of the therapist-patient relationship supported its establishment of this "special relationship:" the therapist's ability to predict dangerous behavior, and the therapist's ability to exercise some degree of control over dangerous behavior.[66]

This duty was later refined and limited. In a subsequent case, *Brady v. Hopper*, the court refused to extend liability between a therapist and the "world at large" for the actions of a patient.[67] The therapist only had a duty to act if there was a specific foreseeability that the harm would occur, and if the risk that existed included the harm that, in fact, did occur.[68] The court held that a therapist's duty to protect a third person does not arise until the risk of harm to the victim becomes foreseeable—when the threats are verbalized and directed at an identifiable person.[69] For example, in *Thompson v. County of Alameda*, the Supreme Court of California refused to extend the *Tarasoff* duty because the court found that the patient had made only general threats to kill, not specific threats targeted towards a specific, identifiable victim.[70] As the court in *Brady* stated, "the possibility that [a patient] may inflict injury on another is vague, speculative, and a matter of conjecture."[71] Other courts have refused to hold a therapist liable for injuries to a third person without the foreseeability created by specific threats to a "readily identifiable victim."[72]

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64. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

65. *Id.* at 340.

66. *Id.* at 343, 345.

67. Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983) (citing Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928)).

68. *Id.*

69. *Id.*

70. Thompson v. County of Alameda, 614 P.2d 728, 735 (Cal. 1980).

71. *Brady*, 570 F. Supp. at 1338.

72. *See id.* (citing *Thompson*, 614 P.2d 728; Doyle v. United States, 530 F. Supp. 1278 (C.D. Cal. 1982); Furr v. Spring Grove State Hosp., 454 A.2d 414 (Md. Ct. Spec. App. 1983); Megeff v.

b. Special Relationship with the Injured Party

Courts have ruled that the existence of a special relationship between a defendant and the injured person can impose a duty of reasonable care on the defendant. Relationships in this category include the relationship between an innkeeper and a guest,[73] a common carrier and a passenger,[74] a jailor and a prisoner,[75] a teacher and student,[76] a shopkeeper and business visitor,[77] and an employer and an employee acting in the course of employment.[78]

The scope of the duty arising out of these special relationships is limited to dangers that arise within the confines of the relationship, regardless of the source of the risk.[79] The relationships are also limited by geography and time.[80] For example, a common carrier only has a duty to a person as long as she is a passenger.[81] An innkeeper only has a duty to a guest while he is at the inn, not when the guest is away from

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Doland, 176 Cal. Rptr. 467 (Cal. Ct. App. 1981)).

73. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(2). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(2). *See, e.g.*, Dove v. Lowden, 47 F. Supp. 546 (W.D. Mo. 1942) (holding that innkeeper had duty to help a guest escape a hotel fire).

74. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(1). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(1). *See, e.g.*, Yu v. N.Y., New Haven & Hartford R.R. Co., 144 A.2d 56 (Conn. 1958) (finding that where a passenger who walked with a noticeable limp fell and was injured while boarding a train, the railroad company had a duty to aid); Middleton v. Whitridge, 108 N.E. 192 (N.Y. 1915) (holding street car employees liable for failing to aid sick passenger who employees assumed was intoxicated, not injured).

75. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(2). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(4). *See, e.g.*, Thomas v. Williams, 124 S.E.2d 409 (Ga. Ct. App. 1962) (holding that when a prisoner's mattress caught on fire in his cell, the jailor had a duty to rescue the prisoner).

76. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 320 cmt. b (passage imposing affirmative duty on custodians to control third persons observes that custodial relationship and accompanying duty is applicable to school and their students). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(5) & cmt. l.

77. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A(3). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(3). *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334 (Ind. 1942) (holding that when a six-year-old business visitor fell down the escalator and caught his fingers in the escalator's moving parts, the shopkeeper defendant had a duty to rescue the customer).

78. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314B. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41(4).

79. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 314A cmts. c, d. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmts. f, g.

80. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. f.

81. *Id.* § 41 cmt. e.

the premises.[82]

Other relationships may also qualify as special relationships that create an affirmative duty of care.[83] In determining what gives rise to a "special relationship," courts balance the value of allowing a tort claim to proceed against judicial interference in a person's family relations, private life, and other fundamental areas of personal privacy.[84] The decision of when to impose a duty, and upon whom, is influenced by the public policy goals of tort law—deterrence and the need for compensation—as well as by the need to protect essential relationships and rights.[85] When a special relationship between the parties justifies a court's interference and outweighs interests of personal privacy, a duty exists.[86]

While there is "[n]o algorithm . . . to provide clear guidance about which policies in which proportions justify the imposition of an affirmative duty based on a relationship,"[87] common threads emerge from the cases. Special relationships traditionally were based on economic relationships; for-profit entities had a higher duty to act than a disinterested party.[88] Many relationships relied on the actor's physical

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82. *Id.*

83. *See id.* § 41 cmt. o. Courts have considered some relationships that may create special duties of care, including: 1) social companions, *compare* Farwell v. Keaton, 240 N.W.2d 217, 222 (Mich. 1976) (holding that imposing no legal duty to assist companions in a social adventure "would be shocking to humanitarian considerations and fly in the face of the commonly accepted code of social conduct"), *with* Webstad v. Stortini, 924 P.2d 940, 948 (Wash. Ct. App. 1996) (holding that no "special relationship" duty of care arose where a defendant employed, dated, housed, and served alcohol to a woman who, while at his house, committed suicide); 2) police officers with intoxicated persons, *compare* Weldy v. Town of Kingston, 514 A.2d 1257, 1260–61 (N.H. 1986) (holding that officers' failure to arrest teenagers whom the officers observed drinking and transporting alcohol in their car breached duty of care), *with* Hildenbrand v. Cox, 369 N.W.2d 411, 414–15 (Iowa 1985) (holding that officer did not have "special relationship" to intoxicated driver who was killed in an accident where, earlier in the night, the officer pulled over the driver and gave him a citation); 3) surrogacy clinics, *see* Huddleston v. Infertility Ctr. of Am., 700 A.2d 453, 460 (Pa. 1997) (holding that surrogacy clinic has "special relationship" with prospective-parent patrons and with child born as a result of clinic's services); and 4) family members, *see* Chastain v. Fuqua Indus., Inc., 275 S.E.2d 679, 681–82 (Ga. Ct. App. 1980) (holding that aunt does not owe an affirmative duty to her nephew); *cf.* WILLIAM L. PROSSER, THE LAW OF TORTS § 54, at 338 (3d ed. 1964) (predicting for four decades that courts would recognize family members as a special relationship).

84. KEETON ET AL., *supra* note 45, § 3, at 16.

85. *See* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 187 (1981).

86. KEETON ET AL., *supra* note 45, § 36, at 376.

87. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. h.

88. KEETON ET AL., *supra* note 45, § 36, at 376; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. h ("That a defendant derives a commercial advantage from the relationship has . . . been influential in the identification of special relationships. Although not involving an affirmative duty, commercial benefit has been critical to

custody of the other person, such as common carrier and passenger, and innkeeper and guest.[89] In these relationships, a person's ability to protect himself or herself is compromised, while the defendant is in a much better position to protect that person.[90] In some cases, a relationship identifies a specific person or group of persons, both making it easier for the actor to control the other and providing "a more limited and justified incursion on autonomy."[91] Some courts have even relied on the expectations of the parties to the relationship to determine whether the relationship is special. The difficulty with this reliance is that "[a]lmost everyone in virtually any kind of relationship expects that another would engage in an easy rescue in the event of serious peril."[92]

In its *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*, the American Law Institute declined to take a position on whether additional relationships should be accepted as sufficient to impose an affirmative duty on actors, since there was no "significant concurrence" among courts as to what those relationships should be.[93] In sum, the group of recognized special relationships is limited, with the majority of these relationships characterized by business dealings or physical custody or control.[94]

2. The Exceptions Involving the Actor's Conduct

The *Restatement (Second) of Torts* advocates for liability against a party for harm resulting to a third person from the tortious conduct of another when the party:

> (b) conducts an activity with the aid of the other and is negligent in employing him, or
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> . . . .
>
> (d) controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the

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distinction between imposing a duty on dram shops with regard to their patrons and declining to impose a duty on social hosts."). *Cf.* Reynolds v. Hicks, 951 P.2d 761, 764 (Wash. 1998).

89. *See* Catlett v. Stewart, 804 S.W.2d 699 (Ark. 1991) (affirming duty of innkeeper to exercise reasonable care for safety of guests); Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881 (Mo. 1983) (same).

90. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 41 cmt. h. *See, e.g.*, Lopez v. S. Cal. Rapid Transit Dist., 710 P.2d 907, 912 (Cal. 1985) (noting that "bus passengers are 'sealed in a moving steel cocoon'").

91. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), *supra* note 49, § 40 cmt. h.

92. *Id.*

93. *See id.* § 41 cmt. o.

94. *See supra* notes 46–94 and accompanying text.