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TOWARD A MODEL PARENTAL LIABILITY ACT

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INTRODUCTION

Public dissatisfaction with the failure of the juvenile justice system to protect the public from harm to person and property has prompted legal scholars, judges, police, lawyers, and correctional officers to reexamine the system's goals and policies.¹ This reexamination should have resulted in an increased awareness of and focus on the emotional and financial harm suffered by victims of juvenile crime. Unfortunately, the contrary is true. Discussion and debate concerning the "physical, emotional and financial stresses”² unique to victims of juvenile crime are virtually nonexistent.³ This is particularly puzzling since statistics, which "barely
hint at the human misery caused by serious juvenile crime” reveal that the nation’s crime problem is a juvenile problem.4

In contrast to the juvenile justice system, the criminal justice system has recognized that victims of crime are frequently victimized not only by the perpetrator of the violent act, but also by a criminal justice system unresponsive to the needs of victims.5 Although the criminal justice system’s interest in victims as “consumers of justice”6 is recent, and perhaps temporary, there has been, nevertheless, a concentrated effort by the system to relieve the victim from his financial and emotional burden. Professionals within the criminal justice system have generally advocated a two-fold approach to this problem: first, to protect the victim against future harm by improving the efficacy of the system and, second,
to make the victim as financially whole as possible.7 Since "victims of criminal acts suffer the same injury regardless of the age of the perpetrators,"8 these recommendations address issues of public policy and legislation common to victims of juvenile crime as well.

The first recommendation, to improve the efficacy of the system, has a long political and social history in the United States.9 Although admirable in intent, it represents wishful thinking and no more. Despite the best creative efforts of juvenile justice professionals and millions of tax dollars spent by federal and state governments,10 the rate of juvenile crime continues to rise.11 There is, therefore, no reason to expect that future innovations and expenditures will lessen the number of crimes committed by juveniles in this country.

The second recommendation encourages legislation aimed at making victims financially whole. Funded from the public coffers, these "crime victims compensation statutes" theoretically provide a "balm for the suffering of innocent victims of crime."12 Numerous states have enacted these statutes and Congress has proposed similar legislation.13 Yet, augmenting the role of the criminal or juvenile justice system to include additional responsibility for victims is doomed by a myriad of problems "ranging from funding and financial considerations to eligibility requirements."14 Furthermore, similar to many government programs:

[V]ictim compensation is designed with the best of intentions, and appears to cost relatively little to achieve a desirable goal.

7. See TASK FORCE ON VIOLENT CRIME, supra note 2, at 87.
9. See generally supra notes 1 and 5.
10. Total expenditures by the states in 1977 was estimated at $707,732,000 for public juvenile custody facilities and $384,327,000 for private juvenile custody facilities. See U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STANDARDS 129 (1980); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CHILDREN IN CUSTODY: ADVANCE REPORT ON THE JUVENILE DETENTION AND CORRECTIONAL FACILITY CENSUS OF 1974 5-6 (1977). In 1975, federal expenditures on delinquency and related problems were estimated at between $92 million and $20 billion. See LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, FIRST COMPREHENSIVE PLAN FOR FEDERAL JUVENILE DELINQUENCY PROGRAMS 3 (1976).
11. See supra note 4.
14. TASK FORCE ON VIOLENT CRIME, supra note 2, at 91.
In reality, victim compensation threatens to emerge as another tentacle of leviathan, encompassing far more territory and dollars than ever envisioned. Numerous similar stories have unfolded in recent years, and victim compensation would seem likely to offer an additional instance of bureaucratic growth.\textsuperscript{15}

Thus, the inevitable result is the creation of a new bureaucracy which will further overburden the already disgruntled taxpayer while failing to reduce crime or provide, in many cases, financial restitution.

In contemporary America, victims of juvenile crime and delinquency are in a position identical to that of victims of adult crime. The purpose of both the criminal justice and juvenile justice systems is the deterrence, rehabilitation, and punishment of criminals.\textsuperscript{16} Redress for the victim is not a feature in either system. The victim who wants to recover his losses and simultaneously exact a measure of vindication has but one solution: he must hire a lawyer and sue in a civil court.\textsuperscript{17}

There are, of course, limitations on the use of a civil remedy by victims. In many cases the adult criminal or tortfeasor will be judgment-proof, thus, the victim will not bother to litigate. Since it is especially true that even fewer juveniles are capable of satisfying a judgment against them, the barrier to recovery is more insurmountable for the victim of a juvenile crime. In effect, the victim of juvenile crime has no remedy.

Since the 1950’s, state legislatures have attempted to overcome this obstacle to recovery by providing victims of juvenile crimes with a statutory means of financial redress. These civil statutes, generally entitled “parental responsibility acts” or “parental liability acts”\textsuperscript{18} were enacted to serve two goals: (1) to compensate victims of juvenile crimes by imposing vicarious liability on parents of children who intentionally or maliciously harm the person or property of another, and (2) to deter juvenile crime and delinquency by encouraging increased parental supervision.\textsuperscript{19}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Meiners, \textit{Public Compensation of the Victim}, supra note 12, at 329.
\item \textsuperscript{16} See McDonald, \textit{The Role of the Victim in America}, in \textit{Assessing the Criminal: Restitution, Retribution and the Legal Process}, 296 (1977).
\item \textsuperscript{17} \textit{Id.} at 295-96. The author incisively and critically traces the treatment of victims by the American criminal justice system from “central to peripheral actor in the system, from a prime beneficiary to an also-ran.” \textit{Id.} at 306.
\item \textsuperscript{19} See Note, \textit{The Iowa Act}, supra note 18, at 1037. In a philosophical examination of the dispute between deontological and utilitarian moral theories, Professor George P. Fletcher poses the purpose of tort law in these terms: “[D]o we require tortfeasors to compensate their victims because the victims deserve a monetary surro-
\end{itemize}
\end{footnotesize}
For thirty years, this legislative device has had the potential to serve the financial as well as emotional needs of many victims of juvenile delinquency. The use of vague and ambiguous terminology in the acts, however, has vitiated their effectiveness.\(^{20}\) The Model Parental Liability Act, proposed in Part IV of this Article and discussed in the Commentary section of Part V, seeks to eliminate many of the impediments to recovery, thereby encouraging victims to seek the financial compensation and emotional vindication promised them in the statutes.

In order to understand the design and purpose of the Model Act, the historical development and judicial interpretation of the state acts must be examined. Part I, therefore, reviews the severity of the common law restrictions on financial recovery against a parent of a juvenile tortfeasor. Part II compares the common law with the civil law of Louisiana and Hawaii, both of which have long held parents liable for the torts of their children. Finally, Part III analyzes the cases which have determined the constitutionality of state parental liability acts.

I. THE COMMON LAW

At common law, parents are not liable for damage caused by their children unless the damage can be attributed to some action or inaction of the parents.\(^{21}\) As a general rule, the parent is liable only if: (1) he directed the act, (2) he ratified the child's act by acceptance, (3) the child was acting as his agent or servant, (4) the child was entrusted with a dangerous instrumentality \textit{per se}, such as a gun, or (5) the child was negligently entrusted with an automobile.\(^{22}\) The social policy underlying the severe limitations on recovery against parents for the intentional torts of their children is based on the belief that parents should not be burdened with liability due to a child's incorrigibility or "nasty disposition."\(^{23}\)

This common law rule developed during the time of the leading cases of \textit{Brown v. Kendall}\(^{24}\) and \textit{Stanley v. Powell}.\(^{25}\) Both held there could be "no liability without fault."\(^{26}\) Thus, "causation lia-

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\(^{20}\) See Note, \textit{The Iowa Act}, supra note 18, at 1038.

\(^{21}\) Id. at 1038-39.


\(^{23}\) W. PROSSER, \textit{supra} note 22, at 873.

\(^{24}\) 60 Mass. (6 Cush.) 292 (1850).

\(^{25}\) 1 Q.B. 86 (1891).

\(^{26}\) \textit{Note, Torts: Parent and Child: Liability of Parent for the Torts of Minor
bility” was superceded by “culpa liability,” and the standard required by the common law is now one of reasonable conduct. Proceeding on the theory of liability flowing from culpability, the primary attention of the modern law “was diverted from the fact and the extent of the sufferer’s damage and became fixed upon the wrongfulness of the actor’s conduct.”

In practice, therefore, and to the detriment of the victim, a parent is liable only if the parent had notice of a specific type of harmful conduct on the part of the child and an opportunity to interfere or warn others of the danger. A thorough review of the case law yields few instances where an innocent victim was able to overcome this two-pronged standard and recover compensation. It is beneficial to compare the severity of the common law with the civil law approach which recognizes and better serves the needs of the victim.

II. THE CIVIL LAW

The civil law rule of parental liability presents a significant contrast to that of the common law. The civil codes of France, Quebec, Louisiana, and Hawaii have provided for parental liability whereas common law jurisdictions have not.

Initially, it would be prudent to briefly examine the historical roots which may account for the development of these differences. One authority suggests that:

[H]ere in its unmodified form, we find an interesting and important difference between the common law and the civil law. The accent of the former upon the notion of individual responsibility might be said to illustrate the general emphasis of the English common law upon the individual as seen through Ren-

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Child, 19 CORNELL L.Q. 643, 646 (1933-34) [hereinafter cited as Note, Torts: Parent and Child].
27. Id.
28. Id. The notions of “culpability” and “intent” derive from what Justice Holmes described as “blameworthiness,” that is liability arising out of conduct which would be blameworthy in “the average man, the man of ordinary intelligence and reasonable prudence.” O. HOLMES, THE COMMON LAW 4 (1923). See e.g., Goldman, Restitution for Damages to Public School Property, 11 J. LAW & EDUC. 147, 149 (1982).
29. See W. PROSSER, supra note 22, at 873.
30. There are many tragic examples of the severity and unfairness the common law rule has on victims of juvenile crime and delinquency. Two recent, and especially egregious examples, occurred in Parsons v. Smithey, 504 P.2d 1272 (Ariz. 1973) (victim suffered lacerated ear, multi-contusions and fractures when attacked by 14 year-old with a lengthy history of violent conduct) and Moore v. Crumpton, 295 S.E.2d 436 (N.C. 1982) (victim raped at knifepoint by 17 year-old who had long history of mental illness and drug problems). In both cases, the children were released from detention facilities and returned home. The courts held that the parents could not have “anticipated” the conduct of their child.
aissance and English Reformation thought. The civil law's preoccupation with the notion of family solidarity, received from the Roman law, is a theme which runs throughout the codes. Fundamentally, and of immediate importance here, the distinction may be summed up as the difference between the common law doctrine of "no liability without fault" and the civil law concept that "where one of two innocent persons must suffer a loss it shall fall on him who acted."

Hawaii and Louisiana both enacted parental responsibility acts long before the adoption of these laws by the common law states. Hawaii adopted the civil code rule in 1884, yet the Hawaii Supreme Court has never directly interpreted the statute. Prior to 1916, the statute was examined in three cases. First, the federal district court held that the statute did not impose liability when the child, because of young age, was not responsible for his acts. A second court held that the father is liable in every case where the infant would be liable at common law. Finally, the court held that the statute could not impose liability for breach of contract.

Louisiana, unlike Hawaii, has an extensive history of litigation in this field. Article 2318 of the Louisiana Civil Code, enacted in 1804 and modeled after the French statute, required parental negligence for liability. The parent was thus able to raise, as an affirmative defense, his inability to prevent the child from causing

33. See Hawaii Rev. Stat. § 577-3 (1976). The Hawaii statute is unique because it permits victims to recover for all torts "regardless of whether based upon negligence or intentional acts." Letter from Steven J. Trecker, Esq., to lead authors (November 3, 1982) (Trecker was plaintiff's counsel in Bryan v. Kitamura, discussed infra notes 138-55 and accompanying text) [hereinafter cited as Letter from Steven J. Trecker].
34. Since Hawaii did not formally become a state until 1958, the three cases discussed infra notes 35-37 and accompanying text were decided by the United States District Court for the District of Hawaii.
the damage. In that same year, and for reasons that remain an historical mystery, the Louisiana code was amended to repeal that provision.\textsuperscript{39}

Early Louisiana cases held the parent to be liable whether the parent "could or could not have prevented the damage and regardless of whether the child himself could be held liable to the injured party."\textsuperscript{40} However, in 1934 the Louisiana Supreme Court revised its interpretation of the statute and found that a parent could not be held liable if the child was legally incapable of fault.\textsuperscript{41} Thus, only if the child was at fault and could be held liable to the injured party did liability automatically attach to the parent.\textsuperscript{42} Absent fault and liability of the child, the parent must be personally negligent to incur liability.

In a line of cases ending in 1975,\textsuperscript{43} the Louisiana Supreme Court overturned their earlier decision and its progeny and reinstated the rule that a parent is liable regardless of his ability to prevent the acts of the child. Moreover, the child's lack of capacity to be at fault no longer constituted a defense against liability.\textsuperscript{44} Therefore, under Article 2318 the only available defenses are a "showing of fault by a victim, fault by a third person, or a fortuitous event."\textsuperscript{45} The rule finally expressed by the Louisiana Supreme Court is consonant with the intent of the Louisiana statute and the policy underlying the civil law that the victim should not bear the loss between two "innocent" parties.

Fifty years ago, the Louisiana cases and the civil law in general were criticized for presuming that "liability is a natural corollary of the relation of parent and child and that its imposition might have a socially healthful result."\textsuperscript{46} It was further argued that:

\begin{quote}
\textbf{Note, Torts: Parent and Child, supra note 26, at 644-45.}
\end{quote}

\begin{quote}
\textbf{Comment, Civil Responsibility of Parents, supra note 3, at 532 (footnote omitted).}
\end{quote}

\begin{quote}
\textbf{Johnson v. Butterworth, 180 La. 586, 157 So. 121 (1934).}
\end{quote}

\begin{quote}
\textbf{Id.}
\end{quote}

\begin{quote}
\textbf{Turner v. Bucher, 308 So. 2d 270 (La. 1975). (Six year old boy struck pedestrian with his bicycle injuring her. Father strictly liable whether or not he could have prevented the act.)}
\end{quote}

\begin{quote}
\textbf{Id. at 277.}
\end{quote}

\begin{quote}
\textbf{Ryle v. Potter, 413 So. 2d 649, 651 (La. Ct. App. 1982). (Ten year old boy shot another boy with air rifle and strict liability imposed on boy's parents.)}
\end{quote}

\begin{quote}
\textbf{Note, Torts: Parent and Child, supra note 26, at 647. In contrast, one commentator, in an article favoring parental liability under the so-called "automobile doctrine," argued that:}
\end{quote}

\begin{quote}
\textbf{[W]e are perfectly aware that this is a period in which parents do very little forbidding. We are aware also that the pernicious philosophy of education now dominant, which apothesizes self-expression, is interpreted to permit the child to make an unrestrained fool of himself in as many ways as his immature impulses may dictate. But that philosophy does not excuse parents for letting the child make a nuisance of himself to others. . . . [w]e offer the suggestion that inasmuch as parents, in our legal system, have hith-}
1984] TOWARD A MODEL PARENTAL LIABILITY ACT 195

[It has been the general experience that a standard of reasonable conduct can adequately deal with the ordinary situation of our economic and social life. As applied today the common law rule would seem satisfactorily to protect the third person from loss resulting from the acts of irresponsible minors.47 Today, in hindsight, these thoughts appear both optimistic and incorrect. The rate of mayhem and destruction has not been checked under the common law nor have the victims been "adequately" redressed.

Moreover, the purpose of the civil law and parental responsibility acts is not confined to modification of the juvenile's behavior, although this is a legitimate legislative purpose. In fact, an honest appraisal would lead to the conclusion that these statutes will have an insignificant effect on delinquent behavior. Rather, the most important social and legal goal of these laws is to compensate the victim of juvenile offenses. In this respect, the civil law and parental liability acts serve the needs of the public and the victim.

III. CONSTITUTIONALITY

Since 1961, few reported cases have examined the constitutionality of state parental liability acts. The paucity of decisions by higher state courts may reflect the fact that trial courts have had little trouble disposing of constitutional challenges to the acts. It may also indicate that many victims of juvenile crime and their attorneys are simply unaware of the existence of these statutes. Regardless of the reason for the scarcity of reported decisions, judicial analysis of the constitutional issues in those decisions available, with few exceptions, have rarely been sophisticated or clear.

Generally, the constitutionality of these statutes are challenged under the fourteenth amendment: first, that the statutes deprive parents of property without due process of law by imposing liability without fault,48 and, second, that the statutes deny equal pro-

47. Note, Torts: Parent and Child, supra note 26, at 647. The author also argued that the civil law rule "seems quite as likely to foster birth control." Id. Subsequent study of the population growth in the civil law states may verify this conclusion.

48. Dean Prosser defined vicarious liability, as follows:

\[ A \] is negligent, \[ B \] is not. "Imputed negligence" means that, by reason of some relation existing between \[ A \] and \[ B \], the negligence of \[ A \] is to be charged against \[ B \], although \[ B \] has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.
tection under the law. Excepting one Georgia case, all reported decisions have upheld the constitutionality of these acts. The courts have concluded that the legislative purpose of the parental responsibility acts reflects either one or both of the two goals: the compensation of the victim, or the deterrence of juvenile crime. These purposes are a legitimate exercise of the state police power.

Prior to 1970, the constitutionality of parental liability acts was challenged only three times. A Texas appeals court, in 1961, upheld the constitutionality of the Texas statute. The court, however, did not engage in a clear, well-reasoned analysis of the constitutional issues. The court found the statute "reasonable" and seemed to equate reasonableness with constitutionality. The court also appeared favorably impressed with the fact that other states had similar statutes, and that law review commentators viewed these statutes as serving a positive purpose. In addition, the court focused on the compensatory aspects of the statute rather than its possible deterrent effects on juvenile delinquency, and concluded that parents, not the innocent victims, should bear the loss.

Two years later, the North Carolina Supreme Court reviewed a challenge to the constitutionality of the North Carolina act. In contrast to the Texas court, the North Carolina Supreme Court emphasized the punitive nature of the statute which limited parental liability to five hundred dollars. Because this amount would be inadequate to compensate many victims, the court reasoned that the statute "fails to serve any of the general compensatory objectives of tort law."

W. Prosser, supra note 22, at 458.


51. Kelly v. Williams, 346 S.W.2d 434, 437 (Tex. Civ. App. 1961). (Fifteen year old boy stole car and drove it at 110 miles per hour during a police chase, damaging the car). The Texas Court of Civil Appeals recently refused to reverse Kelly and held that the Texas statute does not deny "equal protection under the law or due process of law." Buie v. Longspaugh, 598 S.W.2d 673, 676 (Tex. Civ. App. 1980). (Two minor girls vandalized three houses, court held $5,000 limit of recovery would be applied to each act.)

52. Kelly, 346 S.W.2d at 437.

53. Id. at 438.


55. In 1981, the statutory limit to recovery was raised to $1,000. See Appendix, infra.

Nevertheless, the North Carolina court held that the statute did not violate provisions of the state constitution nor the fifth amendment of the United States Constitution. According to the court, the state can legitimately enact punitive statutes aimed at curtailting juvenile crime as an exercise of its police power. The court also noted that the child’s parents were given the opportunity for a full hearing and adjudication. The decision was unclear regarding the applicability of the fifth amendment, or whether the statute complied with procedural safeguards required by the fourteenth amendment. Moreover, the court did not address the question of whether a statute with a high or unlimited amount of recovery would also be punitive and, hence, withstand a due process challenge.

The Wyoming Supreme Court relied on these two cases to uphold the constitutionality of the Wyoming statute. The court summarily stated that “courts will not declare a statute unconstitutional unless the unconstitutionality is clear.” In this case, defendants also raised an equal protection argument. They challenged the statute’s imposition of liability upon the “natural parents” only, claiming that the differential treatment between natural parents and other custodians violated the equal protection clause of the fourteenth amendment. The court rejected this argument on the ground that restricting liability to a natural parent was reasonable and that all those within the class were treated equally.

In 1971, the parental responsibility act of Georgia was held unconstitutional in Corley v. Lewliss. In Corley, the minor child, Bruce Brady, age 12, was involved in a fight which resulted in head injuries to the minor plaintiff, Clark Lewliss. Bruce Brady threw a brick or stone which struck the plaintiff in the forehead. The plaintiff brought suit against the minor’s mother and uncle, with whom the defendant lived.

The Georgia Supreme Court held the statute violated the due

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57. Id.
58. Id.
59. See Note, The Iowa Act, supra note 18, at 1042.
60. Id.
62. Mahaney, 426 P.2d at 444.
63. Id.
64. Id.
process clause of the fourteenth amendment. The Georgia court distinguished cases upholding parental liability statutes on the ground that the Georgia statute permitted unlimited recovery, while the other state statutes imposed limitations on the amount recoverable. The court reasoned that the limitations on recovery imposed in the Texas, North Carolina, and Wyoming acts indicated that the acts were penal in purpose rather than compensatory. It should be noted, however, that the Texas court had focused solely on the compensatory, not the deterrent effect of the Texas statute.

The Georgia court concluded that since the statute permitted unlimited recovery, the act was not penal, but compensatory. The court declared that the imposition of vicarious liability, based solely on the parent-child relationship, "would deprive the defendant of property without due process of law, would authorize recovery without liability, and would compel payment without fault." As such, the statute violated the due process clauses of the state and federal Constitutions.

The Georgia court held that the statute violated due process under the state constitution as well as the fourteenth amendment of the federal Constitution. The court's interpretation of due process, however, was in direct conflict with the United States Supreme Court's treatment of substantive due process since 1934. The Supreme Court continues to apply substantive due process analysis, but only where the government seeks to affect civil liberties, or where the Court determines that a right is "fundamental." Rights which the Court has recognized as fundamental include:

most of the guarantees of the Bill of Rights, the right to fairness in the criminal process, the right to privacy, including some freedoms of choice in matters of marriage, sexual relations and child bearing, the right to travel, the right to vote, the freedom

67. Id. at 751, 182 S.E.2d at 770.
68. The current version of the Georgia statute limits parental liability to $5,000.00. GA. CODE ANN. § 50-2-3 (Supp. 1983).
69. Corley, 227 Ga. at 749, 182 S.E.2d at 769.
70. See supra notes 51-53 and accompanying text.
71. Corley, 227 Ga. at 750, 182 S.E.2d at 770.
of association and some aspects of fairness in the adjudication of individual claims against the government procedural due process rights.\textsuperscript{75} The Georgia court did not point to any fundamental right violated by the statute. It merely concluded that the liability attributed to the act of the child deprives a parent of property without fault, and thus violates due process.\textsuperscript{76}

If the court considered property to be a fundamental right, it failed to state a rationale supporting this conclusion. Moreover, the ownership of property \textit{per se} is not a fundamental right. It is, instead a procedural due process matter.\textsuperscript{77} Since the statute did not deny the defendants any of the elements of a full adjudication, the integrity of procedural due process was maintained.

In the absence of a fundamental right, due process requires only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall bear a rational relationship to the legislative objective sought.\textsuperscript{78} The Georgia court did not examine the statute to determine if the application of vicarious liability to compensate a victim was an irrational exercise of the state's police power. Furthermore, the court did not consider the point at which the statutorily imposed limitation on recovery crosses the arbitrary line separating penal from compensatory acts. How much recovery then, is too much recovery?

In no other state have the courts declared their respective parental liability acts unconstitutional. In \textit{Hayward v. Ramick},\textsuperscript{79} the Georgia Supreme Court noted, eleven years after finding the parental liability act unconstitutional, that "\textit{Corley stands alone among a number of opinions dealing with the constitutionality of parental responsibility statutes . . . .}"\textsuperscript{80} The court then distinguished its earlier decision and upheld a revised Georgia statute,\textsuperscript{81} finding the five hundred dollar ceiling on liability manifested the punitive purpose of the statute.\textsuperscript{82} The court found that the state

\textsuperscript{75} See \textsc{Nowak}, \textsc{Constitutional Law}, \textit{supra} note 74, at 409.
\textsuperscript{76} \textit{Corley}, 227 Ga. at 750-51, 182 S.E.2d at 770.
\textsuperscript{77} See \textsc{Nowak}, \textsc{Constitutional Law}, \textit{supra} note 74, at 490-91.
\textsuperscript{78} See \textsc{Vebbia}, 291 U.S. 502, 525 (1934).
\textsuperscript{79} 248 Ga. 841, 285 S.E.2d 697 (1982).
\textsuperscript{80} \textit{Id.} at 843, 285 S.E.2d at 698.
\textsuperscript{82} \textit{Hayward}, 248 Ga. at 843, 285 S.E.2d at 699. Five years after \textit{Corley}, the Georgia Assembly amended the Georgia code sections 105-13 to limit recovery to five hundred dollars. Following the court's decision in \textit{Hayward}, the Georgia Assembly again amended the revised statute, sections 51-52-53, and raised the limitation on recovery to five thousand dollars. GA. CODE ANN. \textsection 51-52-53 (Supp. 1983). It remains to be seen whether the court will hold that a $5,000 limitation manifests the punitive purpose of the statute. In the alternative, the court could overturn or narrow
has a legitimate interest in controlling juvenile crime, and that "there is a rational relationship between the means used of (imposing liability upon parents of children who willfully or maliciously damage property) and this object." Moreover, it is noteworthy that the Georgia Supreme Court may have been dissatisfied with its earlier decision. The court stated, "while we do not reaffirm Corley, we do hold that the legislature has met the objections to Corley in the new statute with which we now deal."

Other courts have engaged in more traditional and thorough due process analyses following the finding of unconstitutionality by the Georgia court. These courts have consistently maintained that either or both, the deterrence of juvenile crime, and the compensation of the victim are legitimate legislative ends, and parental responsibility acts are a valid means of achieving these goals.

The Maryland Court of Appeals, after reviewing the cases previously discussed, held that the Maryland statute reflected the state's legitimate interest in legislating a matter of general welfare and was, therefore, constitutional. The court reasoned that:

The due process clause does not, anymore than the contract clause, inhibit a state from insisting that all contract and property rights are held subject to the fair exercise of the police power. . . . The exercise of the power is fair when the purpose is a proper public one and the means employed bear a real and substantial relation to the end sought and are not arbitrary or oppressive.

The Connecticut Court of Common Pleas upheld the constitutionality of the Connecticut parental responsibility act in 1977, and acknowledged that the statute had a dual purpose of curtailting juvenile delinquency and compensating victims. The defendants raised two equal protection claims. They contended that

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Corley by declaring that a compensatory purpose, with any ceiling on recovery, is a constitutional exercise of the state's police power.

84. Id. (emphasis added). In the eleven years between Corley and Hayward, the composition of the Georgia Supreme Court changed completely, such that not one justice from Corley participated in the Hayward decision.
86. Id. at 188, 315 A.2d at 115 (quoting Allied Am. Co. v. Comm'r, 219 Md. 607, 616, 150 A.2d 421, 427 (1959) (citations omitted). The court also questioned the soundness of the Georgia court's reasoning by Corley. The court remarked, "even acceptance of the inference suggested in Corley, that limitation upon the amount of vicarious parental liability would affect the constitutionality of a legislative right to impose it, the appellants here are not aided." Id. at 187, 315 A.2d at 115 (emphasis added).
88. Id. at 10, 373 A.2d at 193.
the statute unconstitutionally differentiated between parents and all others who might be responsible for children. In response, the court held that the legislature could find a reasonable basis for such differentiation. Since parents are in the best position to exert the most control over their children, thus fulfilling the deterrence goal of the statute. The court concluded that parents’ liability for the torts of their children does not interfere with this right. The court stated that 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 others are protected.” The court held that both purposes, deterrence and compensation, bear a rational relationship to the preservation and promotion of the public welfare.

Similar issues were raised in an Ohio case, though the Ohio Court of Appeals more thoroughly addressed the due process claim. As such, the court held compensation to property owners for damage caused by willful misconduct was a legitimate state goal and the imposition of a $2,000 judgment on the parents was reasonably related to that end. The court noted, however, that the limitation on recovery may constitute a civil penalty since some victims will not be fully compensated, thereby frustrating the statute’s compensatory purpose. Nevertheless, the court held that although the statute contained a limitation on recovery, the monetary amount was reasonable, practical, and usually sufficient to compensate the victim.

The defendants argued the Act could not, in fact, be shown to deter juvenile crime, and therefore was not rationally related to that goal. The court found it unnecessary to examine this argument since compensation was, by itself, a legitimate state end. The court added that a low recovery limit could compel it to determine if the deterrence of juvenile delinquency was a worthwhile objective in itself—a conclusion which would force the court to analyze the statute’s actual effect on juvenile delinquency.

89. Id. at 8, 373 A.2d at 192.
90. Id.
91. Id.
92. Id. at 10-11, 373 A.2d at 193.
94. Id. at 419, 374 N.E.2d at 175.
95. Id. at 419 n.5, 374 N.E.2d at 175 n.5.
96. Id. at 419, 374 N.E.2d at 175.
97. Id. at 420, 374 N.E.2d at 175.
98. Id.
In 1979, the Illinois Court of Appeals held that the state's parental responsibility act was a constitutional exercise of the state's police power. The defendants raised a number of claims in support of their constitutional challenge. They asserted that the law was unconstitutional, because it deprived a parent of property without due process of law by imposing liability on a parent who did not commit the tort. The defendants also ingeniously argued that in other liability without fault statutes, such as workmen's compensation, the party held liable reaps a benefit from the activities of the person for whom he is held legally responsible. Thus, in those situations it seems justifiable to impose some of the costs of these activities on the party held liable. The defendants claimed, therefore, that the vicarious liability aspect of the parental responsibility act is flawed because the person vicariously liable (the parent) is not benefiting from the tortfeasor's activities (the child's offense). The court did not directly respond to this argument but merely found that no violation of due process had occurred.

Another argument was asserted that holding only parents liable creates an unreasonable classification, thus violating the equal protection clause of the fourteenth amendment. The defendants argued that other societal groups have a strong influence on the conduct of children, thereby limiting the degree of parental control over their children. The court responded simply that the unequal treatment in the statute had a "reasonable basis in fact."

In their second equal protection argument, defendants claimed that the statute is an invalid exercise of the state's police power. The defendants contended that the statute is not rationally related

100. Vanthournout, 68 Ill. App. at 194, 387 N.E.2d at 342.
101. Id. Other examples given of no-fault liability accompanied by a benefit on the part of the liable party are: the liability of an operator of a dram shop, the liability of a seller of food which may become adulterated, and the vicarious liability imposed under the "Family Purpose Doctrine." Id.
102. Id.
103. Id. at 196, 387 N.E.2d at 343-44. Defendant's argument was flawed in several respects. Vicarious liability has been justified on other grounds, including deliberate allocation of risk, distribution of cost through pricing, and liability insurance. See generally W. PROSSER, supra note 22, at 969.
105. Id.
107. Id. at 195, 387 N.E.2d at 343.
to the punitive goals of the statute, since parental control over juvenile behavior is vague and limited. The court did not explore this issue but summarily concluded that the statute is a legitimate exercise of the state's police power, and is, therefore, proper. The defendants also questioned the scope and coverage of the statute, asserting that torts committed by a juvenile outside the boundaries of the statute's definition of a minor go uncompensated. The court did not address this issue at all.

In a recent decision concerning a New Jersey statute, the issues raised by the parties were somewhat different from those discussed in the previous cases. The New Jersey statute applied only to parents or guardians of minor children in public schools who damage public school property. The New Jersey Supreme Court first considered the scope of the statute. It found that liability was not based solely on the parent-child relationship, but applied also to those who have custody and control of the child, and are responsible for the child's conduct. Furthermore, although the statute contains no explicit reference to liability based on the willful or malicious conduct of minors, the court read these restrictions into the statute. The court justified this finding by concluding that this was consonant with one of the legislative purposes—deterrence of vandalism. Thus, the legislature "was concerned not solely with compensating school boards for damage to property but also with deterring delinquent behavior. Permitting the school board to recover from the parents where a child has caused damage negligently or without fault would not further the purpose of deterrence in any way."

The court then dealt with the constitutional issues raised by defendants. First, defendants claimed that the statute violated due process, asserting that no rational relationship exists between the purpose of deterring delinquent behavior and the imposition of

108. Id.
109. Id. at 196, 387 N.E.2d at 343-44.
110. Id. at 343.
114. Id. at 316-17, 431 A.2d at 803.
115. Id. at 317, 431 A.2d at 803.
116. Id.
liability on parents.\textsuperscript{117} In response, the court discussed vicarious liability and its application in other contexts and the rationale behind it. The court noted that, “in most instances, strict or vicarious liability has its sources in a public policy decision that the person liable is in a position to spread the cost of injury over a large portion of the public.”\textsuperscript{118} The court found that the legislature could reasonably believe that holding parents liable for the willful and malicious acts of their children would induce parents to exercise more control, thereby deterring juvenile delinquency and minimizing the cost to the public.\textsuperscript{119} The court also upheld the statute's unlimited recovery, stating that a maximum ceiling would be contrary to the compensatory purpose of the statute.\textsuperscript{120}

Defendants also suggested that their fundamental right to bear children is burdened by the parental responsibility act. The court dismissed this claim stating, “the effect of the vicarious liability statute on the decisions of individuals to bear and beget children is speculative at best” and that “[o]ther laws impose financial burdens on parents” as well.\textsuperscript{121} The court stated that the strict scrutiny standard was not triggered since no fundamental right or suspect classification was implicated.\textsuperscript{122} Thus, in order to withstand an equal protection challenge, the statute need only rationally relate to a legitimate state purpose that does not constitute invidious discrimination.\textsuperscript{123} Furthermore, the court held that the difference in treatment between parents of public school children and parents of other children was rationally related to a legitimate purpose.

\textsuperscript{117} \textit{Id.} at 318, 431 A.2d at 804.

\textsuperscript{118} \textit{Id.} at 319, 431 A.2d at 804.

\textsuperscript{119} \textit{Id.} at 319-20, 431 A.2d at 804-05. The court suggested that the resolution of juvenile crime must begin with the belief that:

\[ \text{[P]arents should take responsibility for their children's activities. This responsibility comes with one's status as a parent and reaches legal and moral dimensions in our society. The laws of this State, if not the higher principles, may properly provide incentives for parents to fulfill their role in the lives of their children.}\]

\textit{Id.} at 327, 431 A.2d at 807.

\textsuperscript{120} \textit{Id.} at 321, 431 A.2d at 805.

\textsuperscript{121} \textit{Id.} at 323, 431 A.2d at 806. Defendants also asserted that free education is a fundamental right and that the New Jersey act unduly interferes with that right. Relying on San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973), the New Jersey Supreme Court held that no such federal right to a free education exists. \textit{Caffiero}, 86 N.J at 323, 431 A.2d at 806.

The court noted that the New Jersey constitution does protect, as a fundamental right, the right to a free education. \textit{Id.} The court concluded that the statute does not burden this fundamental right since the “remote potential for vicarious liability of parents does not pose a sufficient threat to this right of their children.” \textit{Id.} at 323, 431 A.2d at 806-07.

\textsuperscript{122} \textit{Caffiero}, 86 N.J. at 324, 431 A.2d at 807.

\textsuperscript{123} \textit{Id.}
Florida and South Carolina courts have summarily upheld the constitutionality of their respective state parental liability acts. The Florida District Court of Appeals concluded that the rational basis of the statute is legitimately related to the deterrence of juvenile crime. The court held that since “we feel the better view supports constitutionality, we reverse and remand upon the well-reasoned authority, which we adopt . . . .”

The South Carolina Supreme Court noted that although “our statute has never been construed, North Carolina’s similar statute was considered in General Insurance Company of America v. Faulkner, 259 N.C. 317, 130 S.E. 2d 645 (1963) and found to be constitutionally within the state’s police power.” The South Carolina court then restated the reasoning of Faulkner, but did not expressly hold the South Carolina statute constitutional. Instead, the court proceeded to apply the act to the facts of the case. Apparently, the court intended that the Faulkner rationale apply to the South Carolina act.

The constitutionality of New Mexico’s parental liability statute was recently upheld. Defendants primary claim was that the 1977 New Mexico act, as it existed in 1979 when plaintiff was injured, was unconstitutional because parents were liable regardless of whether or not they had custody and control of their child. The court agreed that the statute did not require parental control for liability to attach to parents, but that this only raises a question of the statute’s “wisdom.” The court properly observed that the “wisdom of the statute, however, is not our concern; doubt as to the statute’s wisdom is not pertinent in determining whether the statute is unconstitutional.”

 Defendants contended that the statute deprived them of equal

124. Id. at 324-25, 431 A.2d at 807.
128. See supra notes 54-60 and accompanying text.
129. Standard, 295 S.E.2d at 788.
131. Id. at 103, 645 P.2d at 459. In 1981, the New Mexico legislature restored the “custody and control” requirement to the statute. Id. See N.M. STAT. ANN. § 31-46 (1981).
132. Alber, at 104, 645 P.2d at 460.
protection since liability is imposed "solely because of their status relationship to their daughter." The New Mexico court rejected this argument on the ground that defendants failed to prove either that the statute is applied unequally among all parents of children who commit willful or malicious damage, or that such parents are an improper class.

The court also rejected defendants general claim that the statute violated procedural due process by depriving them of property without due process of law. Since the defendants failed to suggest that procedural due process was denied, the court recharacterized defendant's claim as a substantive due process issue. The court concluded that there "is no violation of substantive due process (by making the parents liable for the malicious or willful tort of Monika) if the statute imposing liability was within the scope of legislative authority (the police power), and if the statutory liability accords with the purpose of the statute."

Defendants relied on a Georgia court decision to show that the New Mexico statute violated due process. The court distinguished the Georgia decision on the ground that the Georgia statute provided full compensation while "our statute limits damage compensation to a maximum of $2,500.00." Adopting the reasoning of previous decisions upholding parental liability statutes, the court held that the New Mexico statute did not violate substantive due process, since the legislature could properly determine that a "parental liability statute was reasonably necessary."

The Federal District Court of Hawaii upheld the constitutionality of the Hawaii parental responsibility statute in 1982. As discussed earlier in Part II, Hawaii was one of two American states that adopted the civil law rather than the common law approach. 

133. Id.
134. Id.
135. Id.
136. Id. at 105, 645 P.2d at 461 (citation omitted).
137. Id.
138. See supra notes 51-64 and accompanying text.
139. Alber, at 106, 645 P.2d at 462 (citation omitted).
140. Bryan v. Kitamura, 529 F. Supp. 394 (D. Hawaii 1982). The opinion of Judge Pence is a thoughtful and well reasoned analysis of the constitutional issues underlying parental liability acts. The threshold issue before the court in Bryan concerned the precedential authority of Piscataway, discussed supra notes 109-22 and accompanying text, which the United States Supreme Court dismissed for want of a substantial federal question. Judge Pence concluded that this "disposition is the equivalent to an affirmance on the merits... . This court is therefore bound by the result in Piscataway to the extent that the two cases may involve the same legal issues," 529 F. Supp. at 397 (citations omitted).

Judges Pence, however, concurred with defendants claim that the Hawaii statute, and the facts, differed significantly from Piscataway, thus requiring "detailed consideration of its [Hawaii Rev. Stat. § 577-3] alleged constitutional defects." Id.
to vicarious liability. The Hawaii statute differs from the laws in other states in two respects: (1) there is imposition of unlimited liability with regard to tortious acts, and (2) there is parental liability for negligent, as well as intentional torts of children.

The primary issue raised by defendants was that the statute interferes with a parent's fundamental right to raise a family. They argued that the statute discourages persons from having children and interferes with the raising of children by placing a severe economic burden on the parents. The court engaged in a well reasoned analysis of fundamental rights. It rejected defendants' attempt to bring the Hawaii statute within the purview of the United States Supreme Court decisions which hold that some personal choices affecting the family are important enough to be deemed "fundamental." The court declared that, unlike the other interests held to be fundamental, the parental responsibility act is not one that implicates personal choice. The court concluded that the presence of a threat of potential tort liability places no real burden on the decision to have a child. The court stated, in fact, that a statute may interfere with the parents' interest in raising a family free from state imposed economic limitations. "Although some families may undergo financial strain as a result of the statute, this fact alone does not establish encroachment on a fundamental interest."

Since no fundamental right was involved, the court found that the statute need only be rationally related to a legitimate government interest. The statute not only provides compensation for tort victims but may also deter juvenile delinquency by encouraging parents to more carefully supervise their children. De-

141. See supra notes 33-37 and accompanying text.
143. Id. at 398-99.
144. Id. at 399.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id. at 400. The court recognized that the imposition of vicarious liability is justified by a public policy which holds that the person liable is in a position to "spread the cost of the injury to the public at large through the purchase of liability insurance." Id. (footnote omitted). The court found that this policy applies to parents, who can purchase liability insurance and protect victims from bearing "the entire cost of the injury suffered." Id. Moreover, the court noted that this "conclusion is buttressed by the fact that almost all of the defendants in the present action are so insured." Id. at 400 n.23.

In fact, the defendants in Bryan eventually settled for a total of $712,000.00, which came from the "homeowners policies of the defendant parents." Letter from Steven J. Trecker, supra note 33.
fendants argued that the statute is not tailored to meet the latter objective since the statute imposes liability even where parents have exercised care in supervising their children. 151 The court dismissed this argument, concerning liability for a child's negligent acts, by finding that a statute need not be perfect in order to have a rational basis. 152

The court held the statute does not contain an unconstitutional irrebuttable presumption that natural parents are responsible for the torts of their children regardless of due care or custody. 153 The court concluded that this was basically an equal protection argument since classification is the problematic issue. 154 The court did state, however, that parents are not automatically liable for all damages caused by their children, and at trial, may use all the defenses available to their children. 155

The defendants alleged that the statute discriminates against natural parents by failing to impose liability on others who may be equally responsible. 156 The court found that natural parents are not a suspect class, therefore singling out of natural parents for liability need only have a rational basis. The court held that the statute indeed has a rational basis but indicated that the statute may be interpreted to require "a nexus between natural parentage and a significant period of custody or control of the child." 157

Although the courts have uniformly upheld the constitutionality of state parental liability acts, the statutes have provided little guidance for determining the scope and purpose of this legislation. The Model Parental Liability Act which follows is proposed to provide legislatures with a clear and simple means of achieving an important social goal: the financial compensation and personal vindication of victims of juvenile crime and delinquency. The Commentary following the Model Act briefly outlines the effect and intent of the operative terms and phrases used in the proposed statute. The Commentary is not intended to be all inclusive, but merely to provide a framework for understanding both the Model Act, and the flaws which undermine the effectiveness of current state acts.

151. Id.
152. Id.
153. Id. at 401.
154. Id.
155. Id.
156. Id. at 402.
157. Id. (footnote omitted). Compare Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982), discussed supra notes 128-30 and accompanying text, which held a New Mexico statute that did not require parental "custody and control" constitutional.
IV. PROPOSED MODEL PARENTAL LIABILITY ACT

Section 1. Title.
This Act shall be known as The Parental Liability Act.

Section 2. Definitions.
As used in this Act:

(a) "Parent" means any person who has legal custody and control of an unemancipated minor or places himself in the position of discharging parental rights, responsibilities, and liabilities.

(b) "Unemancipated minor" means any individual who is not the age of majority and is under the custody and control of a parent.

(c) "Person" means any natural person, partnership, association, private and public corporation, religious organization, the United States and any governmental agency, and the State and any agency or political subdivision.

Section 3. Liability.
A parent and unemancipated minor shall be jointly and severally liable for all actual damages to any person or property resulting from the intentional commission of a tortious act by the minor.

Section 4. Costs and Attorney's Fees.
The court may award costs and reasonable attorney's fees to the prevailing party.

V. COMMENTARY

A. Section 2. Definitions

1. Section 2(a) — Parent. The Model Act's definition of "parent" in Section 2(a) incorporates Section 2(c) of the Model Act which defines the term "person." The definition of "parent," therefore, includes any individual or entity who acquires the status of in loco parentis. This is a departure from state parental liability acts which, with one exception, fail to define the parties liable under the act. The state acts simply use the word "parent," either alone or in conjunction with the words "guardian" or "in loco parentis." Since the word "parent" at common law is strictly construed, those state statutes which impose liability upon the "parent" only, effectively limit liability to the "natural father or

158. "In loco parentis" has been defined as a person or entity "standing in the place of, or instead of, a parent; one charged fictitiously with a parent's rights, duties and responsibilities." Leverly v. United States, 162 F.2d 79, 85 (10th Cir. 1947).

Although statutes limiting liability to natural parents are constitutional, it is unreasonable for natural parents to shoulder liability while other "persons" with identical parental rights and responsibilities are not held liable.

Under the Model Act, state and federal governments as well as private and public agencies are potentially liable parties. The development of modern tort law has seen the erosion or abrogation of the common law rule of sovereign immunity. Many states and the federal government have adopted this modern view.

If the state has custody and control of an unemancipated minor and that minor commits a tort, the state should incur the same liability now placed on other "parents." The purpose of the Model Act, and many state acts, is to relieve the victim of financial hardship caused by the intentional harmful conduct of a minor. The Model Act equitably applies this policy to all parties. Moreover, as a practical consideration, the government and public or private agencies are generally insured. Since the purpose of insurance is to compensate the injured party by spreading the cost among the public, there exists no overriding financial burden or public policy for denying recovery to the victim.

The Model Act treats all persons legally responsible for minors equally. This expanded definition of "parent" must be considered in the context of the growing number of children who, due to divorce or changes in lifestyle, no longer live with one or both of their natural parents. The victim's right to financial recovery

161. See supra notes 63-64, 155-56 and accompanying text.
164. W. PROSSER, supra note 22, at § 83. Bryan provides an excellent example of the availability of insurance to protect against juvenile acts. See supra note 147.
165. Dean Prosser characterized the trend of the law as follows:

There is "a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence shift the loss by creating liability where there has been no fault" . . . The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it.

W. PROSSER, supra note 22, § 75 at 494-95. Cf. Note, Holding Governments Strictly Liable for the Release of Dangerous Parolees, 55 N.Y.U. L. REV. 907, 908 (1980) "Not only would victims be treated more equally under such a system of tort liability, but holding the government strictly liable would best reconcile the competing social policies on which the institution of parole is based." See generally TASK FORCE ON VIOLENT CRIME, supra note 2, at 90-91.
166. See e.g. Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 U.C.L.A. L. REV. 1125 (1981); Glick, Children of Divorced Parents in Demographic Perspective, 35 J. SOC. ISSUES 170 (1975); Weitzman, The Economics of Divorce: So-
against a "parent" under the Model Act, therefore, is predicated solely on a factual and legal determination of whether the "parent" had "custody and control" of the unemancipated minor at the time of the tortious conduct. 167

2. Section 2(b) — Unemancipated Minor. The Model Act defines the term "unemancipated minor" to expressly include children under the age of majority. This is consistent with the rule that when a "minor attains the age of majority, emancipation occurs automatically by operation of law." 168 Absent specific reference to age or state law, however, a parental liability act may extend liability to parents of adult children. For example, several state acts simply use the word "child" in the statute. 169 Although courts may incorporate into the act the condition that the child be a "minor" at the time of the tort, 170 statutory vagueness could result in liability to parents beyond legislative intent.

As discussed previously in Section 2(a), parental liability under The Model Act is predicated upon a determination that the parents had "custody and control" of the minor. 171 Avoidance of parental liability will therefore depend on the parent's ability to prove as an affirmative defense that the minor was, as a matter of fact or by operation of law, emancipated. 172 Such a determination has historically required judicial resolution of complex, and often confused, issues of law and fact. 173 Commentators have criticized


169. See Appendix I, infra.

170. See e.g. Alber v. Nolle, 68 N.M. 100, 103, 645 P.2d 456, 459 (Ct. App. 1982).

171. See supra note 165 and accompanying text.

172. "Emancipation may not be presumed but must be expressly or impliedly proven. Therefore, the burden was on the defendants to allege and prove, as an affirmative matter, that Douglas was in fact emancipated." Conrad v. Dickerson, 31 Ill. App. 3d 1011, 1012, 325 N.E.2d 67-68 (App. Ct. 1975).

173. See generally Katz, Schroeder & Sidman, Emancipating Our Children — Coming of Legal Age in America, 7 FAM. L.Q. 211, 214-32 (1973). Among the most frequently considered factors are:

whether the child is living at home, whether the child is paying room and board if living at home, whether the parents are exercising disciplinary control over the minor, whether the child is independently employed, whether the child has been given the right to retain wages and spend them without
this case-by-case method of determining emancipation as outmoded “in light of modern, cultural, social, economic, and legal conditions,” and encouraged the enactment of comprehensive emancipation statutes similar to those adopted in California and Connecticut.

The Model Act, as a matter of statutory construction, should be consistent with applicable state laws. Thus, current problems in determining the legal and factual criteria for emancipation will inevitably arise under the Model Act. This is unavoidable unless the Act includes a lengthy definition of “emancipation.” Since this is impractical and would conflict with the judicial and statutory law in many jurisdictions, legislatures should consider enacting modern emancipation statutes. Increased parental liability necessitates clear standards from which parents can, with reasonable certainty, ascertain whether they are liable for the torts of their children and protect themselves by purchasing insurance or seeking dissolution of their rights and responsibilities.

3. **Section 2(c) — Person.** The term “person” is defined in a number of state parental responsibility acts. The purpose of these definitions is to list the parties who may bring an action against the parents of juvenile tortfeasors. The Model Act definition also serves this function. In addition, the Model Act’s definition of “parent” clearly defines the parties who are liable under the Act.

**B. Section 3. Liability**

1. **Joint and Several Liability.** In Section 3 of the Model Act, the terms “parent” and “unemancipated minor” are followed by parental restraints, whether the child is responsible for debts incurred and the extent of the parents’ contributions toward the payment of outstanding bills, whether the child owns a major commodity such as a car, and whether the parent has listed the child as a dependent for tax purposes. Age, of course, is also a critical element.

*Id.* at 218 (footnotes omitted). Only marriage and enlistment in the Army have been deemed sufficient in themselves to constitute emancipation. *Id.* at 217.

*But see* Albert v. Ellis, 7 Ohio Op. 3d 115, 359 N.E.2d 1033 (C.P. 1077) in which the parents of a sixteen-year old, married, self-supporting son were held liable under the Ohio Parental Responsibility Act. The court held that unless the “actual physical custody and control” of the minor was taken from the parents by the state, the legislature intended to impose liability on all parents of children under eighteen regardless of the factual relationship of parent and child. *Id.* at 118, 359 N.E.2d at 1036.


177. See supra notes 156-65.
the phrase "shall be jointly and severally liable." 178 The purpose of the Model Act is not served if the parent alone is held liable for the acts of the juvenile. The juvenile should be liable to the extent of his assets, if he possesses any. Thus, the Model Act encourages victims to treat the parent and child as joint tortfeasors for the purpose of satisfying a compensatory judgment. 179 Although the parent of the juvenile tortfeasor will often be responsible for paying the judgment, on those occasions where it is possible, the juvenile should contribute to the best of her ability.

2. Actual Damages. The Model Act permits recovery of actual damages in accordance with the compensatory purpose of the statute. 180 The Act, however, diverges from most of the states in that it has no ceiling on the amount which may be recovered from the parent of a child tortfeasor. Although limitation may bear a rational relationship to most injuries, many victims are left with the bulk of their medical and repair expenses. 181 Unlimited recovery will not place an onerous burden on parents of juvenile delinquents. The parent who is subject to a substantial judgment would be accorded all the statutory, judicial and procedural safeguards available to any debtor. Furthermore, and as several courts have recently pointed out, insurance is available to parents for the purpose of providing coverage from this type of liability. 182 In addition, current homeowner's insurance policies may protect

178. For a general discussion of the legal principles and problems underlying the liability of joint tortfeasors, see W. Prosser, supra note 22, at §§ 46-52.


180. "Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved . . . ." Birdsall v. Coolidge, 93 U.S. 64 (1876). It is also well-settled that:

[O]ne who sustains bodily injury may recover damages for past and future physical pain and serious mental suffering accompanying such injury or produced thereby. This includes fright and shock at the time of the injury, pain during treatment, fear of future incapacity, and, in some states, the humiliation produced by mutilation or disfigurement . . . .

C. McCormick, Damages 315 (1935). Thus, a "claim for bodily pain lets in mental suffering. Damages for mental suffering if reasonable, are recoverable as compensation to which the claimant is entitled as a matter of right." Id. at 315-16. See Alber v. Nolle, 98 N.M. 100, 107, 645 P.2d 456, 463 (Ct. App. 1982), where the court held: "Pain and suffering is an actual damage recoverable under the parental liability statute."

181. See e.g., Parsons v. Smithey, 109 Ariz. 49, 504 P.2d 1272 (1973). (Fourteen year old boy attacked mother and daughter with a knife, hammer, and belt buckle.)

parents under certain circumstances. Statutory limitations on recovery operate exclusively to the detriment of the innocent victim particularly in the many cases where the parent is capable of satisfying the judgment.

3. **Person and Property.** The Model Act and more than half the states permit recovery for personal injury. The remaining states limit liability to property damage. This limitation is untenable and frustrates the policies underlying this legislation. Juveniles are responsible for a large percentage of personal injury inflicted on victims each year. Those states forbidding recovery for personal injury grant legislative immunity to those who intentionally harm others while undermining the legislative attempt to deter juvenile crime or provide aid to victims. Since some of the most vicious and costly injuries to victims are physically inflicted by juveniles, the denial of this remedy by the legislature is the most egregious defect in current parental responsibility acts.

4. **Intentional.** State parental liability acts generally require that the minor commit the tortious act "intentionally" or "willfully" for the victim to recover against the parent. Although many state acts also require that the tort be committed both intentionally and with a "mischievous purpose, a design to injure or any ill-will," several courts have held that malicious conduct is

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183. See supra note 142. In Liberty Mut. Ins. Co. v. Davis, 52 Ohio Misc. 26, 368 N.E.2d, 336 (Akron Mun. Ct., 1977), the court concluded that "while standard homeowners' policies usually provide for an exclusion from such coverage for intentional acts, a judgment against a minor's parents is not based on the parent's intentional act and therefore is, not excluded." Id. at 29, 368 N.E.2d 339.

Another court adopted the following paradigm:

Assuming A, B & C are each insured under the policy, and A and B are independently liable in suits against them arising out of C's act there is no provision of the contract which should be construed to deny them coverage simply because C's coverage would be excluded if an action were brought against him.


184. See Appendix I, infra.

185. See generally supra note 4.


187. Since the statutes require "intent" by the minor to commit the tort, the courts have imputed the common law rule that "a minor's conduct should be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances" into the terms of the statute. See, e.g., Walker v. Kelly, 6 Conn. Cir. Ct. 715, 314 A.2d 785 (Cir. Ct. 1973) (five year old); Lutteman v. Martin, 20 Conn. Supp. 371, 135 A.2d 600 (C.P. 1957) (nine year old); Connors v. Pantano, 165 Neb. 515, 86 N.E.2d 367 (1957) (four year old). See generally RESTATEMENT (SECOND) OF TORTS § 283A (1965). But see Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786, 788 (1982) in which the court interpreted the South Carolina Act to mean "no presumptions shall be indulged; minors of any age can commit intentional and malicious torts."

equivalent to intentional conduct.\textsuperscript{189} The Model Act adopts the term "intentional" in Section 3, because it imports the clearest standard of conduct, and is fair and consistent with the compensatory purpose of the Act. The requirement that the minor's act be "intentional" provides the parent with the opportunity to refute the victim's contention that the minor acted with the "purpose of causing such injury or with knowledge that the injury is substantially likely to follow."\textsuperscript{190}

The term "intentional" in The Model Act is contained in the phrase "liable for all actual damages to any person or property resulting from the commission of a tortious act by the minor." Several courts have interpreted their state acts as limiting liability to the precipitory intentional act only and have forbidden recovery for injuries which resulted, or flowed, from the initial tort.\textsuperscript{191} The language used in Section 3 of The Model Act specifically rejects this interpretation. Under The Model Act, the minor and his parents are liable for any harm "resulting" from the commission of the initial tort.\textsuperscript{192} Section 3 of The Model Act, therefore, attaches liability to the parent if the victim can prove that the minor committed an intentional act, resulting in injury to the victim.

The Model Act does not hold parents liable for the negligent acts of their children.\textsuperscript{193} Although consistent with the purpose of the Act, to compensate the victim, such a statute would probably not be socially or politically palatable at the present time. The increase in the availability of insurance may, however, eventually eliminate the need for this distinction.

\textbf{C. Section 4. Costs and Attorney's Fees}

In some cases, a victim's damages are too small to warrant litigation under ordinary circumstances. The Model Act encourages a victim to seek compensation by permitting the judge the discre-
tion to award costs and attorney's fees if the victim prevails. A judge may award these expenses to assure the plaintiff just compensation in cases involving small judgments. Moreover, the possibility that the plaintiff may recover these costs from the defendant might encourage reluctant defendants to settle out of court rather than risk the additional expense of litigation. Alternatively, litigation which is aimed at harassing a defendant is discouraged since the judge may assess these same expenses against the plaintiff. The judge, of course, may also elect to allow both parties to bear their own costs.

**CONCLUSION**

Defendant parents have challenged parental liability acts largely on the grounds that these acts interfere with their fundamental right to bear and raise children, and violate due process and equal protection under the fourteenth amendment. The courts, with one exception, have rejected these arguments and upheld the constitutionality of the statutes. In only a few cases, however, have the courts engaged in an in-depth analysis of the issues raised.

Several cases have specifically held that parental liability acts do not interfere with a "fundamental right" to bear and raise children. The fact that a few parents may incur some financial cost is not a great enough economic burden to interfere with a parent's choice to have children.

Several courts, antipathetical to vicarious liability doctrines, have concluded that the acts' only legitimate purpose is deterrence of juvenile crime. It has not been conclusively shown, however, that these acts encourage greater parental supervision of children, thereby reducing the number of juvenile crimes. Thus, if the purpose of the statute is deterrence, the act may not be rationally related to that goal. The courts have sidestepped this problem by finding that the possibility that these statutes may effectuate the desired result satisfies the rationality requirement.

Other courts have held that compensation of victims is a legitimate state purpose in itself. If compensation is the legislative goal, however, imposition of too low a ceiling on recovery may not be rationally related to that end. A victim's financial costs may often exceed the limited ceiling established by many state statutes. Nevertheless, the courts have consistently held that parental liability acts bear a rational relationship to either deterrence or com-

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For thirty years, state legislatures have acknowledged the need to protect and compensate victims of juvenile crime and delinquency. The courts have supported the legislatures' prerogative to provide victims with an effective and equitable means of financial redress. The Model Act is a positive step in that direction. Drafted in clear and simple language, it is hoped that the Model Act will encourage victims to use this civil remedy. Moreover, The Model Act's elimination of ceilings on recovery substantially enhances the decisive role state legislatures have traditionally assigned tort law in fostering "increased consciousness of social responsibility, of social engineering." The Model Act is a potentially successful means of achieving these goals.

<table>
<thead>
<tr>
<th>Statute</th>
<th>Age Limit</th>
<th>Maximum Recovery</th>
<th>Personal Injury Covered</th>
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* These statutes do not distinguish between personal injury and property damage, but impose liability for "tort," "damage," or "fine."

** If parental negligence is found, no limit to recovery.

*** Limit applies to personal injuries: apparently no limit for property damage.