Article

Informed Bystanders' Duty to Warn

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Should bystanders with credible knowledge about prospective harm owe a duty of care to future victims? This urgent question comes up in various contexts, from former employers who withhold information about a serial harasser to data brokers who are silent about stalkers that track personal information. Under established common law, the "No Duty to Act" ("no-duty") rule generally does not require bystanders to warn strangers. Carving out an exception to this rule decades ago, Tarasoff v. Regents of the University of California *imposed a duty on a mental health professional to warn a prospective victim about the risk posed by a dangerous patient. Yet existing tort scholarship and doctrine undertheorize the grounds for such a duty to warn, and courts struggle to apply the duty in appropriate cases beyond the medical context.*

Offering a fresh take on Tarasoff*, this Article makes the case for a duty to warn owed by those I define as "informed bystanders." I first identify four criteria that courts tend to implicitly consider in deciding whether to recognize the duty: Expertise;*

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Certainty; Cost; and Position of Power or Special Capacity. I then question the theoretical necessity of expertise as one of these criteria. Next, I advance two arguments to support informed bystanders' duty to warn. The first argument—couched both in the common law's self-interested individualism and in feminist legal theory—posits that the no-duty rule's default should be flipped to generally recognize a duty to warn. According to the second, narrower argument, the no-duty rule need not be changed. Instead, existing exceptions to the rule should apply to the special relationship between informed bystanders and future wrongdoers or victims. Finally, I address potential pushbacks, contemplate models for implementing the duty, and flag key cross-private law implications. The Article thus begins a crucial conversation on tort law's nasty habit: allowing bystanders to withhold information that could prevent harm to others.

TABLE OF CONTENTS

Introduction 78
I. Theoretical Underpinnings of a Duty to Warn: The Debate over the Duty to Rescue 83
A. Theoretical Perspectives Supporting the No-Duty Rule 84
B. Theoretical Perspectives Supporting a Limited Duty to Rescue 87
II. The Duty to Warn: Doctrinal Origins and Evolution 93
A. The "No Duty to Act" Rule: Origins and Exceptions 93
B. *Tarasoff* and the Duty to Warn 98
C. The Duty to Warn Post-*Tarasoff* 102
1. Health Professionals 102
2. Non-Medical Professionals with Access to Confidential Information 108
3. Other Individuals or Institutions in Special Positions 111
D. Interim Summary: The Current Doctrinal Limits of the Duty to Warn 116
III. Towards an Informed Bystander's Duty to Warn 117
A. When Should the Duty Apply? Actors with Credible Knowledge About Prospective Harm Unknown to Future Victims 118
1. The Nature and Scope of the Duty 118
2. A Typology of Duties 121
B. The Case for a Duty of Care of the Informed Bystander 123
C. Answers to Overarching Criticisms 129
D. Implementing the Duty Beyond the Common Law of Torts 135
Conclusion 144

INTRODUCTION

"Jessie," 32, saw a post about a guy with whom she went on a date, in a United States–based "Are We Dating the Same Guy?" Facebook group.[1] "Someone had posted . . . accusing him of blackmail and violence. I was so shocked . . . ."[2] She received a direct message from another member: "[This person] told me she is online specifically to warn women about this guy."[3] Jessie recounted feeling "lucky" that she did not become the next victim: "It used to be that we dated people with mutual friends so someone could vouch. Now we're meeting complete strangers on the Internet, we need to look out for each other."[4] Since the first group was founded in New York in 2022, similar groups with millions of subscribers have mushroomed, aiming to empower women to protect one another and raise red flags about abusive behavior.[5] Yet, critics have argued that these groups risk defaming men with little ability to verify or contest information shared about them.[6]

The information Jesse received allowed her to reach an informed decision about her dating choices.[7] In contrast, such warning information is not offered in many other settings. A

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1. Emilie Lavinia, *'Are We Dating the Same Guy:' The Dark Side of These Online Groups*, VICE (May 26, 2023), https://www.vice.com/en/article/dy375q/are-we-dating-the-same-guy-facebook-groups [https://perma.cc/YTN5-FGCS].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Treena Orchard & Erika Chamberlain, *Are We Dating the Same Guy? Online Groups Toe the Line Between Protecting Women and Defaming Men*, THE CONVERSATION (Oct. 4, 2023), https://theconversation.com/are-we-dating-the-same-guy-online-groups-toe-the-line-between-protecting-women-and-defaming-men-214635 [https://perma.cc/LY5F-XGUQ] (describing the mutual protection motive among women using these websites).

6. *Id.* ("Men whose reputations suffer from the information featured in the groups could sue the people posting and the group administrators for defamation . . . ."); *see also* Alexandros Antoniou, *The MeToo Movement and the Public Interest Defence in Libel*, 34 ENT. L. REV. June 30, 2023, at 1 (discussing the first reported United Kingdom case in which a sexual assault victim who named their perpetrator successfully relied on the public interest defense against a suit for libel); Samantha Cole, *Are We Dating the Same Lawsuit*?, COURT WATCH (Jan. 10, 2024), https://www.courtwatch.news/p/are-we-dating-the-same-lawsuit [https://perma.cc/A3EW-8RFV] (describing a Chicago man who recently sued several women over comments that he was "psycho" and "clingy").

7. *See* Lavinia, *supra* note 1 (describing Jessie's relief that she was warned).

common scenario implicating the need to warn others concerns individuals who sexually abuse persons in a workplace or educational institution.[8] Upper management, human resources administrators, and colleagues are often aware of the pattern of wrongdoing.[9] A wrongdoer might have been investigated and discharged or encouraged to leave after allegations of abuse.[10] However, concerns about a potential lawsuit or retaliation discourage former employers from disclosing the misconduct, even as the employee might proceed to cause similar harm at their new workplace.[11]

Should the law not require warning in such cases? It generally does not.[12] The origins of the lack of a legal duty to warn trace back to the debate on the more burdensome duty to *rescue*. A longstanding rule of the common law of torts, known as the "No Duty to Act" ("no-duty") rule, imposes no legal duty to aid strangers who are facing danger.[13] In contrast, most philosophical, political, and legal scholars argue that there should be at least some limited legal duty of easy rescue.[14] This critique has led to several exceptions to the no-duty rule.

One of the most famous cases creating such an exception is *Tarasoff v. Regents of the University of California,* which almost fifty years ago imposed on a clinical psychologist a duty to warn a future victim about the threat posed by a dangerous mental health patient.[15] And yet, notwithstanding a swath of scholarship and policy papers grappling with *Tarasoff*'s confines, we

8. *See, e.g.*, Orchard & Chamberlain, *supra* note 5 (discussing students posting on "are we dating?" websites to protect fellow students). References to "wrongdoers" or "tortfeasors" throughout this Article denote alleged wrongdoers or tortfeasors, as no legal determination has been made regarding liability.

9. I flesh out this example below. *See infra* Part III.A.1.

10. *See infra* Part III.A.1.

11. *See infra* Part III.A.1.

12. "Generally," because such scenarios gave rise to "Don't Pass the Trash" laws in New Jersey and other jurisdictions, which have created a limited duty. *See infra* note 204.

13. See *infra* Part II.A for a detailed discussion of the rule. A similar rule applies in criminal law. *See generally* Miriam Gur-Arye, *A Failure to Prevent Crime—Should It Be Criminal?*, 20 CRIM. JUST. ETHICS, Summer/Fall 2001, at 3, 6–16 (discussing whether there should be a duty to report in the criminal context).

14. For a survey of the range of such perspectives, see *infra* Part I.B.

15. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347–48 (Cal. 1976).

still have more questions than answers about the scope of its applicability as we move beyond the medical and mental health context, and beyond a single, identifiable victim.[16] This gap is particularly troublesome given recent technological shifts, which have made information more shareable and overall less private with respect to many different forms of wrongdoing.[17]

This Article argues that a modern analogy to *Tarasoff* should now require that "informed bystanders"—defined as individuals or entities with credible nonpublic information about prospective harm to future victims—owe a duty to warn in some cases. To make the case for such a duty, the Article first analyzes the *Tarasoff* holding and its applications in subsequent caselaw. A comprehensive review of post-*Tarasoff* doctrine and scholarship reveals that, in applying *Tarasoff,* courts have not expanded the duty in meaningful ways. And yet the doctrinal limits of the duty are far from clear, with states differing on the extent to which the duty is imposed under various factual conditions.[18] To dissipate this doctrinal confusion, I offer a list of four factors that—I argue—implicitly guide courts' decision-making on whether to recognize a duty to warn post-*Tarasoff*: Expertise; Certainty; Cost; and Position of Power or Special Capacity.[19] When all four considerations are present, courts tend to impose a duty to warn, at least in the medical and mental health context.[20] However, I suggest pushing the duty beyond the circumstances of *Tarasoff*. I argue that courts should impose a duty when expertise is absent, yet credible knowledge of prospective harm exists nonetheless. In fact, the absence of a professional

16. *See infra* Part II.C.

17. This is evident in the dating example shared above, but also in other areas such as the consumer context. *See, e.g.*, Sonya Sellmeyer, *Consumer Connection: The Impact of Data Breaches on Consumers*, IOWA FRAUD FIGHTERS (May 28, 2024), https://iowafraudfighters.gov/2024/05/28/consumer-connection-the-impact-of-data-breaches-on-consumers [https://perma.cc/RL97-XYJ2] (discussing data leaks in the consumer context).

18. *Compare, e.g.*, MINN. STAT. § 148.975, subdiv. 2 (2023) (requiring licensees to report all serious and specific threats of physical violence), *with* IOWA CODE § 228.7A (2024) (permitting, but not requiring, licensees to report threats of violence to law enforcement).

19. Special capacity could be attributed to those uniquely positioned to warn about future harm because of their relationship with the wrongdoer, such as spouses or family members.

20. *See infra* Part II.C.

role strengthens the argument for a duty, as it does not involve compromising trust in such professionals.

The Article then builds on this doctrinal analysis as well as existing legal theory to contend that a duty for informed bystanders to warn should be recognized in appropriate cases. It offers a spectrum of such cases.[21] "Easier" cases would involve *implicated* informed bystanders, such as a former employer or a spouse, who are in a special position to act on the duty because of their social standing, relationship with the wrongdoer, or connection to relevant information networks.[22] In such cases there should be an affirmative legal duty to disclose credible information about past abuse. "Harder" cases would refer to true bystanders, like colleagues, who are nevertheless *informed* because they fulfill two crucial conditions—Certainty: holding credible information about the nature of prospective harm, including risk of reoccurrence; and Cost: the burden on the bystander in providing the warning is low compared to a significant harm to the future victim.[23] In such cases, a legal duty might not be warranted as it will open up an ill-defined group of individuals to liability. Still, there might be a moral duty that the law can make easier to fulfill.[24]

Such an approach aligns with budding social practices like the above-mentioned Facebook groups, which disseminate data that was once considered private in order to challenge entrenched social power dynamics.[25] This Article calls for tort law

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21. I discuss harm as distinct from wrong, though the harm might be caused by a wrong at least in some instances. *See generally* JOHN GARDNER, TORTS AND OTHER WRONGS 1–27 (2019) (discussing the unique features of torts compared to other wrongs).

22. Consistent with Fletcher's idea of non-reciprocal risks, there are grounds to recognize a duty to warn with respect to those in positions of power, such as employers. *See generally* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972) (discussing non-reciprocal risks as an explanatory theory for tort law).

23. Importantly, I do not argue that the informed bystander needs to be informed about the specific individual at risk. *See infra* Part III.

24. For a distinction between a moral (grounded in morality or ethics) duty and a legal (grounded in the law) duty see, for example, Massimo Renzo & Leslie Green, *Legal Obligation and Authority*, THE STAN. ENCYC. OF PHIL. (June 30, 2022), https://plato.stanford.edu/entries/legal-obligation [https://perma.cc/ZH3H-KSGB].

25. For an account problematizing the #metoo movement and particularly the slogan "#believewomen," see AMIA SRINIVASAN, THE RIGHT TO SEX: FEMINISM IN THE TWENTY-FIRST CENTURY 1–33 (2021).

to better capture and advance this nascent cultural shift towards sharing information to prevent harm to others.

To support a tort law–based duty owed by implicated informed bystanders, the Article employs two legal arguments, one broad and the other narrow. Under the first argument, I suggest revisiting the no-duty rule, and flipping its default to reflect the values of solidarity and consideration of others' safety, or at the very least to account for the self-interest in ensuring one's own access to information regarding future harm. Setting the opposite default rule—that generally there is a legal duty to warn unless the situation does not call for such a duty—will allow recognition of the duty beyond the *Tarasoff* context. Under the second, narrower argument, I argue for keeping the no-duty rule in place but applying the special relationship exception to the relationship between implicated informed bystanders and future wrongdoers or victims.[26]

Finally, the Article begins to address practical questions such as what discharging the duty would require of informed bystanders and how information would be disseminated. While I argue that an informed bystander's duty to warn can be recognized by courts in appropriate cases as the structure of tort law is sufficiently flexible to accommodate it, a complementary route might be a statutory intervention which establishes—and funds—an effective warning mechanism. I thus discuss several models for such an intervention, such as the National Practitioner Data Bank used for medical malpractice settlements.[27] At the same time, I acknowledge a host of countervailing interests, including implications for the laws of defamation and privacy.[28] Thus, while the Article conceptualizes and justifies informed bystanders' duty to warn on broad, universal terms, it acknowledges that the question of when and how the duty should apply is context-sensitive and must carefully balance such competing interests.[29]

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26. *See infra* Part III. Either way, when it comes to the "harder" cases, I suggest focusing on repeated harm rather than one-off cases as one way of determining propensity for wrongdoing.

27. *See infra* Part III.C.

28. *See infra* Part III.C.

29. As discussed below, some circumstances where I suggest imposing a duty to warn could be reframed as falling under a general duty of reasonable care. *See, e.g.*, Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1007–08 (N.H.

The Article proceeds in three parts. Part I begins by exploring the arguments supporting and contesting the no-duty rule in the context of a legal duty to *rescue*. While a duty to rescue is broader and harder to justify, such arguments provide necessary theoretical background for the discussion regarding a duty to warn. Next, Part II describes the doctrinal origins of the no-duty rule and its exceptions. It then discusses the *Tarasoff* case and its interpretation by judges and scholars. This part also offers a novel classification of factors that tend to guide courts' decisions regarding a duty to warn. Part III then makes the case for an informed bystander's duty to warn, discussing the nature of the duty and offering two main arguments to support it. This Part also responds to the primary critiques which might arise against the imposition of the duty. Finally, I suggest initial thoughts on the implementation of the duty beyond the common law and some concluding reflections. The Article thus begins to answer a series of difficult theoretical and practical questions regarding an expansion of the duty to warn and the extent to which such a duty is workable for the law of torts. In so doing, I hope to begin a conversation about the relationship between a tort-based duty to warn and our society's ever-changing values.

I. THEORETICAL UNDERPINNINGS OF A DUTY TO WARN: THE DEBATE OVER THE DUTY TO RESCUE

To consider both the current doctrinal limits and a potential extension of the duty to warn, we must first trace the debate over bystanders' legal duty to *rescue* others. Even though this Article discusses a narrower and qualitatively distinct duty to warn rather than a general duty to rescue, the theoretical discussion regarding the broader duty is instructive. This Part thus examines theoretical rationales offered both for the no-duty rule and for altering it to require an "easy rescue," one that involves only minimal risk to the intervening bystander. I also briefly respond to arguments resisting an overlap between a moral and a legal duty to rescue.

2003) (recognizing that the duty owed by a data broker to a stalking victim whose stalker tracked her through information provided by the company was partially grounded in a general duty of care).

A. THEORETICAL PERSPECTIVES SUPPORTING THE NO-DUTY RULE

Several key justifications have been provided over the years for the no-duty rule. The first is historical and rooted in the distinction between misfeasance and nonfeasance.[30] The common law generally imposes liability only for situations in which defendants wrongfully caused harm to others rather than when defendants fail to act in a way that would benefit others.[31] According to Francis Bohlen:

> There is no distinction more deeply rooted in the common law and more fundamental than that . . . between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.[32]

As Steven Heyman suggests, while the historical justification is not in and of itself a reason to resist changing the rule, it reflects our legal system's most fundamental principles and indicates that "the no-duty doctrine is so deeply woven into the fabric of Anglo-American law that it cannot be altered without radically transforming that law."[33]

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30. Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 675 (1994).

31. *Id.*; *see also* Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 209 (1905).

32. Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219–20 (1908). According to Bohlen, there are two key differences between misfeasance and nonfeasance: the nature of the conduct, and the nature of the result. *Id.* at 220. As for the latter, while misfeasance will make a plaintiff "positively worse off," nonfeasance will make the plaintiff neither better nor worse off. *Id.* at 220.

33. Heyman, *supra* note 30, at 676.

The second justification is value-based, contending that the no-duty rule is embedded in the principles which underly our legal system.[34] Scholars adhering to this view, who tend to be libertarians, argue that people should be free to act as they please so long as they do so without harming others, and that the law should not require people to act for the benefit of others.[35] According to Richard Epstein, without a causal connection between the defendant's behavior and the plaintiff's unfortunate situation, we are missing a moral justification on which to premise a legal duty to act.[36] Related to this view, though not quite rooted in the libertarian tradition, is Arthur Ripstein's Kantian argument. Ripstein contends that—unlike an interference with one's pursuit of their ends—one's incapacity in and of itself is not another person's problem.[37] Another related justification is substantive, focused on the nature of private law as inherently negative in prohibiting individuals from invading the rights of others.[38] This rationale—identified primarily with Ernest Weinrib[39]—explains that private law's negative nature is inconsistent with a positive duty to rescue.[40]

Finally, a third justification is grounded in process or administrability; James Henderson argued that a duty to rescue

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34. *Id.* (noting that this argument tends to invoke "the natural rights tradition of Locke and Kant" in arguing that "the proper function of law is to protect individual rights against infringement"); *see also* Robert L. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946) (attributing the no-duty rule to an ideology of individualism).

35. *See, e.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 197–204 (1973); *see also* Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFFS. 230, 235–59 (1980) (critiquing the introduction of Bad Samaritan laws); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974) (arguing that a legitimate state "may not use its coercive apparatus for the purpose of getting some citizens to aid others"). As Heyman notes, and as discussed further in this Article, these scholars may agree that while there is a moral duty to aid others, the law should not enforce such a duty. Heyman, *supra* note 30, at 676.

36. Epstein, *supra* note 35, at 169.

37. *See* Arthur Ripstein, *Three Duties to Rescue: Moral, Civil and Criminal*, 19 LAW & PHIL. 751, 751, 768–69 (2000) (describing the Kantian conception of right which does not require one person to confer a benefit on another).

38. Heyman describes this rationale as derived from the theory of legal formalism. Heyman, *supra* note 30, at 676–77.

39. For a selection of Weinrib's works which develop his ideas about private law, see, for example, Ernest Weinrib, *Rescue and Restitution*, 1 S'VARA: J. PHIL. AND JUDAISM 59, 59–60 (1990) (contrasting the common law's lack of a duty to

would clash with our legal system's requirement of avoiding rules which refer to "nonverifiable factual events and circumstances,"[41] and would create problems of proof and difficult counterfactual assessments.[42]

Underlying some of these justifications for preserving the no-duty rule is a broader concern about blurring the lines between moral and legal duties and crowding out moral incentives to rescue others in peril.[43] Some have argued that the imposition

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rescue with Talmudic law); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 411 (1989) (noting Aristotle's acknowledgement that private law was based on "the doing and suffering of harm"); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 516–17 (1989) (explaining why liability must be based in action); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1297–301 (1989) (differentiating rights and advantages); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 978 (1988) (explaining the bilateral aspects of private law); Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, 1 CAN. J.L. & JURIS. 3, 6 (1988) [hereinafter Weinrib, *Liberty, Community, and Corrective Justice*] (stating that the difference between misfeasance and nonfeasance "lies at the heart of private law"); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 489 (1987) (expressing that private law has only negative duties); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (classifying private law as a moral practice distinct from economics and politics).

40. Weinrib's view draws on Kant's concept of autonomous individuals' freedom. *See, e.g.*, Weinrib, *Liberty, Community, and Corrective Justice*, *supra* note 39, at 16–17. In a sense, it can also be explained in terms of concern about the risk of creating moral guilt. *Id.* Weinrib also relies on Aristotle's conception of corrective justice in his negative account of private law. *See* Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409 (1992) ("A violation of corrective justice involves one party's gain at the other's expense."). For a critique of this account, see Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 683–702 (1992) (arguing that Weinrib's formalist account of tort law fails to account for the normative principles that inform notions of justice). However, Weinrib's earlier work actually defended a duty to rescue on moral grounds. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 251 (1980) [hereinafter Weinrib, *The Case for a Duty to Rescue*] ("[I] set[] forth an argument in favor of a judicially created duty to effect an easy rescue.").

41. James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 932 (1982).

42. *Id.* Henderson also argues that there is no moral basis to impose a duty on an innocent defendant who is psychologically incapable of rescue. *Id.* at 931. However, as explained below, barriers related to vagueness can be resolved through a specific definition of who the duty attaches to and what it entails. *See infra* Part III.A.

43. *See* Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1078–81 (2014) (arguing that the introduction of legal incentives may reduce the number of internal incentives an agent has to engage in the same activity).

of a legal sanction might be unnecessary as people are already internally motivated to assist others.[44] Similarly, others have argued that the law should only enforce the most basic duties.[45] Such basic duties would be those that establish order and protect the individual from harm:[46] "Whatever else may be morally required, only those principles that are or would be autonomously chosen can be required by the state."[47]

As the next Section explains, I am skeptical about many of these arguments, particularly the concern over legal duties crowding out moral incentives. First, because the crowding out assertion is unfounded as an empirical matter. And second, because of my view that tort law is inherently tied to social and moral norms of behavior.

B. THEORETICAL PERSPECTIVES SUPPORTING A LIMITED DUTY TO RESCUE

Over the years, many scholars have articulated persuasive arguments in support of a legal—rather than merely moral—duty to rescue, sharply criticizing the no-duty rule. An early example is James Barr Ames, who argues that because the law is utilitarian and aims to serve the reasonable needs of society, a duty to rescue another person involving little or no

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44. *See, e.g.*, Henderson, *supra* note 41, at 928 ("[E]ven without a legal duty most persons will help others in distress whenever they can do so at little cost to themselves.").

45. A key distinction in this context is between perfect and imperfect duties. Traditionally, duties of aid and rescue have been seen as more akin to duties of beneficence than to negative duties against harm. *See, e.g.*, Thomas E. Hill, Jr., *Kant on Imperfect Duty and Supererogation*, 62 KANT-STUDIEN 55, 60 n.17 (1971) (theorizing that the duty to promote the happiness of others is an imperfect duty). The former are *imperfect duties*, rather than perfect duties not to harm. *Id.* It is, all else equal, good for me to help you, to give charity, etc., but I am under no obligation to do so always to the complete extent possible. *Id.* at 56 ("[I]mperfect duty can be expressed in the form 'One ought to do (or avoid) x sometimes, to some extent.'"). Such acts of aid are also sometimes considered supererogatory, that is, acts that do more than morally or legally required. *See id.* at 71–76.

46. *See* JOHN STUART MILL, ON LIBERTY 13 (Simon & Brown 2011) (1859) ("To make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception.").

47. Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 278 (1983).

inconvenience to the rescuer should be viewed as advancing such goals.[48] In his earlier work, Ernest Weinrib also argues for a duty to rescue.[49] Weinrib posits that the law should reflect moral norms, and that "the role of the common-law judge centrally involves making moral duties into legal ones."[50] Weinrib grounds the duty in a Kantian or deontological account of the moral duty of beneficence.[51] He suggests that the duty should fall with an individual well-positioned to provide aid, given that in times of actual danger the "peril cannot await assistance from the appropriate social institutions."[52]

Still rooted in the common law tradition, Robert Lipkin has argued that a duty of easy rescue can be embedded in self-interested individualism.[53] Lipkin relies on the harm principle,[54] which suggests that individuals in society "give[] up [their] unbridled 'right to every thing' in exchange for the assurance that [they] will be free to realize [their] life plans, as long as these plans do not interfere with the life plans of others."[55] He argues that while requiring individuals to put themselves at risk would severely restrict their autonomy and self-interest, a duty of easy rescue is perfectly reconcilable with both individualism and the

48. *See, e.g.*, James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111–13 (1908) (arguing that a legal duty to rescue would be beneficial and workable).

49. Weinrib, *The Case for a Duty to Rescue*, *supra* note 40.

50. *Id.* at 263.

51. *Id.* at 287–92. Yet, as Weinrib recognizes, a duty like that would be difficult to determine regarding the extent of the actions required and "the linking of particular benefactors to particular beneficiaries." *Id.* at 291. Therefore, Weinrib argues, "[w]hat is required is to set up social institutions to perform the necessary tasks of coordination and determination." *Id.*; *see also* Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 891 (1976) (exploring the philosophical and theoretical bases for a legal duty to aid others through a state-organized system of wealth distribution).

52. Weinrib, *The Case for a Duty to Rescue*, *supra* note 40, at 292. While such a duty may require the rescuer to suffer major inconvenience, it should not involve physical danger or significant interference with the rescuer's life. *Id.* at 290.

53. Lipkin, *supra* note 47, at 278 (suggesting that this argument requires an inquiry into the political and theoretical foundations of individualism).

54. The principle forbids physically injuring another's person or property and prohibits interfering with another's interests. *Id.* at 279. For more on the harm principle, see JOEL FEINBERG, SOCIAL PHILOSOPHY 26–31 (1973).

55. Lipkin, *supra* note 47, at 279 (footnotes omitted).

harm principle.[56] The reason is that an easy rescue only requires minimal risk, and yet confers on individuals the reassuring knowledge that they will be entitled to rescue if needed:[57] "A person should accept the principle of easy rescue because it enhances his liberty; he should accept this principle because it is in his rational self-interest to do so."[58]

In contrast, Steven Heyman relies on the relationship between public law and private law to support his argument in favor of a duty to rescue.[59] Building on Locke's theory of natural rights and the social contract theory, Heyman argues that there is a philosophical justification for a duty owed by individual members of society to prevent violence.[60] Such a social duty is owed "not only to the community as a whole but also to [their] fellow citizens."[61] As a result, there are parallel public law and private law obligations to rescue others in danger, the latter giving rise to individual rights enforceable within private law.[62] Heyman thus labels his account of the case for a duty to rescue "a liberal-communitarian theory."[63]

Taking the role of the community a step forward, and embedding her proposal within a larger critique of the traditional individualistic nature of tort law, Leslie Bender offers a more radical shift to justify changing the no-duty rule.[64] Per Bender,

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56. *Id.* at 287–88.

57. *Id.* at 289–90 (explaining that these are in fact two separate benefits: first, increasing the chances of being rescued, and second, the knowledge that someone will come to their rescue should they need such assistance).

58. *Id.* at 291 (footnote omitted).

59. *See* Heyman, *supra* note 30, at 682–90 (providing a theoretical basis for a private social duty owed not only to the community but to its individual members).

60. *Id.* at 679.

61. *Id.* at 679–80.

62. *Id.* at 680 ("[F]or Hegel, these obligations run not only to the community itself but also to one's fellow citizens . . . ."). Hegel's thought, Heyman argues, supports the duty to rescue as a matter of both tort and criminal law. *Id.*

63. *Id.* at 681 ("It is communitarian in that it finds the justification for such a duty in the individual's responsibility toward the community and in her relationship with other individuals as members of the community. It is liberal in emphasizing that one of the community's paramount obligations is to protect the rights and promote the welfare of the individuals that compose it.").

64. *See generally* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988). According to Bender, the traditional approach to tort law tends to "view accidents and tragedies abstractly, removed from their

one needs to rely on an alternative conception of human nature which involves responsibility towards others:[65] "The recognition that we are all interdependent and connected . . . should lead us to judge conduct as tortious when it does not evidence responsible care or concern for another's safety, welfare, or health."[66] Bender therefore suggests that the no-duty rule should be set aside, because it sacrifices others to "liberalism's concerns for autonomy and liberty."[67] Instead, we should adopt a duty to exercise the "conscious care and concern of a responsible neighbor or social acquaintance,"[68] which would result in a duty to provide aid within the individual's capacity.[69] Bender calls for the acknowledgement that the person in distress is not detached from others; they have relationships, people who care about them, and roles within various groups.[70] Thus, rather than grounded in liberalist self-interest or in public law notions, Bender's legal duty to rescue is prompted by "a feminist ethic based upon notions of caring, responsibility, interconnectedness,

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social and particularized contexts, and to apply instead rationally-derived universal principles and a vision of human nature as atomistic, self-interested, and as free from constraint as possible." *Id.* at 33.

65. *Id.* at 32; *see* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 35 (1982) (noting that people often experience a conflict between responsibility to others and a responsibility to self). Relatedly, Cristina Tilley has argued that "modern Americans may . . . [owe] a duty to imagine the dignitary impact of their conduct on fellow participants in the national community." Cristina Tilley, Living as One: Tort Law and a Duty to Imagine 1 (Apr. 2024) (unpublished manuscript) (on file with the Minnesota Law Review).

66. Bender, *supra* note 64, at 31.

67. *Id.*

68. *Id.*

69. *Id.* at 31–36. For a feminist critique of Bender's view, see Linda C. McClain, "*Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1238–42 (1992) (suggesting instead a defense of legal liberalism's core values and analysis). *See also* Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369, 372 (1992) ("Bender's goals in restructuring negligence law could have been furthered more effectively by introducing Judeo-Christian values into her feminism.").

70. Bender, *supra* note 64, at 34–35.

and cooperation."[71] Bender argues that such interconnectedness applies even between strangers, as fellow humans.[72]

The no-duty rule has also been grounded in a sharp distinction between moral and legal duties.[73] While a discussion regarding the extent to which the legal should track the moral far exceeds the scope of this Article,[74] a quick response is inevitable. Indeed, a moral duty to rescue another in danger—at least when rescue endangers neither the rescuer nor others—is taken for granted by most moral philosophers.[75] Though I agree as a preliminary matter that the law does not function to maintain the entire fabric of morality, the existence of a moral duty to rescue does not necessarily mean the *absence* of a legal duty.[76]

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71. *Id.* at 34. Bender further notes, "[w]hy should our autonomy or freedom not to rescue weigh more heavily in law than a stranger's harms and the consequent harms to people with whom she is interconnected?" *Id.* at 35.

72. *Id.* at 34 ("In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action."). Indeed, the women in the "Are We Dating the Same Guy?" Facebook groups noted above are essentially embodying the feminist ethic that Bender speaks to. *See supra* notes 1–6 and accompanying text; Lavinia, *supra* note 1 (explaining that women post on these websites to warn other women about dangerous men). However, this notion of interconnectedness between strangers has been criticized, even by those supporting a duty to rescue on other grounds. *See* Heyman, *supra* note 30, at 744–45 ("If interconnectedness is conceived of in terms of concrete social relationships, it can provide the basis for affirmative duties within special relationships, but not between strangers. If [Bender] wishes to establish a general duty to rescue, on the other hand, she must rely on an abstract conception of interconnectedness that is not rooted in any concrete relationship or community."). Heyman purports to resolve this dilemma by treating individuals who belong to the same society as fellow citizens rather than strangers. *Id.*

73. *See, e.g.*, Ripstein, *supra* note 37, at 752 (explaining that many people find that there is a moral duty to rescue, but struggle with whether there should be a legal duty).

74. For a fascinating effort to make sense of this relationship, see SCOTT HERSHOVITZ, LAW IS A MORAL PRACTICE 1–43 (2023) (arguing that law is a part of our moral lives and a tool we use to adjust our moral relationships).

75. *See, e.g.*, Helen Frowe, *Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley*, 68 PHIL. Q. 460, 460 (2018) ("Ordinarily, an agent is under a duty to rescue unless doing so imposes too great a cost on her, or violates someone else's rights.").

76. *See* Soldano v. O'Daniels, 190 Cal. Rptr. 3d 310, 313 (Cal. Ct. App. 1983) (explaining that moral and ethical convictions that become "settled convictions . . . do in time color the judicial conception of legal obligation"). The court noted that the common law also tends to change, with new torts often recognized. *Id.* at 317–18.

As John Goldberg and Ben Zipursky argue, legal duties are mostly taken from "social norms of safe conduct."[77] In their words: "In different settings and situations, with respect to different sorts of interactions, individuals conceive of themselves as occupying different sorts of normative space governed by different norms of responsibility that impose different sorts of demands or expectations of them."[78] By this view, not only does the existence of a moral duty not mean the absence of a legal duty, but rather legal duties are often founded on moral ones.

Thus, a variety of legal theorists agree that the law should at the very least enforce a duty of easy rescue, be it from a liberalist, public law, or feminist perspective.[79] Moreover, European countries have long adopted a duty to rescue, proving its potential administrability.[80] As one example, German courts have consistently enforced a duty to rescue,[81] adopting a reasonableness standard to determine which actions were required under the circumstances.[82]

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77. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 608 (2005); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 392 (2005) (describing social norms as "obligations already recognized in familiar forms of social interaction").

78. Goldberg & Zipursky, *supra* note 77, at 392. *See generally* Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 546–47 (2013) (discussing the social norms component of civil recourse theory).

79. Thus, while this Article advocates for a duty to warn, a rescue might be more appropriate in some scenarios, e.g., where the victim is already in a dangerous situation and the bystander is in a position to extricate them from the situation.

80. *See* Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 685 (2002) ("It is hard to believe that civil-law countries would have persisted in maintaining a duty to rescue if the rule was unadministrable.").

81. The German law asserts that one "who does not provide help in the event of an accident, common danger, or emergency . . . without significant personal risk and without violating other important obligations, shall be punished with imprisonment for up to one year or with a fine." Strafgesetzbuch [StGB] [Penal Code], § 323c, para. 1, https://www.gesetze-im-internet.de/stgb/__323c.html [https://perma.cc/EH9F-533E].

82. *Unterlassene Hilfeleistung nach § 323c Abs. 1 StGB bei in Seenot geratenen Personen [Failure to Assist in Accordance with Section 323c Paragraph 1 StGB for People in Distress at Sea]*, DEUTSCHER BUNDESTAG (Oct. 9, 2018), https://www.bundestag.de/resource/blob/583048/cc52960b90789fa8a11f69586713539c/WD-7-221-18-pdf.pdf [https://perma.cc/K4KZ-JHEV].

And yet the common law's no-duty rule persists, subject only to the exceptions described below. This gap between the no-duty rule and the sharp critiques levelled against it should push us to reconsider the rule's existing confines, at least regarding a duty to warn.

II. THE DUTY TO WARN: DOCTRINAL ORIGINS AND EVOLUTION

With these theoretical arguments in mind, this Part discusses the doctrinal background necessary for the Article's argument in support of an informed bystander's duty to warn. I begin with the doctrinal origins of the no-duty rule and the main exceptions to it. Next, I describe the seminal *Tarasoff* case and its application in later caselaw, offering an analysis of the post-*Tarasoff* duty to warn.

A. THE "NO DUTY TO ACT" RULE: ORIGINS AND EXCEPTIONS

As noted, according to the longstanding common law no-duty rule, bystanders do not have a legal duty to rescue strangers who are facing danger.[83] Despite critiques made against the rule over the years,[84] it generally persists,[85] with courts justifying the rule based on two distinctions: between moral and legal duties, and between positive acts and a failure

83. *See, e.g.*, Fultz v. Union-Commerce Assocs., 683 N.W.2d 587, 591 (Mich. 2004) ("[A]s a general rule, there is no duty that obligates one person to aid or protect another." (quoting Williams v. Cunningham Drug Stores, Inc., 418 N.W.2d 381, 383 (Mich. 1988))); Parra v. Tarasco, Inc., 595 N.E.2d 1186, 1187 (Ill. App. Ct. 1992) ("The common law recognizes no general duty to aid a person in peril."); Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) ("Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no cost to the rescuer.").

84. *See supra* Part I.B; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 341 (4th ed. 1971) ("[D]ecisions [which affirm the no duty to act rule] are revolting to any moral sense. They have been denounced with vigor by legal writers.").

85. *See* Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 316 (1997) ("In the face of continuous academic attacks, one body of tort law has survived this century, at least superficially, intact—the duty (or lack thereof) to rescue. Today, it is commonly understood that there is no general, nonstatutory duty to rescue another in peril, not even a minimal duty that could be discharged by a riskless warning, absent a special relationship." (footnotes omitted)).

to act (or, misfeasance and nonfeasance).[86] One famous case involved a boy whose hand was injured while visiting the defendant's mill where the boy's older brother worked.[87] A manager at the mill had asked the boy to leave, yet, not knowing any English, he remained on site.[88] The boy sued in negligence, arguing the mill should have removed him.[89] The court found for the mill, noting that the defendant did not commit any "intentional or negligent acts of personal violence."[90] Explaining its decision based on a distinction between the moral and the legal, the court said:

> With purely moral obligations the law does not deal. . . . Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, . . . he is not liable in damages.[91]

Courts have also relied on the distinction between misfeasance and nonfeasance to justify the rule, only recognizing a legal duty in the former.[92] Courts tend to justify this distinction

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86. The moral versus legal distinction reflects a longstanding debate in legal theory regarding the nature of law. *See supra* Part I.B.

87. Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1898).

88. *Id.* at 810.

89. *Id.*

90. *Id.*

91. *Id.* A similar distinction was recognized by other early twentieth century courts. *See, e.g.*, Union Pac. Ry. Co. v. Cappier, 72 P. 281, 283 (Kan. 1903) (declining to impose a duty on railroad workers to aid a man struck by a freight car, noting the risks where instead of enforcing the law, courts would rely on "varying ideas of morals which the changing incumbents of the bench might from time to time entertain"); Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928) (holding that renting a canoe to an intoxicated man who then drowned did not constitute a violation of a legal duty), *overruled by* Pridgen v. Bos. Hous. Auth., 308 N.E.2d 467, 477 (Mass. 1974). Both holdings would be less likely today given business-invitee relationships, as well as control over the instrumentality causing the harm. For a later example, see Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) ("The mere fact that Bigan saw [the decedent] in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue . . . .").

92. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984). Scholars often cite this distinction as justifying the lack of a positive duty to aid. *See id.* at 375 (noting that the no-duty rule originates from a "reluctance to countenance 'nonfeasance' as a basis of liability").

not only in historic terms,[93] but also substantively, grounding it in the difference between actively causing an injury and passively failing to prevent one.[94]

However, the no-duty rule has been significantly relaxed over the years, with courts and the Restatement recognizing several exceptions to the rule based on "custom, public sentiment and views of social policy."[95] The main exceptions include duties based on: (1) a special relationship with the victim; (2) a special relationship with the perpetrator; (3) an innocent creation of the risk; (4) gratuitous services; and (5) statutory provisions.[96]

Exceptions (1) and (2) relate to special relationships.[97] A duty can arise when a defendant has a special responsibility towards the victim-plaintiff, as is the case with common carriers, business owners, legal custodians, and teachers.[98] In each of

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93. *See* Williams v. Cunningham Drug Stores, Inc., 418 N.W.2d 381, 382–83 (Mich. 1988) ("The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff.").

94. *See Buch*, 44 A. at 811 ("There is a wide difference . . . both in reason and in law, between causing and preventing an injury; between doing, by negligence or otherwise, a wrong to one's neighbor, and preventing him from injuring himself . . . .").

95. KEETON ET AL., *supra* note 92, at 374; *see also* State v. Miranda, 715 A.2d 680, 687 (Conn. 1998) (noting four general scenarios in which there might be a legal duty to aid: "(1) where one stands in a certain relationship to another; (2) where a statute imposes a duty to help another; (3) where one has assumed a contractual duty; and (4) where one voluntarily has assumed the care of another"), *rev'd on other grounds*, 864 A.2d 680 (Conn. 2004).

96. *See* JOSEPH W. GLANNON, THE LAW OF TORTS 277–82 (6th ed. 2020). Others have characterized the exceptions in a slightly different manner, adding, for example, an exception for contractual obligations to rescue. *See* Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 426 (1985) (noting various contractual obligations to rescue, including those of lifeguards and nurses).

97. Even Bohlen acknowledges a positive duty of care which arises in certain relationships. *See supra* notes 31–32 and accompanying text; Bohlen, *supra* note 32, at 221.

98. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2012) ("An actor in a special relationship with another owes a duty of reasonable care with regard to risks that arise within the scope of the relationship."); 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, 360 (1999) (collecting recognized exceptions to the no-duty to rescue rule

these situations, the defendant is not the source of the conduct which produced the injury. For example, a train conductor who saw a passenger being attacked by another but did not come to the victim's rescue did not personally inflict harm on the victim.[99] Nevertheless, given the conductor's special relationship with the victim, courts may (and indeed do) impose a duty on the conductor to take affirmative steps to mitigate or avoid the harm.[100] A duty can also arise from a special relationship with the perpetrator of the harm.[101] Examples include the duty of parents regarding their children and of employers with respect to their employees.[102] The Restatement imposes a similar duty on one who takes charge of another with "dangerous propensities."[103] This exception was applied primarily to those in control of mental patients or prisoners, reflecting courts' perception that defendants who take charge of persons who pose a risk of injury to others accept a duty of care towards their victims.[104] An employer's duty to prevent injuries by her employee is explained through the benefit the employer derives from the employee's work.[105] But a key justification across these situations is also the defendant being uniquely positioned to prevent the harm.[106]

The innocent creation of the risk exception refers to situations in which, absent any fault, the defendant's conduct harmed or put someone else in danger.[107] For example, a duty was

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relating to special relationships with the plaintiff). This list is not exclusive, and courts continue to expand it. *See* RESTATEMENT (SECOND) OF TORTS §§ 314A–314B (AM. L. INST. 1965) (listing relationships where duties arise and defining those duties); *id.* § 314A cmt. b ("The relations listed are not intended to be exclusive . . . . The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or mutual dependence.").

99. GLANNON, *supra* note 96, at 278.

100. *Id.*

101. *Id.*

102. RESTATEMENT (SECOND) OF TORTS §§ 316–317 (AM. L. INST. 1965).

103. *Id.* § 319; a*ccord* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2012) ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.").

104. GLANNON, *supra* note 96, at 279.

105. *Id.* at 278.

106. *Id.* at 279.

107. *See* RESTATEMENT (SECOND) OF TORTS §§ 321–322 (AM. L. INST. 1965); KEETON ET AL., *supra* note 92, at 379; *see also* RESTATEMENT (THIRD) OF TORTS:

imposed on a non-negligent defendant when a child's hand was injured by the defendant's escalator.[108] The rationale is likely grounded in knowledge of the risk, which puts the defendant in a better position to reduce or remedy it, "simply requiring [a person] to minimize the consequences of risks which society gives him a privilege to create."[109] The fourth exception relates to offering gratuitous services; when the defendant, though under no initial duty to do so, undertakes to aid another person but then fails to follow through.[110] Here, the basis for the exception is that the actor, while morally virtuous, still gave rise to the risk by providing incomplete assistance to the victim, and the victim should not be left to bear the consequences.[111] Finally, state legislatures create exceptions to the no-duty rule, including a duty to report crimes or rescue another in danger.[112] These statutes

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LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 39 (AM. L. INST. 2012). Interestingly, this duty was not recognized in the RESTATEMENT (FIRST) OF TORTS, which limited the duty to persons "made helpless by tortious conduct." RESTATEMENT (FIRST) OF TORTS § 324 (AM. L. INST. 1934).

108. L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942) (noting the escalator was an instrumentality controlled by the defendant). *But see* McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1560 (7th Cir. 1987) (affirming a judgment of no liability against a hotel for failing to protect a guest from attack by a third party).

109. Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 NW. L. REV. 778, 804 (1953).

110. RESTATEMENT (SECOND) OF TORTS § 324 (AM. L. INST. 1965). A common example is a bystander who goes to the assistance of a pedestrian hit by a car, but in so doing negligently causes her further injury. GLANNON, *supra* note 96, at 280.

111. For an exploration of this exception, see Dov Waisman, *Making Things Worse, Failing to Make Things Better*, FLA. L. REV. (forthcoming 2024) (manuscript at 1) (on file with the Minnesota Law Review) (arguing that "[n]egligent conduct that does not increase the risk to another person" should result in liability only where "a volunteer rescuer engages in bad-faith misconduct after taking charge of" the person in danger).

112. Twenty-nine states—not including New York, which has a different regime—require bystanders to alert the police of a person in danger or even assist if this does not involve risk to the rescuer. Only two of these states—Vermont and Rhode Island—demand bystanders' physical intervention through "reasonable assistance." For a database containing these statutes, see *Bad Samaritan Laws*, ZACHARY D. KAUFMAN (Sept. 2, 2024), https://www.zacharykaufman.com/projects/bad-samaritan-laws [https://perma.cc/DCR3-DWXA]. *See also* Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1335–36 (2018) (exploring the statutory duties that witnesses of criminal offenses have toward victims); Heyman, *supra* note 30, at 689 n.66 (citing eight states—Florida, Massachusetts, Ohio, Rhode

typically require reasonable assistance and only apply when intervening does not endanger the actor.[113]

B. *TARASOFF* AND THE DUTY TO WARN

One of the most well-known—and controversial—cases establishing an affirmative duty of care is *Tarasoff v. Regents of the University of California*.[114] Prosenjit Poddar, a University of California, Berkeley graduate student, shared with his therapist, Dr. Lawrence Moore, a clinical psychologist at the University's student health center, that he wished to kill a woman "readily identifiable" as Tatiana Tarasoff.[115] After being committed to a mental hospital and taken into custody by the campus police, Poddar was released, and later murdered Ms. Tarasoff.[116]

Island, Washington, Wisconsin, Minnesota, and Vermont—in which either failure to rescue or to report, or both, are misdemeanors; Colorado establishes a duty to report crimes but does not penalize violations). These statutes differ from "Good Samaritan" statutes which limit the liability imposed on bystanders who assist strangers in an emergency. *See* Silver, *supra* note 96, at 428 ("[T]hese statutes reduce the standard of care . . . imposing liability only for gross negligence or bad faith."). Mandated reporting laws, requiring health professionals to report child abuse, have been adopted by all fifty states, as well as on the federal level. *See generally* Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. ONLINE: TOLLE LEGE 37 (2013); Child Abuse Prevention and Treatment Act of 1974 (CAPTA), 42 U.S.C. §§ 5101–5116i.

113. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519(a) (2024) (effective Mar. 22, 1968).

114. Tarasoff v. Regents of the Univ. of Cal. (*Tarasoff II*), 551 P.2d 334 (Cal. 1976). The 1976 decision is a rehearing of the 1974 case, *Tarasoff v. Regents of the Univ. of Cal.* (*Tarasoff I*), 529 P.2d 553 (Cal. 1974).

115. *Tarasoff II*, 551 P.2d at 342. Dr. Moore diagnosed Poddar as a potentially dangerous paranoid schizophrenic, primarily because of his pathological attachment to Ms. Tarasoff. People v. Poddar, 518 P.2d 342, 344 (Cal. 1974). The relationship between the two started a year earlier when they took a folk dancing class at the University's international house. *Id.* They became friends and later kissed on New Year's Eve of 1968. *Id.* Later, though, Tarasoff rejected Poddar's romantic pursuits, and he grew increasingly distressed, which led him to seek Dr. Moore's care. *Id.* During the ninth therapy session, Poddar confided in Dr. Moore that he was going to kill Tarasoff when she returned from a vacation in Brazil. *Tarasoff II*, 551 P.2d at 341.

116. Dr. Moore notified the campus police of Poddar's intentions and mentioned that, in his view, Poddar should be civilly committed. *Id.* The police released Poddar soon after taking him into custody, judging him to be rational and not harmful, and after he promised to stay away from Tarasoff. *Id.* Dr. Moore's request for civil commitment was denied. *Id.* Poddar never returned to

Tarasoff's parents sued the University, the therapists who treated Poddar, and the police, claiming that they acted negligently either by failing to commit Poddar or by failing to warn them and their daughter of the danger posed by Poddar.[117] In a 5-2 decision, the California Supreme Court found that the psychotherapists had an affirmative duty to warn Tarasoff of the threat Poddar posed:[118]

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require . . . to warn the intended victim or others likely to apprise the victim of the danger, to notify the police or take whatever other steps are reasonably necessary under the circumstances.[119]

According to the *Tarasoff* court, existing duties under California law had already established a hospital's need to take reasonable care to protect third-parties from a patient exhibiting behavior that might endanger others,[120] as well as a doctor's requirement to warn patients when their own conduct—such as driving—might pose a risk to others.[121] Furthermore, prior to *Tarasoff*, the court had held that doctors must take reasonable care to protect others from peril resulting from their patients' illness.[122] The court did acknowledge the challenge that mental health professionals may encounter in attempting to predict a

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therapy nor was further restrained. On October 27, 1969, Poddar entered Tarasoff's home, shot her with a pellet gun, and fatally stabbed her with a kitchen knife. He then immediately turned himself in. *Poddar*, 518 P.2d at 345.

117. *Tarasoff II*, 551 P.2d at 341.

118. *Tarasoff I*, 529 P.2d at 561. The dissent urged against violating the psychotherapist-patient privilege by requiring disclosure of information learned during therapy. *Id.* at 565–66. Because the mental health community was extremely concerned about *Tarasoff I*, it sought to have the case reheard. *See* Brief of Amici Curiae in Support of Petition for Rehearing at 14–15, Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974) (S.F. No. 23042) [hereinafter *Tarasoff* Amici Brief] (asserting that the duty imposed by the court's decision in *Tarasoff I* would "require therapists to make premature judgments attempting to sort" patients' credible intentions from fantasies, and create a breach in patient-therapist trust). The court did not note why it was rehearing *Tarasoff I*, but it slightly modified its decision regarding the therapists' responsibility and released the police from responsibility. *Tarasoff II*, 551 P.2d at 349.

119. *Tarasoff II*, 551 P.2d 334, at 340.

120. *Id.* at 342–43.

121. *Id.* at 343–44.

122. *Id.*

patient's violent tendencies.[123] Thus, while there was no absolute duty to warn, the court held that therapists must use "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances" in order to predict patients' violence.[124] Finally, the defendants argued that a duty to warn might chill the open communication needed for a successful psychotherapeutic process.[125] However, weighing the public interest in safety from violent assault against a patient's confidentiality interests, the court stated: "The protective privilege ends where the public peril begins."[126] The court found that the therapist's relationship to a dangerous patient gave rise to a duty to warn the patient's intended victim that the patient had threatened to kill her.[127] However, the decision leaves open several key questions, including: what to do when violence is difficult to predict;[128] whether

123. *Id.* at 345.

124. *Id.* (alteration in original) (quoting Bardessono v. Michels, 478 P.2d 480, 484 (Cal. 1970)).

125. *Id.* at 346. The American Psychiatric Association urged the court to consider the chilling effect a duty to warn might have on potentially dangerous individuals, who might avoid seeking therapy. *Id.* at 346 n.12.

126. *Id.* at 347. In 1985, California codified the *Tarasoff* rule in the state's civil code. Act of Sept. 17, 1985, ch. 737, 1985 Cal. Stat. 2394 (codified at CAL. CIV. CODE § 43.92 (West 2024)). It states that a psychotherapist has a duty to protect "if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." CAL. CIV. CODE § 43.92(a) (West 2024). Psychotherapists can discharge this duty by making reasonable efforts to communicate the threat to the victim and to law enforcement. *Id.* § 43.92(b).

127. *Tarasoff II*, 551 P.2d 334, 343–44.

128. *See* J. Monahan, *Clinical and Actuarial Predictions of Violence*, *in* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 300, 316–17 (D. Faigman et al. eds 1997) (noting clinicians' "modest, better-than-chance level of accuracy" in predicting violent behavior, but also acknowledging that "no one claims that mental disorder *per se* is a dominating risk factor for the occurrence of violence, or that clinical predictions are anywhere near perfection"). Because in *Tarasoff* the patient was known to be dangerous, professionals worried that courts will be willing to say violence can be accurately predicted. *See Tarasoff* Amici Brief*, supra* note 118, at 5–6 (arguing that given the unpredictable nature of violent behavior, the duty to warn "places the psychotherapist on the horns of an impossible dilemma"—either underreporting and violating the duty, or overreporting and violating patient confidentiality). Courts have acknowledged this concern when determining whether sufficient danger exists to create a duty to warn, applying a standard of reasonableness, relative to generally accepted practice within the profession. *See, e.g.*, Menendez

there is also a duty to *protect*;[129] and the class to whom the duty is owed where the victim is not readily identifiable.[130]

Thus, while *Tarasoff* seems grounded in the special relationship between a mental health professional and a patient, it is harder to assess its deeper theoretical roots. The court's decision might turn on the responsibility to *control* a patient's actions or on the *reliable information* the patient provides, indicating they are likely to pose a danger to others. As I argue below, the distinction is significant if we seek to expand *Tarasoff* beyond health professionals.

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v. Superior Ct. of L.A., 834 P.2d 786, 795 (Cal. 1992) ("'[R]easonable cause to believe' [that a patient is dangerous] must be determined in light of the standards of the psychotherapeutic community. . . . [A]llow[ing] broad discretion to the individual psychotherapist."); White v. United States, 780 F.2d 97, 101–02 (D.C. Cir. 1986) (requiring ordinary, reasonable knowledge, care, and skill in determining the danger posed by a patient). To make the rules regarding dangerousness clearer, several states, including California, have created statutory limits on the duty to extend only to situations in which the patient poses "serious threat of physical violence against a reasonably identifiable victim." *See* ANNE DAILEY, LAW AND THE UNCONSCIOUS 158–76 (2017) (discussing these rules). Dailey notes that the struggle to let go of the *Tarasoff* rule perhaps reflects a "shared fantasy about predictive powers of professionals in our lives." *Id.* at 175.

129. *See* Currie v. United States, 644 F. Supp. 1074, 1081–83 (M.D.N.C. 1986) (weighing the policy implications in favor and against psychotherapist liability for failure to control dangerous patients); Estates of Morgan v. Fairfield Fam. Counseling Ctr., 673 N.E.2d 1311, 1325 (Ohio 1997) (noting that there is no reliable statistical evidence showing undue confinement resulting from imposing a duty to protect). There are also alternatives to retaining custody or committing. *See* Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984) (limiting protection of a psychiatrist's discretion to return weapons to a patient diagnosed with paranoid schizophrenia who was obsessed with weapons).

130. Some courts have resisted extending the duty beyond risk to a specific victim. *See* Thompson v. Cnty. of Alameda, 614 P.2d 728, 728 (Cal. 1980) (holding that no duty of care existed where the threat was generalized—a known desire to kill a young child—rather than to a known, identifiable victim); Rousey v. United States, 115 F.3d 394, 399 (6th Cir. 1997) (holding that a duty to warn requires victims to be identified); Leonard v. State, 491 N.W.2d 508, 512 (Iowa 1992) (holding that a psychiatrist does not owe a duty to members of the general public when discharging a patient). An uncertainty about the class could pose a challenge to conveying the warning message. The *Thompson* court noted that it would be difficult to provide generalized warnings and, if frequently repeated, warnings would do little to increase safety. *Thompson*, 614 P.2d at 736.

C. THE DUTY TO WARN POST-*TARASOFF*

Having reviewed the decision in *Tarasoff*, its rationales, and the questions it leaves open, I now turn to surveying the developments regarding the duty to warn since *Tarasoff* was decided, almost fifty years ago. This Section outlines the duty's current doctrinal limits by addressing several categories of cases. The first category discusses the most natural application of *Tarasoff*—to other scenarios involving medical and mental health professionals. The second seeks to apply the duty to non-medical professionals, including attorneys and the clergy, who similarly may have access to confidential information regarding dangers to third parties. Here, courts have generally resisted a duty to warn. Finally, the third category goes beyond the individual professional to organizations in special positions involving responsibility towards victims, control over perpetrators, access to information or some combination of all three, with considerable variation in the application of the duty.

1. Health Professionals

Tarasoff generated significant concern among health professionals.[131] In particular, therapists worried about disclosing confidential patients' communications which would disrupt the therapist-patient relationship and prevent effective treatment.[132] Moreover, psychotherapists expressed concerns about determination of patient dangerousness as a basis for liability

131. Mental health professionals are often familiar with the case. Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, WIS. L. REV. 443, 443 (1984) ("*Tarasoff* is well known to therapists and a majority, even outside of California, believe it governs their professions.").

132. Leslie B. Small, *Psychotherapists' Duty to Warn: Ten Years After* Tarasoff, 15 GOLDEN GATE U. L. REV. 271, 272 (1985); Alan A. Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 359 (1976); Tony Pryor Wise, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165, 166 (1978); Jerome S. Beigler, Tarasoff *v. Confidentiality*, 2 BEHAV. SCIS. & L. 273, 277 (1984); Howard Gurevitz, Tarasoff*: Protective Privilege Versus Public Peril*, 134 AM. J. PSYCHIATRY 289, 291 (1977); Loren H. Roth & Alan Meisel, *Dangerousness, Confidentiality, and the Duty to Warn*, 134 AM. J. PSYCHIATRY 508, 508 (1977); *see also* Elisia Klinka, Note, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 FORDHAM L. REV. 863, 869 (2009) (arguing that when psychotherapists advise patients of their duty to warn, the threats such patients make cannot be considered privileged).

when such predictions are far from accurate or consistent,[133] as well as further expansions of the duty to warn.[134]

But courts and lawmakers seemed less concerned. In the wake of *Tarasoff*, many states embedded variations of the duty to warn into their caselaw or statutes,[135] at least with respect to medical professionals: "The vast majority of courts that . . . considered the issue . . . accepted the Tarasoff analysis."[136] For example, courts in Michigan, Vermont and New Jersey specifically adopted rules that closely track the *Tarasoff* duty, creating a duty to warn owed by mental health professionals to their violent

133. Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1098–101 (1976); Harold Birns & Jane S. Levien, *Dangerousness: Legal Determinations and Clinical Speculations*, 52 PSYCHIATRIC Q. 108, 108 (1980); Henry J. Steadman, *The Right Not to be a False Positive: Problems in the Application of the Dangerousness Standard*, 52 PSYCHIATRIC Q. 84, 96 (1980) ("Nowhere in the research literature is there any documentation that clinicians can predict dangerous behavior beyond the level of chance."); *see also* Robert M. Wettstein, *The Prediction of Violent Behavior and the Duty to Protect Third Parties*, 2 BEHAV. SCIS. & L. 291, 297–307 (1984) (reviewing research studying the accuracy of predictions of mental health patient dangerousness).

134. *See* Mark J. Mills, *The So-Called Duty to Warn: The Psychotherapeutic Duty to Protect Third Parties from Patients' Violent Acts*, 2 BEHAV. SCIS. & L. 237, 239 (1984) (noting the expansion from a duty to warn to a duty to protect, and certain jurisdictions' extension of this duty to unspecified classes of victims, rather than known individuals); Stuart A. Anfang & Paul S. Appelbaum, *Twenty Years After* Tarasoff*: Reviewing the Duty to Protect*, 4 HARV. REV. PSYCHIATRY 67, 67 (1996) (noting the frustration, confusion, and fear of litigation this uncertain legal terrain has generated); Alan R. Felthous, *The Clinician's Duty to Protect Third Parties*, 22 PSYCHIATRIC CLINICS N. AM. 49, 49 (1999) (describing clinician's duty to protect third parties as "exceedingly complex").

135. Allison L. Almason, Comment, *Personal Liability Implications of the Duty to Warn Are Hard Pills to Swallow: From* Tarasoff *to* Hutchinson v. Patel *and Beyond*, 13 J. CONTEMP. HEALTH L. & POL'Y 471, 477–82 (1997) (surveying the development of the *Tarasoff* doctrine in caselaw and statutes addressing the duty to protect); *see* Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 751–59 (1995) (collecting cases and scholarly articles on the scope of the duty to warn across jurisdictions); Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 98 (1994) (finding that most jurisdictions have accepted the *Tarasoff* doctrine). At times, the duty has been articulated in both a statute and caselaw. *See e.g.*, Bradley v. Ray, 904 S.W.2d 302, 307–08 (Mo. Ct. App. 1995) ("A *Tarasoff*-type duty has been adopted in 23 states, in addition to California, either as a result of judicial decision, legislation, *or both*." (emphasis added)).

136. Currie v. United States, 644 F. Supp. 1074, 1078 (M.D.N.C. 1986).

patients' readily identifiable victims.[137] Connecticut and Delaware have taken the duty a step further, extending it to situations where classes of potential victims are identifiable.[138] Other states, such as North Carolina and Wisconsin, have extended the scope of the duty to refer to any foreseeable victim, even in the absence of a specific threat to that victim.[139]

Moreover, the duty to warn was applied in some jurisdictions to medical professionals acting in other contexts, particularly infectious diseases.[140] Doctors' duty to prevent the spread

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137. *See* Bardoni v. Kim, 390 N.W.2d 218, 218 (Mich. Ct. App. 1986) (finding a duty to warn an identifiable victim); Peck v. Counseling Serv. of Addison Cnty., 499 A.2d 422, 426 (Vt. 1985); McIntosh v. Milano, 403 A.2d 500, 500 (N.J. 1979). In New Jersey, the duty was also codified in a statute. N.J. STAT. ANN. § 2A:62A-16 (West 2024).

138. *See* Almonte v. N.Y. Med. Coll., 851 F. Supp. 34, 41 (D. Conn. 1994) (holding that there may be a duty to warn a particular class of victims); Naidu v. Laird, 539 A.2d 1064, 1073 (Del. 1988) (finding a duty to warn the general public).

139. *See Currie*, 644 F. Supp. at 1079 (finding a duty where the victim falls within the "foreseeable victims" rule); Schuster v. Altenberg, 424 N.W.2d 159, 164, 166 (Wis. 1988) (extending the duty, once negligence is established, to any threat, foreseeable or not, and to any potential victim, even if not foreseeable). Arizona adopted, but later overturned, a similar rule. *See* Hamman v. County of Maricopa, 775 P.2d 1122, 1128 (Ariz. 1989) (holding that a mental health professional owed a duty to anyone "within the zone of danger, that is, subject to probable risk of the patient's violent conduct"), *overruled by* Avitia v. Crisis Preparation & Recovery Inc., 536 P.3d 776, 778 (Ariz. 2023) ("[M]ental health professionals owe a duty to third parties based not on foreseeability of harm, but on their special relationship and public policy."). In *Lipari v. Sears, Roebuck & Co.*, a United States district court, applying Nebraska law, held that a therapist's liability extended to all individuals whom a patient might foreseeably endanger. 497 F. Supp. 185, 194–95 (D. Neb. 1980). The Nebraska legislature later overrode this decision, limiting the duty to a "reasonably identifiable victim or victims." NEB. REV. STAT. § 38-2137 (2024).

140. *See, e.g.*, Christine E. Stenger, Comment, *Taking* Tarasoff *Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471, 487–89 (1996) (surveying courts' application of a physician's duty to warn in the context of infectious disease, specifically HIV); Guion L. Johnstone, Note, *A Social Worker's Dilemma When a Client Has a Sexually Transmitted Disease: The Conflict Between the Duty of Confidentiality and the Duty to Warn Sexual Partners*, 49 U. LOUISVILLE L. REV. 111, 132 (2010) (pushing for further guidelines but ultimately advocating disclosure). Some scholars have pushed back against applying *Tarasoff* in the HIV/AIDS context. *See, e.g.*, Judith C. Ensor, *Doctor-Patient Confidentiality Versus Duty to Warn in the Context of AIDS Patients and Their Partners*, 47 MD. L. REV. 675, 688–89 (1988) (arguing that AIDS fails *Tarasoff*'s danger requirement because HIV doesn't always develop into AIDS and questioning whether transmitting

of contagious diseases is not new,[141] nor is the duty to use reasonable care to advise and warn members of the patient's immediate family of the existence and dangers of such a disease.[142] However, after *Tarasoff*, some courts have acknowledged a cause of action by third parties due to a failure to warn regarding contagious diseases. For example, the California Supreme Court found that an unknowable third party who suffered harm as a result of a hospital's failure to warn its patient of her surgery-induced exposure to HIV was eligible for damages.[143] Similarly, the Tennessee Supreme Court found a doctor liable for failing to inform the family of a patient who contracted Rocky Mountain Spotted Fever, a generally non-contagious disease, of the risk of contraction.[144]

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diseases itself should constitute violence); Obiajulu Nnamuchi & Remigius N. Nwabueze, *Duty to Warn of the Risk of HIV/AIDS Infection in Africa: An Appropriate Legal Response?*, 22 ANNALS HEALTH L. 386, 391–93 (2013) (arguing that AIDS transmission does not meet the *Tarasoff* foreseeability standard because of the limited types of interactions that lead to infection). Others have argued that a *Tarasoff*-like duty should apply in this context, albeit by using a sliding scale of disclosure measures. *See* Sten L. Gustafson, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1025–26 (1992) ("The Texas Legislature should . . . statutorily require a physician to notify, via state health authorities, the spouse of an AIDS-infected patient upon diagnosis of the disease.").

141. *See* Skillings v. Allen, 173 N.W. 663, 664 (Minn. 1919) (finding a legal duty to guard the public against scarlet fever); Davis v. Rodman, 227 S.W. 612, 614 (Ark. 1921) (holding that a physician has a duty to prevent the spread of an infectious disease); Jones v. Stanko, 160 N.E. 456, 458 (Ohio 1928) (finding a doctor liable for not properly diagnosing a contagious disease).

142. Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970); *see* Shepard v. Redford Cmty. Hosp., 390 N.W.2d 239, 241 (Mich. Ct. App. 1986) (holding that the defendant had a special relationship with the plaintiff and thus owed a duty to the plaintiff's son to inform him of his mother's spinal meningitis); Simonsen v. Swenson, 177 N.W. 831, 832 (Neb. 1920) (holding that a doctor was not liable to his patient for disclosing the patient's confidential medical information to prevent spreading an infectious disease); *see also* McIntosh v. Milano, 403 A.2d 500, 509, 511–12 (N.J. Super. Ct. Law Div. 1979) (extending the legal duty to a therapist to protect his or her patient's intended or potential victim from a violent act).

143. Reisner v. Regents of the Univ. of Cal., 37 Cal. Rptr. 2d 518, 523 (Cal. Ct. App. 1995).

144. Bradshaw v. Daniel, 854 S.W.2d 865, 872–73 (Tenn. 1993). In *Bradshaw*, the patient's wife died of Rocky Mountain Spotted Fever days after her husband. *Id.* at 867. The plaintiff, their son, presented expert testimony that the standard of care required the doctor to inform the family of the disease's symptoms, incubation period, and need for immediate medical attention at the

Furthermore, several courts have recognized a *Tarasoff*-like duty to warn about contracting hepatitis B. The Pennsylvania Supreme Court found that where a doctor failed to properly advise a patient who has been exposed to a communicable disease, and the patient spread the disease to a third-party, the doctor has breached the duty of care:

> If a third person is in that class of persons whose health is likely to be threatened by the patient, and if erroneous advice is given to that patient to the ultimate detriment of the third person, the third person has a cause of action against the physician, because the physician should recognize that the services rendered to the patient are necessary for the protection of the third person.[145]

The court held that the class of persons whose health is likely to be threatened by the patient includes anyone who is physically intimate with the patient.[146] Limiting the scope of the duty to individuals who have a "special relationship" with the doctor or the patient, the U.S. Court of Appeals for the Tenth Circuit noted that a doctor does not have a duty to warn unidentified third parties of the dangers of exposure to a patient's disease: "It would appear that at the bare minimum the physician must be aware of the specific risks to specific persons before a duty to warn exists."[147] Because in that case the doctor was not aware of the injured third party, it would be an "unreasonable burden" to impose a duty to warn.[148] Generally, then, courts tend to impose on doctors a duty to warn specific, identified others about foreseeable risks of infectious diseases.[149]

Genetics has been another potential area for *Tarasoff* duties, with scholars debating whether it constitutes a public

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onset of symptoms. *Id.* at 867. For commentary on this decision, see Roy F. Satterwhite III, *Supreme Court Expands Physician's Duty: Warning Non-Patients Now Includes Non-Contagious Diseases*, 29 TENN. BAR J. 12, 16 (1993) (warning that *Bradshaw v. Daniel* could become a physician's "duty to prevent the initial exposure" for wildlife diseases and food-borne diseases).

145. DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422, 424–25 (Pa. 1990).

146. *Id.* at 425 ("Those, like the trial court, who insist that we cannot predict, or foresee, that a patient will engage in sexual activity outside of the marital relationship and that thus, we need not protect those who engage in 'casual' sex, are exalting an unheeded morality over reality.").

147. Gammill v. United States, 727 F.2d 950, 954 (10th Cir. 1984).

148. *Id.*

149. *See* McIntosh v. Milano, 403 A.2d 500, 509 (N.J. Super. Ct. Law Div. 1979) (noting in dicta that there exists a "duty to warn third persons against possible exposure to contagious or infectious diseases").

health issue which justifies a duty to warn.[150] This is, in part, because unlike the prospective victim of violence, a relative who shares genes might *not* consent to knowing about the genetic condition.[151] Similarly, disclosure of paternity information raises competing interests, including the best interest of the child, the medical necessity of information regarding paternal identity, the potential disruption to the family (biological and legal), and the interests of the state.[152]

Finally, a duty to warn was also considered in several jurisdictions regarding the use of firearms, including by potential mass shooters.[153] Similar to *Tarasoff*, the discussion involved the duties of mental health professionals to assess dangerousness and warn third parties when appropriate.[154] While scholars have

150. *See* Michelle R. King, *Physician Duty to Warn a Patient's Offspring of Hereditary Genetic Defects: Balancing the Patient's Right to Confidentiality Against the Family Member's Right to Know—Can or Should* Tarasoff *Apply*, 4 QUINNIPIAC HEALTH L.J. 1, 32–36 (2000) (arguing that genetics are not communicable or infectious to anyone outside of the person's direct descendants; and, knowledge of genetics does not necessarily create a special relationship between the doctor and the relative); Susan M. Denbo, *What Your Genes Know Affects Them: Should Patient Confidentiality Prevent Disclosure of Genetic Test Results to a Patient's Biological Relatives?*, 43 AM. BUS. L.J. 561, 606–07 (2006) (arguing that patients should control disclosure of their own genetic information with the limited exception of informing the parents of minor children).

151. *See* L.J. Deftos, *Genomic Torts: The Law of the Future-the Duty of Physicians to Disclose the Presence of A Genetic Disease to the Relatives of Their Patients with the Disease*, 32 U.S.F. L. REV. 105, 136–37 (1997) (arguing that a physician *should* have a duty to inform relatives, but that the physician should ask for consent first); *cf.* King, *supra* note 150, at 37–38 (concluding that if there is a duty, it should be a duty to warn the patient only).

152. *See* Janet Leach Richards & Sheryl Wolf, *Medical Confidentiality and Disclosure of Paternity*, 48 S.D. L. REV. 409, 410, 442 (2003) (proposing a balancing test which weighs the medical and psychological benefit to the child against the potential harms of disclosure). I have not found any articles or cases that use *Tarasoff* directly or substantively for maternity or egg-donor arguments.

153. *See generally* J. Thomas Sullivan, *Mass Shootings, Mental "Illness," and* Tarasoff, 82 U. PITT. L. REV. 685 (2021) (discussing the possibility that a duty to warn should be implemented for mass shootings); Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J. COLL. & UNIV. L. 267 (2011) (arguing that the frequency of mass shootings necessitates a duty to warn of potential shooters in campus communities).

154. *See* Elisabeth J. Ryan, *Firearms and Physicians: Finding a Duty to Discuss*, 11 NE. U. L. REV. 155, 184–85 (2019) (discussing *Tarasoff* as a general background for the framework of primary care, pediatricians, and mental

criticized legislative frameworks attempting to apply *Tarasoff* to mass shootings, the general policy is to shield professionals from liability in this area.[155]

2. Non-Medical Professionals with Access to Confidential Information

Outside the medical context, *Tarasoff* has scarcely been applied to professionals or religious figures who—as fiduciaries—hold confidential information about a danger to third parties.[156]

Attorneys are one such instance. They often hold confidential client information that might be used to warn a third party of prospective danger, and are uniquely situated to learn about a client's intention to harm others.[157] As a result, some jurisdictions have imposed on lawyers a duty to warn where the client threatens harm to any person.[158] The victim might be an adversary, a witness, or another when it appears "beyond a reasonable doubt that the client has formed a firm intention to assault an unknowing, readily identifiable third party; and it appears beyond a reasonable doubt that the benefit of disclosure outweighs the policies underlying confidentiality."[159] This issue was

healthcare doctors having a moral, but not a legal, "duty to discuss" firearms); Marshall B. Kapp, *The Physician's Responsibility Concerning Firearms and Older Patients*, 25 KAN. J.L. & PUB. POL'Y 159, 186 (2016) (advocating for tort liability for physicians who don't exercise a *Tarasoff*-like duty when older patients have unsafe access to firearms). Both authors are generally opposed to legislative mandates that require physicians to counsel patients about their firearms. *See* Kapp, *supra*, at 186; Ryan, *supra*, at 184–85.

155. *See* Sullivan, *supra* note 153, at 754–65, 831–33 (analyzing legislative responses to mass shootings that echo a *Tarasoff* duty to warn the victim or law enforcement); Ryan, *supra* note 154, at 185–88 (highlighting that states' differing approaches to imposing a duty to warn patients about the dangers of firearms can already be read into existing duties). A Florida statute restricting doctors' ability to discuss firearm safety with patients was held partially unconstitutional. *See* FLA. STAT. § 790.338 (2024), *held unconstitutional in part by* Wollschlaeger v. Governor, Florida, 848 F.3d 1293 (11th Cir. 2017) (striking provisions that limited physicians' ability to inquire about and record patients' gun ownership as violating the right to free speech).

156. *See* Marc L. Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355, 365 (1986) (noting there is only one reported case against an attorney for failure to disclose threats made by a client); *id.* at 368–69 ("Thus, attempts to apply a *Tarasoff*-like duty to the clergy have so far failed.").

157. *Id.* at 356–57.

158. *Id.* at 359.

159. *Id.* at 373 (emphasis omitted).

considered in *Hawkins v. King County Department of Rehabilitative Services*, where the court left the door open for an attorney's duty to warn about harm to a third party when considering pre-trial release.[160]

It is unclear whether a duty to warn aligns with lawyers' ethical duties towards their clients.[161] While the rules of professional responsibility address physical harm to others, they do not give rise to a duty of care.[162] Furthermore, a lawyer "is less capable of predicting if a client is serious in his or her threats, and has fewer alternatives; that is, unlike a psychotherapist, he or she cannot recommend voluntary or involuntary commitment."[163] However, unlike clergymen discussed below, attorneys do not enjoy free exercise protections,[164] and states' ethical rules already either permit or require disclosure when a client

160. 602 P.2d 361, 365 (1979) (noting that a court can "limit the attorney's duty of confidentiality when the values protected by that duty are outweighed by other interests necessary to the administration of justice"); *see also* Sands, *supra* note 156, at 366–67 (citing a *Hawkins* amicus brief which argued that an attorney should have a legal duty to warn but only "where it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person"); Barner v. Leeds, 13 P.3d 704, 710–11, 714 (Cal. 2000) (holding, partially based on *Tarasoff* language, that a public defender is accountable for legal malpractice, since his or her work is beyond the scope of immunity for discretionary decisions). In *Hawkins*, however, the court held that defendant attorney did not have a duty of care, since, unlike Tatiana Tarasoff, the victims already knew about the risk. *Hawkins*, 602 P.2d at 365.

161. *See generally* Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447 (2006) (discussing the opposing forces of attorney-client confidentiality and the duty to warn, and contrasting current ethical rules of the various states with applicable domestic violence policies and statutes); *see also* Christine A. Picker, *The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues for Attorneys Who Represent Battered Women with Abused Children*, 12 ST. LOUIS U. PUB. L. REV. 69, 93–98 (1993) (discussing the possibility that a "future court might recognize an attorney's duty to warn under different circumstances" than those in *Hawkins*, arguing that expanded duty to warn may be appropriate in the context of attorneys representing a battered woman with at risk children).

162. For rules which are merely permissive of sharing confidential information in such instances, see MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE ¶ 20 (AM. BAR ASS'N 2024). Some states, however, have adopted a mandatory disclosure model. *See, e.g.*, N.J. R. PRO. CONDUCT 1.6(b).

163. Sands, *supra* note 156, at 362.

164. *Id.* at 368–69 (comparing attorneys and clergy, which have had immunity from liability).

threatens serious bodily harm or death to others.[165] Thus, some have suggested that a duty to warn is warranted, either specifically in domestic violence cases,[166] or more generally any time a client threatens to injure a third party.[167] Such a duty is needed, it has been argued, to create concrete consequences for attorneys who fail to report their clients' threats, and provide an avenue for recovery for harmed individuals.[168]

A duty to warn has also been discussed for clergymen, where free exercise considerations loom large.[169] Whereas therapists are not guaranteed freedom from governmental interference, the confessional aspect is core to the role of the clergy, and violating it might require a higher burden than cracking the walls of the therapist's office.[170] Thus, courts have tended to refrain from

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165. *See supra* note 162.

166. *See* Buel & Drew, *supra* note 161, at 447, 491 (advocating for a three-prong duty for attorneys in such cases to: (1) inquire about planned harm if a client alerts counsel directly or indirectly; (2) attempt to dissuade the client from taking such action; and (3) apply a mandatory duty to warn identifiable third parties of foreseeable harm by a client in line with duties imposed on other professionals (doctors, hospitals, social workers, etc.)).

167. *See* Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 504–06 (2000) (advocating for a duty to warn and arguing that current disciplinary frameworks are insufficient to prevent harm to third parties). Cooper argues that "the duty to warn would require an attorney who reasonably believes his or her client will act on stated threats to kill or seriously injure a readily identifiable third party, to warn that third party." *Id.* at 511.

168. *Id.* Lawyers' duties to warn have also been discussed in specific states. *See, e.g.*, John M. Burman, *An Attorney's Duty to Warn*, 30 WYO. LAW. 36, 40 (2007) (discussing the Wyoming Supreme Court's foreseeability requirements); Jeffrey P. Kerrane, *Will* Tarasoff *Liability Be Extended to Attorneys in Light of New California Evidence Code Section 956.5?*, 35 SANTA CLARA L. REV. 825, 843 (1995) (concluding that substantial uncertainty remained regarding attorney disclosure requirements following California's passage of Evidence Code section 956.5); Michael A. Backstrom, Note, *Unveiling the Truth When it Matters Most: Implementing the* Tarasoff *Duty for California's Attorneys*, 73 S. CAL. L. REV. 139, 167 (1999) (proposing a statutory amendment to enact the *Tarasoff*-like duty for attorneys in California).

169. *See* Sands, *supra* note 156, at 368–69 (noting that while clergymen enjoy First Amendment protections, attorneys do not).

170. *Cf.* James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 55–56 (1994) (citing *Tarasoff* in support of extending the secular counselor duty identified in that case to religious counselors engaging in similar work).

imposing a *Tarasoff*-like duty on clergymen who failed to warn a third party. For example, in *Nally v. Grace Community Church of the Valley,* the court held a student who sought spiritual counseling with a pastor before taking his own life was a case which "ha[d] not met the threshold requirements for imposing on defendants a duty to prevent suicide."[171] Furthermore, there is a concern that a plaintiff alleging that church membership creates a protective relationship would be "unavoidably seek[ing] civil court adjudication of religious facts, which the First Amendment precludes."[172]

In contrast, scholars have argued that the Constitution does not make religious organizations immune to tort liability, especially because the clergy satisfies the same special relationship exception that therapists do.[173] Some have raised concerns that a religious exemption from a *Tarasoff*-like duty would give religious figures a privilege without accountability.[174] Yet, here too, the majority rule is one of no liability.[175]

3. Other Individuals or Institutions in Special Positions

The question of applying *Tarasoff* beyond its original context becomes even more complex as we move further away from the professional setting to special positions that involve some combination of responsibility towards victims, control of perpetrators, and unique knowledge about the danger.

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171. 763 P.2d 948 (Cal. 1988). Some have criticized the decision. *See* John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 892 (1991) (noting that despite the court drawing distinctions in *Nally*, the situation was nearly identical to *Tarasoff*).

172. Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11, 46 (2005). The authors also differentiate the "highly specific" relationship therapists have with patients from the "general counseling" that religious leaders allegedly are limited to. *Id.* at 35.

173. *See, e.g.*, Mark Herman, Note, *The Liability of Clergy for the Acts of Their Congregants*, 98 GEO. L.J. 153, 182–84 (2009) (advocating for a duty because the constitutional protections are *not* unlimited).

174. *See* Patrice A. Villani, Note, Nally v. Grace Community Church of the Valley*: Controversy Surrounding the Clergyman's "Professional" Collar*, 1989 DETROIT COLL. L. REV. 753, 765–66 (1989) (criticizing *Nally* for being too broad and failing to faithfully apply *Tarasoff*).

175. *Id.* at 766.

Universities and schools are arguably such domains, including in the context of mass shootings.[176] Here too, some commentators have expressed hesitation about implementing a duty to warn.[177] In contrast, others have argued that school shootings by students "most likely warrant[] a duty to warn or protect."[178] According to this view, universities occupy a unique space in which they not only have a special relationship with student-perpetrators, but also benefit from controlling student conduct and can exercise some level of control over students.[179] Taken together, these custodial aspects of the relationship reinforce a duty to

176. *See supra* Part II.C.1.

177. Ben "Ziggy" Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?*, 60 FLA. L. REV. 895, 908–09 (2008) (arguing that most university employees lack the professional standards that *Tarasoff* required for mental health providers in predicting violence); *see also* Phyllis Coleman, *Targeting School Shootings: Using Three Warning Signs—Animal Abuse, Domestic Violence, and Conduct Disorder—To Help Prevent Massacres*, 32 WIDENER COMMONWEALTH L. REV. 65, 88–90 (2023) (arguing that students are judged based on observable actions whereas a criminal profile of potential mass-shooters is based on personal and demographic characteristics). This view is an extension of the position that educational institutions with a legal duty generally lack the professional expertise to predict mass shootings. Williamson, *supra*, at 908–09; *cf.* Todd v. Dow, 23 Cal. Rptr. 2d 490, 493 (Cal. Ct. App. 1993) (declining to extend a duty to control to parents of an adult who shot the plaintiff using a rifle which had been stored at the parents' home, reasoning that the *Tarasoff* elements of foreseeability, causation, and moral blame were not met).

178. Sullivan, *supra* note 153, at 792–94 (suggesting behavioral patterns mental health professionals may use to predict shooters); *see also* Melissa L. Gilbert, *"Time-Out" for Student Threats?: Imposing a Duty to Protect on School Officials*, 49 UCLA L. REV. 917, 940–41 (2002) (noting that school officials meet all the requirements for a *Tarasoff* duty and that they don't have to possess police enforcement power to effectively make schools safer).

179. *See* de Haven, *supra* note 153, at 327–29 (highlighting the university's ability to mitigate the risk of school shootings by providing psychological treatment to potential shooters). De Haven notes that *Tarasoff* allowed universities to escape liability regarding mass shooters, since there is no special relationship between a mass shooter and random other students. *Id.* at 285–87 (describing how *Tarasoff* let institutions of higher education maintain the position that colleges have "no duty to protect the safety of their students"); *cf.* Williamson v. Liptzin, 539 S.E.2d 313, 321–23 (N.C. Ct. App. 2000) (declining to find a university mental health provider liable to the shooting victims of a patient, noting the difficulty in "diagnosing diseases of the human mind and predicting future behavior," particularly in the temporary care setting of an out-patient student healthcare facility).

warn.[180] Nevertheless, courts have generally resisted applying *Tarasoff* to universities and schools,[181] with some notable exceptions.[182]

More generally, and as further discussed below, former employers might be in a special position to warn others. While ongoing employee-employer relationships have long been acknowledged as "special relationships,"[183] the duty of former employers has mostly been discussed so far regarding negligent referrals. In such situations, a former employer fails to disclose to a new employer that the former employee has dangerous tendencies. The argument is that a *Tarasoff*-like duty should then apply, as the request for information creates reliance as well as a special

180. *See* de Haven, *supra* note 153, at 269–70, 288, 312, 327 (advocating that *Tarasoff* be applied in three ways to correspond with the three cases of killings: Ms. Tarasoff's killing framed as the "importance of preventability"; the Chapel Hill shooting as "situations that require special attention"; and the Virginia Tech shooting "on the ease of prevention"). De Haven suggests a *Tarasoff* duty should apply given the ability to prevent violence and the foreseeability of student behavior when it comes to universities and suggests a model for legal responsibility which would result in "safer academic spaces." *Id.* at 270. She notes that an answer to the tension between the unique situation of universities as community hubs, and universities as corporate entities with a fiscal desire to avoid liability, would be to apply *Tarasoff* based "less . . . [on] foreseeability and more [on] the capacity to take reasonably effective preventive measures." *Id.* at 289.

181. *See, e.g.*, Univ. of S. Cal. v. Superior Ct. of L.A., 30 Cal. App. 5th 429, 447–48, 453 (Cal. Ct. App. 2018) (holding that the University of Southern California had no special relationship with the plaintiff, a non-student attendee of a fraternity's off-campus party, and therefore no duty to protect the plaintiff), *overruled in part on other grounds by* Brown v. USA Taekwondo, 483 P.3d 159 (Cal. 2021); Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 974–77 (N.D. Okla. 2016) (holding, based in part on *Tarasoff*, that the university had no duty to protect the plaintiff student from sexual assault by another student based on a single prior report against the alleged perpetrator which was not pursued as a criminal charge), *aff'd*, 859 F.3d 1280 (10th Cir. 2017); Desir v. Mallett, No. 14AP-766, 2015 WL 3492499, at *9 (Ohio Ct. App. June 2, 2015) (holding that a college had no duty to protect a student-worker who was stabbed by a random, unknown assailant while working in the college's office).

182. *See, e.g.*, Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty., 413 P.3d 656, 664, 674 (Cal. 2018) (holding that there is a college-student special relationship supporting a limited duty of reasonable care where there exists a "foreseeable threat of violence in a curricular setting"); Leger v. Stockton Unified Sch. Dist., 249 Cal. App. 3d 688, 696 (Cal. Ct. App. 1988) (finding a similar duty for private high schools).

183. *See supra* Part II.A.

relationship.[184] Scholars have reasoned that because former employers hold information of which a future employer should be aware, a "duty of disclosure" is warranted but should be limited to responding to a request for information.[185]

A California case—*Randi W.*—has found such a duty, albeit a limited one.[186] The court held that if an employer gives an *unqualifiedly positive* reference regarding a former employee and if that employee presents a substantial and foreseeable risk of harm to third parties, a duty exists to disclose all material facts about the employee that created a risk of harm.[187] Such decisions have been criticized by those arguing that a duty to warn would place an unjustified burden on employers,[188] that the employer-employee relationship ends once the employment ends, and that employers lack the relevant training to assess employee

184. *See* J. Bradley Buckhalter, Comment, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (Or, How Employers Can Have Their Cake and Eat It Too)*, 22 SEATTLE U. L. REV. 265, 282–85, 299–301 (1998) (arguing that, similar to how a therapist is still the "master of the patient's dangerous information" after the relationship ends, an employer as the "master" of the special employer-employee relationship should have a duty to avoid negligently referring a dangerous employee to another employer); Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L REV. 1645, 1662–65 (1991) (arguing that a former employer's potentially unique knowledge of an employee's past conduct is essential to a prospective employer's proper hiring decisions, thereby creating a "special relationship based upon dependency" that gives rise to a duty of former employers to disclose information about the employee).

185. Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 94–99 (1995) (focusing on the special relationship of dependence as a basis for imposing a duty to warn "potential 'third-party' victims of the employee's future conduct" (citing RESTATEMENT (SECOND) OF TORTS § 314A (AM. L. INST. 1965)).

186. Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 591 (Cal. 1997).

187. *Id.* Thus, rather than referring to any instance when an employer gives a reference, the duty applies only where an employer provides unconditional praise to a former employee, while failing to mention that the same employee presents such a risk. *Id.*

188. *See* Joshua D. Sayko, *When Employers Get "Something for Nothing": The Need to Impose a Limited Obligation to Disclose in Employment Reference Situations*, 38 SUFFOLK U. L. REV. 123, 127 (2004) (rejecting *Tarasoff* extensions to employers, and claiming that the "social goal" does not justify the burden on employers as it does for psychotherapists). Instead, Sayko argues for a qualified privilege conditioned on a showing that the employer did not abuse their privilege by failing to warn another employer. *Id.* at 144–45.

dangerousness.[189] In contrast to this hesitation, courts have been more willing to find a duty to warn a former *employee* of potential harm.[190]

Finally, discussions of a duty to warn have extended to the commercial and technological setting, where scholars have considered application marketers and Internet service providers as potential tort defendants, given their unique positions of responsibility and knowledge.[191] In *Mostert v. CBL & Associates*, a duty was recognized in a business-customer relationship, where a business leasing a movie theatre failed to notify customers of a

189. *See* John Ashby, Note, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117, 132–33, 142 (2004) (rejecting the application of a *Tarasoff* duty on employers, arguing that the relationship ends once the employee moves to another job, and that employers do not have the unique training that justifies imposing the duty on therapists); *see also* Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1443–46 (1996) (arguing that employer-employee relationships are insufficient to establish the special relationship creating a legal (rather than moral) duty).

190. *See, e.g.*, Portier v. NEO Tech. Solutions, No. 3:17-cv-30111, 2019 WL 7946103 at *11 (D. Mass., Dec. 31, 2019) (finding a *Tarasoff* duty for employers to safeguard their employees' data such as W-2s and social security numbers from unauthorized third-parties); Molsbergen v. United States, 757 F.2d 1016, 1021–22, 1023–25 (9th Cir. 1985) (finding that California "would impose a duty on a private employer to warn a former employee of foreseeable dangers to which the employee had been exposed in the course of his employment"). In a related context, a special relationship giving rise to an inverse duty to warn has also been recognized in a caregiver-patient setting where the patient possesses a firearm. *See* Hernandez v. Jensen, 276 Cal. Rptr. 3d 281, 289–91 (Cal. Ct. App. 2021) (finding that a patient with at-home caretakers owed a duty to warn them of a firearm hidden in the closet).

191. *See, e.g.*, Matt Brown, *Should AI Psychotherapy App Marketers Have a Tarasoff Duty?*, 31 ANNALS OF HEALTH L. ADVANCE DIRECTIVE 101, 105–06 (2022) (arguing that the increasing use of artificial intelligence (AI) in mental-health apps and virtual psychotherapy should lead to marketers being responsible to warn third parties). Brown suggests that legislatures should establish a three-part duty for marketers of AI-enabled psychotherapy apps to (1) design AI-enabled apps that can accurately and reliably flag a potential threat to a third party; (2) maintain human oversight of the app; and (3) "warn the third party according to the holding and rationale of *Tarasoff*." *Id.* at 105–06; *see also* Jon B. Eisenberg & Jeremy B. Rosen, *Unmasking "Crack_Smoking_Jesus": Do Internet Service Providers Have a Tarasoff Duty to Divulge the Identity of a Subscriber Who is Making Death Threats?*, 25 HASTINGS COMMC'NS & ENT. L.J. 683, 690–95 (2003) (arguing that Internet service providers have a *Tarasoff* duty to provide user information in order to avert danger to others).

flood notice given during the movie.[192] However, further applications have been limited.[193]

D. INTERIM SUMMARY: THE CURRENT DOCTRINAL LIMITS OF THE DUTY TO WARN

As the review above suggests, the duty to warn imposed in *Tarasoff* has gained significant attention, with judges, legislatures, and scholars considering its application to a variety of other contexts. That said, beyond the medical context, and perhaps because the basis for the decision was insufficiently clear, *Tarasoff* was applied quite sparsely. As a result, courts tend to draw narrow analogies from *Tarasoff*'s rationales, and most courts resist recognizing a *Tarasoff* duty under different factual conditions.[194] This Part outlined such applications which evolved from the sphere closest to *Tarasoff*—other medical and mental health-related cases—to professionals in whom wrongdoers may confide, such as lawyers and clergymen, and finally to uniquely positioned institutions involving some degree of responsibility towards victims, control of wrongdoers, and access to nonpublic information about prospective risk.

When *Tarasoff* is considered outside the medical context, the emphasis is generally on the special relationship involved and the foreseeability of danger resulting from heightened access to information.[195] Concerns about eroding trust in relationships which require confidentiality have also been discussed.[196] But courts struggle to explain how far the *Tarasoff* duty can go.

One reason for this doctrinal confusion is that the *Tarasoff* framework is insufficiently clear. As I see it, the dominant considerations in applying the duty to warn to a given case are the

192. 741 P.2d 1090, 1096 (Wyo. 1987). *But see* Cunningham v. Braum's Ice Cream & Dairy Stores, 80 P.3d 35, 43 (Kan. 2003) (finding a business had no duty to warn customers who were made to leave the store and drive home during a tornado warning).

193. *See supra* note 29 and accompanying text (recognizing that in specific contexts, the general duty of care may require a business to issue a warning, without supporting the existence of a *Tarasoff* duty to warn, *per se*).

194. For examples, see Part III.C with respect to lawyers and clergy.

195. *See, e.g.*, J.S. v. R.T.H., 714 A.2d 924, 935 (N.J. 1998) (finding spouses have a duty to warn of abuse by their partner due to a special relationship and the foreseeability induced by special information).

196. *See, e.g.*, Mussivand v. David, 544 N.E.2d 265, 273 (Ohio 1989) (considering whether a doctor's role as a confidant affected the duty to warn in specific circumstances).

following: (1) Expertise—a professional ability to identify a risk of harm; (2) Certainty—possession of credible knowledge about prospective harm to a specific victim or group of victims which, as explained below, can be grounded in concrete, credible knowledge of the nature of the harm rather than a professional assessment. Certainty should extend to the risk itself *and* its probability of materializing; (3) Cost—both a relatively low burden in providing the warning, and a potentially substantial benefit to the victim in avoiding significant harm; and (4) Position of Power or Special Capacity—organizations or individuals in a position of power or enhanced capacity to act on the duty. Past employers and educational institutions might fall into the former, as their position allows them to share information through, for example, letters of recommendation and employer networks. Special capacity could be attributed to spouses and other close relations of the perpetrator who are well-positioned to take steps to warn others due to, among other things, their connection to relevant information networks. When all four considerations are present, at least in the medical or mental health context, courts tend to impose a duty to warn.[197] But as I argue below, even when expertise is not present, highly reliable information about prospective danger held by those in a position of power or special capacity, coupled with a cost/benefit analysis, should be sufficient to recognize a duty to warn.

With this in mind, I now turn to synthesize the theoretical arguments in support of a bystander's duty to rescue with my analysis of *Tarasoff* and its applications to argue that, under narrow circumstances, the informed bystander has a duty to warn third parties in danger.

III. TOWARDS AN INFORMED BYSTANDER'S DUTY TO WARN

When might informed bystanders owe others a duty to warn them about future harm? This Part explores this question, makes the case for an informed bystander's duty to warn, and considers pushbacks and potential models for the implementation of such a duty. Though the Article discusses the duty in broad, universal terms, the question of when it should apply is highly context-sensitive and requires careful balancing of

197. *See, e.g.*, *id.* (considering that a doctor had professional ability, credible knowledge, low burden to warn, and special power in relation to the victim).

competing interests, such as the right to privacy. I outline some of these concerns below, with more comprehensive analysis left for future work.

Throughout my analysis, I use the abusive employee example as an illustration of where the duty should apply. Despite notable differences between the duties,[198] I use the broader duty to rescue as analytic leverage to support my argument for an informed bystander's duty to warn. Where applicable, I account for the differences.

A. WHEN SHOULD THE DUTY APPLY? ACTORS WITH CREDIBLE KNOWLEDGE ABOUT PROSPECTIVE HARM UNKNOWN TO FUTURE VICTIMS

1. The Nature and Scope of the Duty

In what contexts might the informed bystander have a duty to warn? As noted, I define "informed bystanders" as those who hold nonpublic, credible information regarding the risk of harm posed to prospective victims.[199] The situations I am contemplating involve past victims, who either never brought an official claim or have settled confidentially outside of court after a claim or lawsuit had been filed. Either way, information about the nature of the harm is not in the public domain. Further, others at the organization where the harm took place are aware of the nature of the harm, including the risk that such harm will reoccur, though they do not necessarily know of specific future victims. Such informed bystanders thus hold valuable private information which—if shared—could prevent additional harm to other victims. Importantly, in order to give rise to a duty to warn, an informed bystander must be aware of the nature of the harm *as well as* the risk of reoccurrence through credible information,[200] such as exposure to non-disclosure agreements concealing past incidents of wrongdoing or materials produced in an

198. For instance, unlike the prototypical drowning stranger scenario where the danger of drowning is actual, the prospective harm associated with a duty to warn will forever be uncertain or hypothetical (with some optimistic about its likelihood of materializing). Furthermore, acting on a duty to warn might harm the perpetrator's reputation in a way that assisting the stranger in peril often does not.

199. *See supra* Introduction.

200. While such an assessment is far from certain, a pattern of wrongdoing could serve as one indication of a risk of reoccurrence.

internal investigation.[201] The credibility of the information is pivotal.[202] As such, gossip and rumors will not suffice in giving rise to a duty.

It is also crucial to note that I specifically exclude past victims from the definition of informed bystanders. As I discuss elsewhere,[203] victims' disclosure duties raise a host of vexing questions—including the risk of imposing an additional burden on victims—which should be addressed separately from other bystanders. Thus, while the logic of my argument might push towards imposing a duty on victims as they undoubtedly hold credible information, the societal cost such a duty would involve tilts the scale towards excluding victims from the universe of informed bystanders. That said, I address below potential implications of a duty to warn for victims' privacy, wishes, and interests.

A common, live scenario illustrating the abovementioned situations pertains to a serial wrongdoer within a workplace or educational institution setting—for example, a person who sexually abuses others at the organization.[204] Participants in the organization, such as upper management, human resources administrators, and coworkers are aware of the wrongdoing. Perhaps the wrongdoer has even been discharged or encouraged to leave after an internal investigation has been conducted,

201. I address below potential implications for the law of privacy and nondisclosure agreements. *See infra* note 208 and accompanying text.

202. The amount of information might matter too. That is, we might deem it unproductive for a bystander to disclose the warning until they accumulate enough information, allowing the future victim to decide which parts of it are relevant. A fuller analysis of this issue is best left for future work.

203. *See* Gilat J. Bachar, *A Duty to Disclose Social Injustice Torts*, 55 ARIZ. STATE L.J. 41, 89 (2023) (noting that there are difficult questions about introducing burdens onto past victims as disclosure duties enter the policymaking process).

204. Such cases gave rise to what is known as "Don't Pass the Trash" laws. *See* Erin B. Logan, *Without Warning System, Schools Often 'Pass the Trash'—and Expose Kids to Danger*, NPR (Apr. 6, 2018), https://www.npr.org/sections/ed/2018/04/06/582831662/schools-are-supposed-to-have-pass-the-trash-policies-the-dept-of-ed-isn-t-tracki [https://perma.cc/LG6X-4CN9] (discussing New Jersey's law aimed at combatting this phenomenon, which as of this writing is an outlier). For more on the New Jersey law, see also Adam Clark & Jessica Remo, *Enough, Murphy Says, as He Signs Law to Keep N.J. Schools from Hiring Teachers Accused of Sex Abuse*, NJ.COM (Apr. 11, 2018), https://www.nj.com/education/2018/04/gov_phil_murphy_signs_historic_pass_the_trash_legi.html [https://perma.cc/HHW6-29M6] (noting the state's law is "giving New Jersey school administrators sweeping new powers to warn other districts about teachers accused of sexual abuse").

substantiating multiple allegations of abuse. But they might also continue to work at the organization. At the same time, concerns about a potential defamation lawsuit and even physical retaliation encourage individuals at various levels of the organization to stay silent about the abuse.[205]

"Easier" cases for recognizing a duty to warn in such instances would pertain, for example, to a former employer. Tracking the considerations derived from the doctrine, a former employer will likely meet the Certainty (2) consideration, assuming an internal investigation had substantiated the allegations against the wrongdoer and the likelihood of repeated wrongdoing. They will meet the Cost (3) consideration too if they are protected from negative consequences of reporting.[206] Moreover, they will also be in a Position of Power or Special Capacity (4), with an ability to take steps that will prevent future harm. Failure to take preventive steps on the part of such bystanders might have contributed to the danger materializing in the first place. In this sense, such informed bystanders can be considered *implicated informed bystanders*. With respect to these bystanders, I argue, a legal duty to warn is warranted, allowing future victims a right of action against the former employer for failing to comply with the duty. I explain below how such a duty can be supported.

"Harder" cases involve *true informed bystanders* such as colleagues who obtain credible information about an abusive coworker. As noted, information could be acquired through, for example, non-disclosure agreements with previous victims which establish repeat wrongdoing or materials gathered in an internal investigation. Information can also be gathered by witnessing the wrongdoing. While the true bystander has no Position of Power or Special Capacity, a moral duty to warn might still exist, depending on how certain the bystander is regarding the nature of the harm and the risk others might suffer similar harm. Indeed, true informed bystanders might hold just as good and even better information than implicated informed bystanders. Yet, the social cost of imposing a *legal* duty on true informed bystanders would be too heavy. Thus, for such bystanders, the

205. *See* Ben Abbott, '*Passing the Trash' No Longer Viable for HR*, HUM. RES. DIR. (Aug. 31, 2015), https://www.hcamag.com/au/news/general/passing-the-trash-no-longer-viable-for-hr/143669 [https://perma.cc/9R22-B5GL] (noting that employers are often concerned about providing information regarding past misconduct due to fear of litigation and physical retaliation).

206. That said, the cost might vary depending on the circumstances.

law's role should be to provide an adequate mechanism which will allow individuals to discharge their moral duty in good faith, and provide suitable protection from liability for defamation.[207] At the same time, the law should impose a cost for false reporting to protect the unfairly accused.

In such "harder" cases, it is my view that credible knowledge of *multiple* cases of wrongdoing gives rise to a moral duty. My reasoning relates to both the likelihood of repetition and the scope of the harm. First, when harm has been caused to more than one victim, a pattern begins to emerge, potentially indicating a propensity for wrongdoing.[208] Several acts of wrongdoing may increase the likelihood of repetition, thus triggering legal doctrines targeting repeated wrongdoing such as punitive damages.[209] A duty to warn might exist in such cases because the likelihood that harm will be caused to additional victims increases. Second, multiple incidents also increase the known scope of harm beyond an isolated incident, which in turn justifies intervention.[210] For these reasons, I tend to think a true informed bystander's moral duty to warn exists when one holds knowledge of repeated harm.

2. A Typology of Duties

To better understand where the informed bystander's duty to warn fits within existing duties, it is important to distinguish

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207. This reflects a parallel rationale to Good Samaritan Laws, which provide reduced liability for individuals who offer voluntary aid. *See supra* note 112; *see also infra* Part III.C (discussing the need for protections from defamation that might arise if a duty to warn includes making assertions about another person).

208. *See generally* Gilat J. Bachar, *Just Tort Settlements*, 56 ARIZ. STATE L. J. (forthcoming 2024) (discussing inferences drawn from information about repeat wrongdoing); Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 78–79 (2018) (arguing NDAs should be enforceable only if they meet certain requirements, including that they do not protect a repeat wrongdoer).

209. *See generally* Ehud Guttel & Alon Harel, *Matching Probabilities: The Behavioral Law and Economics of Repeated Behavior*, 72 U. CHI. L. REV. 1197 (2005) (explaining repeated choices based on work in behavioral law and economics showing "probability matching"—the phenomenon where the occurrence of an outcome reinforces repetitive behavior, regardless of overall probabilities of its occurrence).

210. *Id.* at 1220–21, 1221 n.74 (describing the rationale that repeat offenders create repeat harms which "justify the award of 'exemplary damages'"). I leave open the question of whether a single incident which caused severe harm or harm to multiple people should be treated differently.

three categories of such duties. The *first* are cases of failure to act, where the party charged with the duty bears some indirect responsibility for the risk imposed by another.[211] For example, a data broker owed such a duty to a stalking victim whose stalker tracked her through information provided by the company.[212] Such duties characterize most special relationship cases, and might help resolve some cases of implicated informed bystanders failing to warn, at least when the relevant conduct involves a blend of acts and omissions.

The *second* category involves cases that regard duties from other legal domains, such as duties when giving a reference or settling cases. For instance, in *Randi W.*, a former employer shared unconditionally positive information about a former employee in a reference letter but failed to disclose material facts that gave rise to a risk of harm.[213] Expanding such duties would prohibit misrepresentations when employers share information about wrongdoers.[214]

The *third* category encompasses pure affirmative duties, where the defendant charged with the duty to warn did not contribute at all to imposing the risk. Rather, such bystanders—much like the doctor in *Tarasoff*—are uniquely positioned to

211. *See generally* Gregory C. Keating, *Putting "Duty" Back on Track*, 16 J. TORT LAW 301 (2023) (discussing California caselaw which gave rise to claims of failure to act by a third party); Brown v. USA Taekwondo, 483 P.3d 159 (Cal. 2021) (holding that third-party competition organizers violated their duty of care by failing to act to protect competitors); *see also id.* at 171 (Cuéllar, J., concurring) (discussing the analysis of special relationship "edge cases" where a bystander's contribution to a harm may not fit within the traditional duty of care but policy considerations nonetheless support the creation of tort liability).

212. *See* Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1007–08 (N.H. 2003) (recognizing a duty grounded partly in a general duty of ordinary care—because giving out some information foreseeably created risks of harm to the victim—and partly in an affirmative duty to warn); *see also* Mussivand v. David, 544 N.E.2d 265 (Ohio 1989) (straddling a similar line between a general duty of reasonable care when affirmative acts create risks of harm and a qualified duty to warn foreseeable victims who were placed in peril).

213. Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 593 (Cal. 1997).

214. Such a duty fits with my arguments regarding duties to disclose information regarding settlements with repeat offenders. See generally Bachar, *supra* note 203.

warn the prospective victim or victims.[215] In such instances of complete omission, a traditional "failure to exercise due care" argument will be insufficient. My argument below focuses on such cases.[216]

B. THE CASE FOR A DUTY OF CARE OF THE INFORMED BYSTANDER

The preceding doctrinal and theoretical discussion regarding the no-duty rule and its gradual relaxation, including the duty to warn recognized in *Tarasoff*, provides the conceptual basis for a duty of care to be recognized in cases involving implicated informed bystanders, such as the abovementioned "easier" case of the former employer. In this section, I offer two main arguments to support the recognition of such a duty: first, flipping the default no-duty rule to allow recognition of a duty to warn, building on the rationales provided by legal theorists to support a duty of easy rescue, and second, more narrowly, expanding the existing exceptions to the rule. Indeed, for "easier" cases, the narrower approach might be sufficient.[217] That said, to give courts a theoretical basis to consider the duty in borderline cases, I offer first a broader argument which reconsiders the no-duty rule regarding informed bystanders.

The first (and more ambitious) *argument* suggests flipping the default of the no-duty rule, to create a presumption of a duty to warn unless contradicted in appropriate instances. Several theoretical bases support such a change. It can be justified, first, on individualistic, self-interested terms. The literature on the duty to rescue is instructive. Per Lipkin: "A person has a legal duty to rescue another when he encounters or witnesses that person in an emergency situation, in danger of grave physical harm or death, and the rescuer has the ability to extricate the victim from the dangerous circumstances without endangering

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215. *See, e.g.*, J.S. v. R.T.H., 714 A.2d 924, 935 (N.J. 1998) (finding that an individual owes a duty to prevent sexual abuse by their spouse if they have a special reason to know that the spouse is likely to abuse an identifiable victim).

216. Of course, where a duty to warn could be reframed as falling under a general duty of reasonable care, such an argument should be made as an alternative or supplement to an argument rooted in a failure to act.

217. Such an approach is also more practical under our current legal system. In this sense, the narrower argument can be thought of as a "transitional" argument, much like the last clear chance doctrine in contributory negligence. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 479–480 (AM. L. INST. 1965).

himself."[218] Imposing a duty of easy rescue, then, need not contradict the individualistic, autonomy-promoting nature of the common law,[219] because such a duty allows people the security to achieve their goals within a narrower sphere of activities.[220] Applying this rationale to a duty to warn, self-interested individuals can certainly subscribe to the notion that information about potential harm must be shared with them. Justifying the duty to warn on those terms brings home the meaning of sharing information about harm for the greater good of society. Thus, because a duty to warn, much like a duty of easy rescue, requires only minimal danger, its benefits exceed its burdens for the individual bystander:[221] "Morality and Good Samaritanism need not be invoked in support of this duty, just the individual's appreciation of the autonomous pursuit of his own self-interest."[222] Similarly, if we take Liam Murphy's position that imposing a positive duty does not involve an encroachment on one's liberty but rather on their welfare,[223] a duty to warn can still be justified. Because, as discussed, the cost of warning the prospective victim is significantly lower than the anticipated harm, the normative grounds to resist an affirmative duty to warn are significantly weakened. Administrability concerns remain, and those are discussed below.

But a duty to warn can also be grounded in a normative shift from the individual to the collective when interpreting the

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218. Lipkin, *supra* note 47 at 266 (footnotes omitted).

219. *Id.* at 277–78 (noting that the law always limits individualistic behaviors in some capacity).

220. *Id.* at 287–88 (arguing that the law provides a foundation and security for individuals to achieve their goals, even if it limits unfettered expressions of individualism).

221. As Lipkin explains, if a duty to rescue is imposed, individuals will be entitled to such a rescue should they themselves be in danger. *Id.* at 292–93. Furthermore, even if these individuals never find themselves in a situation requiring rescue, the security provided by the knowledge that rescue would be forthcoming allows them to better plan their life activities. *Id.* at 289–90.

222. *Id.* at 293 (footnote omitted). A counterargument to this assertion might be as follows: if I am among the few who can swim in town, a duty on those who can swim to rescue those who are drowning only puts a burden on me. And if it comes down to my self-interest, there is no reason for me to subscribe to the duty.

223. *See* Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 606–07 (2001) (arguing that the focus on individual liberty with respect to the duty to rescue is mistaken and that the concern instead should be diminution of one's welfare).

standard of care, such that the standard embodies the values of solidarity, cooperation, and "consideration of another's safety and interests."[224] As Leslie Bender argues: "In defining duty, what matters is that someone, a human being, a part of us is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy . . . ."[225]

Thus, per Bender, instead of the autonomy-focused no-duty rule, we could imagine a rule that considers the potential harms to the victim and the people with whom they are interconnected.[226] Similarly, a duty to warn would take into account how an injury might impact not only the future victim but also the victim's family, friends, and colleagues. It would weigh such harm more heavily than the imposition on a bystander who would be required to disclose information about prospective harm.

Either way, we should consider several counterarguments to this broader theoretical basis for a duty to warn.

First, Richard Posner counters that human nature cannot be altered by changing the no-duty rule.[227] For Posner, since people tend to not care about their neighbors, a legal rule which imposes a duty of care would do little to change their behavior.[228] I disagree. Laws can help shape moral attitudes.[229] Imposing a

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224. Bender, *supra* note 64, at 31.

225. *Id.* at 34.

226. *Id.* at 35 ("If the stranger drowns, many will be harmed. It is not an isolated event with one person's interests balanced against another's."); *see also* Leslie Bender, *Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 581 (1993) ("Tort law would no longer condone the inhumane response of doing absolutely nothing to aid or rescue when one could save another person from dying.").

227. *See generally* Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191 (1989) (arguing that most people are not regularly altruistic and that this human nature will not be changed by altering the no-duty rule).

228. *Id.* at 214 ("[M]ost neighbors are not caring . . . . Human nature will not be altered by holding injurers liable for having failed to take the care that a caring neighbor would have taken."). Interestingly, an empirical study of the no-duty rule has found that rescue is the general rule and "proven cases of non-rescues are extraordinarily rare." David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 656 (2006).

229. *See generally* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change* (describing numerous instances in which enforcement of the law elicited changes in public behavior, for example U.S. antismoking

legal duty to warn might reflect an emerging social norm—as captured in the aforementioned Facebook groups—that sharing information for the benefit of future victims is the right thing to do, thus encouraging such behavior. It might also have some expressive value,[230] capturing a social aspiration that solidarity and mutual care are worthwhile. Furthermore, with appropriate protections in place, a duty to warn would require only minimal imposition or risk.[231] As a result, changing behavior might be easier regarding such a duty.[232]

Second, some might argue that a legal duty would crowd out moral incentives to warn others of prospective harm. Are most people already internally motivated to warn others? This is an empirical question. We cannot assume the answer is yes, as "[n]ews stories are replete with cases of observers standing by while someone is injured or killed."[233] Evidence of abuse kept under wraps for years certainly contests this proposition.[234] Some people may well prefer to remain silent about dangers to others. A legal duty to warn might be required to shift moral attitudes.

As noted, I recognize the ambitious nature of this argument, and the fact that some courts might be concerned about such a radical shift in the law of omissions. Therefore, I suggest an alternative argument to impose a duty to warn on an informed bystander.

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laws), *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman eds., 2014); *see also* Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice* (arguing that people's reason can be engaged in order to use the law to change moral intuitions), *in* 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193 (Mark P. Zanna ed., 2008).

230. *See generally* Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405 (2017); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (considering that the law itself is an expressive institution that speaks to society's norms).

231. *See infra* Part III.C (discussing, inter alia, privacy and defamation protections that would accompany legal duties to report).

232. That said, some have raised compelling arguments challenging the influence that law and social practices have on each other. *See, e.g.,* Amy Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 516 (2009) (critiquing attempts to transplant law or "fix" culture "as an explicit set of social rules capable of shaping social practices.").

233. Lipkin, *supra* note 47, at 262 n.53.

234. *See generally* Gilat Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1 (2022) (discussing the concealment of sexual abuse through a veil of silence).

The second argument for supporting a duty to warn is narrower. This argument entails only applying an existing exception to the no-duty rule, namely the special relationship exception. As noted, tort law has long recognized the need to relax the no-duty rule by using exceptions that reflect "custom, public sentiment and views of social policy."[235] Further expanding the exception due to contemporary developments in culture and technology—supporting more transparency—aligns with this approach.

The special relationship exception could be read to include the relationship between an informed bystander and a future *wrongdoer*, at least with respect to implicated informed bystanders. First, as mentioned, the special relationship exception has already been expanded significantly.[236] As Saul Levmore observes, a duty of care has been identified in a variety of relationships, including employer-employee, leading to liability for failure to rescue.[237] This exception may well include a former employer-employee, thus covering some of the "easier" cases.

Second, the informed bystander possesses a unique epistemological position regarding a wrongdoer that already caused harm.[238] Such bystanders have credible knowledge of the nature of the harm which future victims are likely to suffer, as well as

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235. *See* KEETON ET AL., *supra* note 92, at 374 & n.94.

236. *See* Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 899–900 (1986) (offering a long list of recognized special relationships, including "common carrier-passenger; innkeeper-guest; innkeeper-stranger . . . ; employer-employee; ship-crewman; shopkeeper-business visitor; host-social guest; jailer-prisoner; school-pupil; drinking companions; landlord-trapped trespasser; safety engineer-laborer; physician-patient; psychologist-stranger . . . ; manufacturer-consumer; landlord-tenant; parole board-stranger . . . ; husband-wife; parent-child; and tavern keeper-patron" (footnotes omitted)); *see also* Weinrib, *The Case for a Duty to Rescue*, *supra* note 40, at 247 n.1 (listing special relationships).

237. Levmore, *supra* note 236, at 900. Levmore further explains how systems of rewards and penalties can incentivize rescue by others. *Id.* at 882, 885–86 (describing the intersection of punishment and incentive structures in promoting a duty to rescue).

238. *Cf.* Ashwini Vasanthakumar, *Epistemic Privilege and Victims' Duties to Resist Their Oppression*, 35 J. APPLIED PHIL. 465, 465 (2018) (arguing that the special knowledge *victims* have, which others do not, puts them in a special position which requires reporting); Bachar, *supra* note 203, at 72–75 (relying on epistemological position as grounds to identify a moral duty to disclose owed by plaintiffs to others).

the likelihood of reoccurrence. Thus, if *Tarasoff* can be grounded in the unique knowledge about danger possessed by doctors rather than their control over patients, others with such special knowledge about prospective harm may have a special relationship with future wrongdoers. This argument is sensible given that *Tarasoff* stands for a duty to *warn* the future victim rather than a duty to *protect* the victim (by restraining the wrongdoer), which would be more closely associated with the psychotherapist's capacity to exercise such control.[239] Furthermore, recognizing a duty held by an informed bystander would not erode the confidential relationship between doctors and patients as the *Tarasoff* duty arguably has.

Alternatively, the special relationship exception can be applied to a future *victim*, if justified in terms of social solidarity and common citizenship.[240] The exception has been argued to apply to an easy rescue of a stranger, for two reasons: first, the stranger's ability to rescue the victim, and second, the victim's dependency on the rescuer in that particular moment.[241] In the context discussed here, the availability of reliable information pointing to a prospective danger, which the bystander holds, alongside the victim's dependency on the bystander to warn them of such danger, may well give rise to a special relationship which justifies applying the exception. Furthermore, the existing relationship between the informed bystander and the future

239. That said, in *Tarasoff* the knowledge was not only about the nature of the harm, but also about the specific victim about to suffer it. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 344, 351 (Cal. 1976).

240. *See generally* Bachar, *supra* note 203 (discussing solidarity between past and future victims as a moral justification for sunshine laws). There are also strong policy reasons to impose a duty in order to enhance coordination between past and future victims of the same tortfeasor. Such coordination is especially difficult to achieve regarding sexual misconduct, where victims' sense of shame can lead to reluctance to come forward. But victim coordination is challenging in other settings too, such as products liability. In such cases, the information asymmetry regarding the existence of other victims can be exploited by defendants for a "divide and conquer" strategy. *See generally* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311 (2018). A duty to warn will help close such information gaps.

241. Lipkin, *supra* note 47, at 263–66 (describing easy rescue as appropriate when the circumstances satisfy conditions of bystander ability and victim dependency).

victim could be described as "one of common citizenship,"[242] where information-sharing and transparency is a legally mandated norm.[243]

One might argue in response that expanding existing exceptions is equivalent to flipping the default of the no-duty rule, as broad exceptions tend to swallow the rule. While I take this valid point, I argue that this second approach might be more practical, as it is often easier for courts to expand existing exceptions than to recognize a new duty. It might also serve as a transitional solution on the way towards a more significant legal change and provide courts with a theoretical foundation to decide borderline cases.

C. ANSWERS TO OVERARCHING CRITICISMS

As with any attempt to expand the existing scope of tort liability, several counterarguments might be heard in response to a duty to warn of an informed bystander. In this section, I address several such arguments.

The first pushback might be: Why is a duty on wrongdoers themselves not enough? According to this argument, instead of expanding the targets of potential liability to informed bystanders who are not the direct cause of victims' harm, we should focus on the duty of care that tortfeasors themselves owe victims. This counterargument is related to another common concern: the slippery slope argument, which seeks to limit the universe of potential defendants.[244] My answer is twofold. First, a duty to warn

242. Heyman, *supra* note 30, at 679 (invoking the notion of common citizenship as the basis for a bystander duty to rescue in cases of violent crime).

243. The innocent creation of risk exception might also apply when the defendant's conduct is not negligent but still increases danger to the plaintiff. Under the Consumer Product Safety Act, for example, circumstances that require manufacturers and sellers to *report* risks created by their products are broader than those leading to an actual product recall. 15 U.S.C. § 2055; *see also Duty to Report to CPSC: Rights and Responsibilities of Businesses*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/Duty-to-Report-to-the-CPSC-Your-Rights-and-Responsibilities [https://perma.cc/9H6Y-L8CE]. While such reports are presumptively confidential, the Consumer Product Safety Commission may publish the information if it has taken certain formal steps regarding a product, such as filing a legal complaint. 15 U.S.C. § 2055(6)(b)(5).

244. Kim Ferzan argues that while victims might have a moral duty to rescue third parties, it is unlikely that they have a legal duty grounded in tort law as "it would be quite an expansion to say that a victim, whose relationship to

does not replace the duty owed by the tortfeasor to avoid injuring another through an intentional or a negligent act. Rather, multiple actors might be liable to the victim of a tort if other requirements of liability are met, either through an affirmative or negative duty of care or through a different regime.[245] This is no different than other situations of multiple tortfeasors.[246] Second, as noted, a legal duty to warn should only be owed by those in a position of power or special capacity who hold concrete, credible knowledge about prospective harm.[247] While several actors might hold such knowledge in some circumstances, the duty is still limited enough so as not to be owed by an infinite number of bystanders.

A second concern regards bystanders' ability to know that they were required to warn others and take precautions accordingly.[248] In other words, if taking no action can result in liability, being careful cannot simply mean refraining from action. In the former employer example, this would mean employers cannot simply refrain from giving references to employees discharged following harassment allegations. They may need to take an affirmative action to disclose information. Liability for negligent conduct often involves uncertainty about whether failure to take

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the wrongdoer is quite unlike the volunteer, compensated, expert psychiatrist, should warn others about the harms by someone who, unlike the mentally ill actor in *Tarasoff*, is a culpable, responsible actor." Kimberly Kessler Ferzan, *NDAs: A Study in Rights, Wrongs, and Civil Recourse*, 68 AM. J. JURIS. 161, 167 (2023). While the focus here is on bystanders rather than victims, Ferzan's pushback applies.

245. However, imposing liability on multiple actors can have other practical implications. As studies in social psychology have shown, the more people who can rescue someone, the less likely anyone is to do so because none will feel uniquely responsible. ROGER BROWN, SOCIAL PSYCHOLOGY 44, 67–74 (2d ed. 1986). A similar problem could arise if many are charged with a duty to warn. This is another reason for limiting the universe of informed bystanders charged with a legal duty to those in positions of power or special capacity who hold credible information.

246. *See* Lipkin, *supra* note 47, at 271–72 (arguing that a "multiple tortfeasors" approach would be workable in the context of rules compelling easy rescue).

247. *Supra* Part II.D.

248. Lipkin, *supra* note 47, at 271 n.107 ("The issue then becomes a problem of promulgation: the citizenry must be informed if the law is to work." (citing L. FULLER, THE MORALITY OF LAW 49–50 (1964))).

appropriate precautions will result in an injury to another.[249] In this sense, liability for failure to act is no different: "The question in cases of nonfeasance is this: given knowledge of the circumstances, is it likely that the victim will be injured if the potential [bystander] fails to act?"[250] At least in some cases, an injury by a wrongdoer about whom the victim was not warned is just as likely as an injury resulting from an affirmative act like negligent driving.[251]

A third counterargument would be that a duty to warn belongs in public rather than private law. The duty discussed here does mirror positive duties imposed in the past on citizens to prevent criminal violence.[252] In particular, the common law once recognized "a duty (enforceable by criminal sanctions) to intervene to prevent a felony of violence in instances in which one knew that such an offense was being committed and had the power to prevent it."[253] However, I argue, a duty to warn can fit squarely within current private law. The rationale undergirding the duty is that individuals are not just entitled to the protection of the government, but are also sometimes expected, as citizens, to intervene to protect other members of the community.[254] Therefore, when the potential threat arises from the wrongdoing of another community member, it is far more plausible to envision a duty to warn rooted in the relationship between

249. For example, if someone has knowledge that their icy sidewalk may cause someone to slip and fall, they should remove the ice to avoid liability for the injury. *See* PROSSER, *supra* note 84, at 157 (stating that knowledge is based in perception, so if an actor perceives a risk, then they must act as a "reasonable man" would in the circumstances).

250. Lipkin, *supra* note 47, at 274.

251. Consider sexual assault on campus. Studies have suggested that, among college men who have admitted to behaviors that fit the definition of rape or attempted rape, a significant portion—between twenty-five and sixty-three percent—are repeat offenders. Stephanie Saul, *When Campus Rapists Are Repeat Offenders*, N.Y. TIMES (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/us/when-campus-rapists-are-repeat-offenders.html [https://perma.cc/P85Z-TFCF]. Given these findings, a failure to warn about a known offender may lead to foreseeable harm.

252. *See* Heyman, *supra* note 30, at 677 (noting that the common law imposed various positive duties as a matter of public law).

253. *Id.*

254. *See id.* at 678–79 (arguing that a duty to rescue in tort law can be reconciled with the tenets of private law).

individuals—as part of tort law—than between government and citizen.[255]

This connection between private and public law is not unique to imposing affirmative duties in tort law. When resolving private wrongs, we often look to public-facing aspects of such wrongs.[256] We look to the community to define what we mean by "reasonable," "assault," "consent," and other legal terms.[257] Particularly in tort law, the community helps to crystalize and sometimes even shift existing norms in a public forum by using tools that are not as blunt as those used by the criminal law.[258] And as some have observed, whether a particular issue is governed by criminal law or tort law is not as systematic a choice as one might think.[259] Blurring the lines between public and private

255. I use this rationale to justify a special relationship-based duty to warn. *See supra* Part III.B.

256. *See* Aditi Bagchi, *Private Law and Public Discourse*, 65 ARIZ. L. REV. 541, 541 (2023) (arguing that private law is properly regarded as a site for public discourse despite private litigants pursuing self-interested claims, as it becomes a "critical site for building consensus on political principles").

257. The fact that the community helps define such basic terms in tort law is invoked as a reason to assess how lay people perceive them. *See, e.g.*, Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 766 (2022) (explaining that in building theories of jurisprudence, we aspire to respond to or engage with what is happening "on the ground"); Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2237 (2020) (arguing that lay understandings of legal concepts like consent are relevant for constructing rules about primary behavior).

258. Of course, tort law and criminal law are also distinct in many important ways. *See, e.g.*, Kenneth Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 720, 729–30 (2008) (contrasting the broad spectrum of acts that criminal law seeks to punish with tort law, which predominantly seeks to provide remedy for harmful acts, and discussing the justice principle underlying criminal law and the state's role in prosecuting violations); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992) (noting criminal law's reliance on public enforcement and prosecutorial discretion to inflict punishment); Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 57 (2006) (noting that, while tort law addresses an individual victim's interests, it need not also address broader public objectives).

259. *See* Alexandra D. Lahav, *Crime and Tort: Reflections on Legal Categories*, 72 DEPAUL L. REV. 269, 270 (2022) (exemplifying this complexity in the context of a dangerous product—poisoned milk). Thus, tort law is thought of by some as a somewhat fragmented legal category, and even as a residual option in the space between private ordering and public wrongs. *See* Kenneth S.

law values is thus inevitable when dealing with complex social issues.

That said, grounding a duty to warn in the notion of tort as a community-facilitating body of law might require a definition of the relevant community,[260] and a recognition that the community's nature might influence what information is considered sufficiently "credible" to give rise to the duty. For example, it is possible that some members of the community (e.g., female employees, employees of color) will identify behavior as wrongful while others (managers, white male employees) will not.[261] But it seems to me that tort law is up for the challenge. It can allow communities to consider and signal relational norms, while grappling with individual differences and the appropriate limits of warning duties to avoid an identity-based surveillance ethos.

Finally, a theory of the duty to warn must address the issue of causation. Tortfeasors are liable in torts only if they are found to be the factual and proximate cause of an injury.[262] Such a causal connection can be difficult to establish regarding

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Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293, 295 (2021) ("[T]ort law is not the coherent field it is sometimes thought to be."); Gregory C. Keating, *Form and Substance in the "Private Law" of Torts*, 14 J. TORT L. 45, 84 (2021) ("The origin of our tort law help [sic] to explain why the contemporary revival of the idea that tort is 'private law' goes too far. 'Private law' . . . is insufficiently attentive to the way in which the modern law of torts is entangled with bodies of law that the theorists of 'private law' count as public."). However, others have argued that the law of torts is a coherent body of law with an internal logic. *See generally* JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS 2–3 (2020) (conceptualizing torts as "legally *recognized* wrongs of a particular sort" based on three ideas—civil recourse, torts as wrongs, and pragmatic conceptualism—that figure prominently in tort law).

260. For example, are communities bounded by geography, shared endeavor, age, or other identity characteristics?

261. Similar complexities arise with respect to what behavior is considered child endangerment, as different norms are applied to various groups (e.g., single parents and parents of color versus white nuclear families). *See, e.g.*, Sheila D. Ards et al., *Racialized Perceptions of Child Neglect*, 34 CHILD. & YOUTH SERVS. REV. 1480, 1489 (2012) (correlating racialized beliefs about what constitutes neglect among caseworkers with the overrepresentation of Black children among substantiated maltreatment cases).

262. *See* PROSSER, *supra* note 84, at 236 (discussing the requirement for causation in tort law).

omissions.[263] This is so because of a variety of concerns, chief among them that people fail to do many things which, if done, would prevent injuries, but for which we would not imagine them being held liable.[264] Others, in contrast, maintain that individuals who were morally expected to act—but did not—might be causally responsible for an injury.[265] Their blameworthiness in failing to act arises from the same moral principle that condemns injury caused through an act.[266] In terms of proof of causation, Lipkin has argued that causation should not be a problem for a duty of easy rescue any more than it is for any special relationship for which liability is found, such as an innkeeper failing to rescue a guest.[267] I tend to agree. Still, in some cases, it might be harder to establish a causal relationship between the failure to

263. Because liability is derived from actually performing an act which leads to an injury, tort law generally does not accept "negative causation." *See* Mack, *supra* note 35, at 237 (examining the claim that nonfeasance causes the injury); *see also* PROSSER, *supra* note 84, at 338–40 (discussing the different liability that stems from misfeasance and nonfeasance in tort law). Indeed, some argue that omissions are not causal in the strict sense. *See id.* at 242 (noting that some skeptics of the idea that omissions are causal believe that "speaking of responsibility or even causation is just a way of ascribing blameworthiness and does not involve a genuine causal judgment"). Thus, the law must stipulate duties to establish a connection between the omission and the consequence. *See id.* at 339 (noting that courts have created affirmative duties to assign liability to nonfeasance). As explained below, I do not share this view.

264. *See generally* Mack, *supra* note 35 (discussing the relationship between nonfeasance and harm in arguing against "Bad Samaritan Laws").

265. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 81–83 (2d ed. 1985) (arguing that whether an action or omission caused a consequence is often determined by whether the consequence was "within the risk" of the act or omission); John Casey, *Actions and Consequences*, *in* MORALITY AND MORAL REASONING 155, 178 (John Casey ed. 1971) (noting that someone can be responsible for consequences in a causal sense as through an act or omission); JUDITH JARVIS THOMSON, ACTS AND OTHER EVENTS 212–18 (1977) (arguing that causation can be a product of omissions).

266. Casey, *supra* note 265, at 161 (describing an individual who is blameworthy for an omission or failure to act as involved in "the production of a state of affairs").

267. Lipkin, *supra* note 47, at 269 ("If the problem of causation is not a problem in holding an innkeeper liable for his failure to rescue a guest, it should not be an insurmountable problem regarding a general duty of easy rescue." (footnote omitted)). Lipkin further contends that the guest's reliance on the innkeeper does not explain the result as it is irrelevant for determining causation, and a duty may still exist without expectations or reliance. *Id.* at 269.

warn and the resulting injury.[268] In particular, a person receiving a warning might choose to ignore it altogether, or might be provided with a partial or distorted warning which fails to help the future victim avoid the danger.[269] Thus, causation can serve as a useful limiting principle, allowing courts to assign liability only in those cases where a failure to warn was an actual cause of the harm that ensued. A fuller analysis of the causation issue—both conceptually and in terms of proof—is best left for future work.

To conclude, despite these ongoing conversations and valid critiques, our legal system should continue to consider ways in which the duty to warn can be expanded in order to prevent harm to others.

D. IMPLEMENTING THE DUTY BEYOND THE COMMON LAW OF TORTS

Based on the analysis above, I argue that an informed bystander's duty to warn can be recognized by courts in appropriate circumstances, consistent with either changing the default of the no-duty rule or applying its existing exceptions. That said, a statutory intervention might be required to establish an effective warning mechanism which complements the duties imposed by courts.[270] The common law and a statutory mechanism do not have to be mutually exclusive. Thus, while the problems discussed in this Article can be partially addressed through the

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268. This argument has been made regarding the duty to rescue more generally. *See* Ames, *supra* note 48, at 112–13 (noting that the failure to rescue someone in danger is not itself the cause of their injury); Bohlen, *supra* note 32 (arguing that, in the case of nonfeasance, failure to act is not a cause of harm but rather a failure to confer a benefit); *cf.* Anthony D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U. L. REV. 798, 808–09 (1975) (arguing for criminal liability in certain cases of nonfeasance, even though the nonfeasance was not the cause of injury).

269. The issue of causation raises a related question regarding a possible causal chain: What happens to the duty when information is not provided directly to the future victim? In other words, when does the duty end for one bystander and another bystander picks it up?

270. *See generally* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957 (2014) (offering an argument that reconciles the tension between the common law of torts and the regulatory state); *see also, e.g.*, Benjamin C. Zipursky, *Loyalty and Disclosure in Legal Ethics*, 65 AM. J. JURIS. 83 98–100 (2020) (arguing that a legislative mandate that lawyers disclose their clients' financial fraud has certain advantages over a duty of care rooted in negligence and need not conflict with lawyers' duty of client confidentiality).

common law of torts, public law might reinforce the response. A statutory mechanism could also support individuals who hold credible knowledge about prospective harm and wish to discharge their *moral* duty to warn. In this final section, I turn to considering such schemes. Though a full-blown implementation model exceeds the scope of this Article, I suggest preliminary thoughts about making the duty workable for our legal system, as well as competing interests and obligations.[271]

How would informed bystanders discharge the duty? To streamline compliance with the duty, it is crucial that the warning process not be onerous. At the same time, costs should be imposed on false reporting to minimize weaponization. Several mechanisms for supporting such a duty might be used. One existing model to consider is the Consumer Product Safety Improvement Act (CPSIA) database—a public, Internet-accessible database, which can be used by consumers and public agencies to report information about harm allegedly caused by specific consumer products.[272] Such a model can be expanded beyond the consumer context. However, in addition to privacy and data protection concerns discussed below, a clear disadvantage of the CPSIA model is placing the burden of reporting on consumers rather than entities in a position of power or special capacity, such as employers.

A second option would be a centralized database, to which certain actors must report about a written complaint or a claim by an aggrieved victim demanding monetary payment. This model is largely based on the National Practitioner Data Bank (NPDB). The NPDB, established by the 1986 Healthcare Quality Improvement Act,[273] requires healthcare providers and their liability insurers to report any payments made in response to a medical malpractice claim, or else face sanctions.[274] The NPDB,

271. Importantly, there are a number of public and private regimes like whistleblower laws, internal corporate policies, and self-regulatory organizations rules that already establish warning mechanisms. These can also be used as potential models.

272. Consumer Product Safety Improvement Act (CPSIA) of 2008, Pub. L. No. 110-314, § 212(a), 122 Stat. 3048, 3048–52 (2008) (codified at 15 U.S.C. § 2055(a)).

273. Healthcare Quality Improvement Act of 1986, 42 U.S.C. §§ 11101–11152.

274. *Id.* §§ 11131–11137. The Act also includes voluntary and mandatory reporting systems for disclosure of adverse healthcare incidents. *Id.* For further

which is run by the U.S. Department of Health and Human Services, "is a confidential information clearinghouse created by Congress with the primary goals of improving health care quality, protecting the public, and reducing health care fraud and abuse in the United States."[275] The NPDB collects information on incidents and only releases it to eligible entities,[276] such as hospitals, boards of medical examiners and professional societies that follow a formal peer review process.[277] Further, the disclosure requirement focuses on incidents in which an entity "makes a payment for the benefit of a health care practitioner in settlement of, or in satisfaction in whole or in part of, a written claim or judgment for medical malpractice against that practitioner."[278]

A potential tweak to the NPDB model might be to release information to eligible entities only once an alleged tortfeasor has been named in at least two separate complaints. In this vein, Ian Ayres and Cait Unkovic have suggested the concept of an information escrow—a trusted intermediary which receives sensitive private information and only releases it under certain conditions.[279] Such a rule can help identify actors of whom future victims should be warned while maintaining alleged tortfeasors'

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discussion of the value of a duty to warn, see, for example, Lucian L. Leape, *Reporting of Adverse Events*, 347 NEW ENG. J. MED. 1633, 1633–35 (2002) (discussing the role and efficacy of reporting requirements in the medical industry).

275. *See Chapter E: Reports*, NAT'L PRAC. DATA BANK, https://www.npdb.hrsa.gov/guidebook/EOverview.jsp [https://perma.cc/ZZ8Y-JU6E].

276. *Id.*

277. *See What Is an Eligible Entity?*, NAT'L PRAC. DATA BANK, https://www.npdb.hrsa.gov/guidebook/BWhatIsAnEligibleEntity.jsp [https://perma.cc/YLD3-FDTE].

278. *Reporting Medical Malpractice Payments*, NAT'L PRAC. DATA BANK, https://www.npdb.hrsa.gov/guidebook/EMMPR.jsp [https://perma.cc/EA3L-E263]; *see also* HEALTH RES. & SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., NPDB GUIDEBOOK, at E-18 to -19 (2015) (explaining which forms of medical malpractice payments must be reported).

279. Ayres, *supra* note 208, at 76. *See generally* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 146–50 (2012) (defining "information escrow" and discussing its utility in the legal context); *see also* Ayres, *supra* note 208, at 79–81 (arguing that NDAs should be enforceable only if they meet certain formalities, including explicitly disclosing a survivor's rights to report the 'violations to the Equal Employment Opportunity Commission (EEOC) and comply with official investigations).

privacy regarding isolated incidents.[280] A requirement of an additional, independent "hit" against the same tortfeasor for information to be released might also serve to decrease the impact of false complaints.[281] The reporting bystander's personal information should also be protected to prevent retaliation.[282] Indeed, the complicated experience with sex offender registration and notification laws,[283] and concerns that inspired "Ban the Box" laws,[284] should caution us against a publicly available database.[285] Instead, a database approach should carefully balance,

280. In the sexual harassment and assault context, it is interesting to note Callisto, a mobile app which harnesses technology to encourage reporting and enable coordination between victims of sexual assault. *See* Ian Ayers, *Meet Callisto, the Tinder-Like Platform that Aims to Fight Sexual Assault*, WASH. POST (Oct. 9, 2015), https://www.washingtonpost.com/opinions/using-game-theory-technologyto-fightsexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699_story.html [https://perma.cc/K338-TCDL].

281. Another potential adjustment to consider is reporting any written complaint or claim settled by the organization. The reason is that a database containing only payments resulting from a claim or judgment might discourage out-of-court settlements which compensate victims. Research has found that the NPDB has created such a disincentive, at least on smaller claims. *See* Teresa M. Waters et al., *Impact of the National Practitioner Data Bank on Resolution of Malpractice Claims*, 40 INQUIRY 283, 289–92 (2003) (showing that the NPDB has resulted in providers' unwillingness to settle claims of less than $50,000); Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 306 (2017) ("At least one study shows that providers become more reluctant to settle liability claims if settlement triggers the NPDB mandatory reporting requirement."). Medical providers are "reluctant to agree to even nominal settlements because they trigger reporting requirements, implying fault and tarnishing reputations." Nussbaum, *supra*, at 262.

282. *See supra* note 205 and accompanying text.

283. *See, e.g.*, J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 161 (2011) (finding, that community notification laws may actually increase recidivism in sex offenders); Amanda Y. Agan & J.J. Prescott, *Sex Offender Law and the Geography of Victimization*, 11 J. EMPIRICAL LEGAL STUD. 786, 786 (2014) (finding that at least for some types of sex crimes, "notification appears to *increase* the relative risk of victimization in neighborhoods with greater concentrations of [registered sex offenders]").

284. "Ban the Box" laws prevent employers from asking about criminal history on job applications with the purpose of preventing employment discrimination based on criminal record. *See* Dallan F. Flake, *Do Ban-the-Box Laws Really Work*, 104 IOWA L. REV. 1079, 1087–93 (2019).

285. While not providing a full solution, the information should be provided as part of the licensing process for certain professions, similar to the medical context. *See What Is an Eligible Entity?*, *supra* note 277 (describing an "Eligible Entity," including "[a] state licensing or certification authority"). In products

along the lines discussed here, the benefits of information dissemination with the risks of breaching individuals' privacy.

A different model in the employment context might expand employee background checks. In recent years, several states have attempted to combat a practice known as "passing the trash," which involves educators accused of sexual abuse quietly resigning and relocating to other school districts, often evading detection.[286] In response, in 2018, New Jersey introduced a statute[287] which mandates that schools inquire about teachers' sexual misconduct investigations spanning the last two decades.[288] Several other states have enacted similar statutes with variations in requirements and penalties.[289] However, impact remains limited,[290] in part because mandatory reporting often

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liability cases, established consumer protection organizations, such as Consumer Reports, should have access. *See, e.g.*, CONSUMER REPORTS, https://www.consumerreports.org [https://perma.cc/5GGW-XAPT].

286. *See Passing the Trash*, CERRI BOSKOVICH & ALLARD, https://www.cbalawfirm.com/passing-the-trash.html [https://perma.cc/K59A-MGC6]. See also *supra* notes 204–05 and accompanying text for a discussion of former employers' duty to warn.

287. N.J. STAT. ANN. §§ 18A:6-7.6 to -7.13 (West 2024).

288. *Id.* § 18A:6-7.7. Complaints against former teachers must be shared with prospective employers unless proven false. *See Safeguarding New Jersey Students from Sexual Predators and Child Abuse at School*, STATE OF N.J. COMM'N OF INVESTIGATION 7 (Mar. 2024), https://www.nj.gov/sci/pdf/SCI%20Pass%20the%20Trash%20Report.pdf [https://perma.cc/QG8Z-5QCS]. Failure to provide the requested information within 20 days can lead to the disqualification of an applicant. *P.L. 2018, c. 5 Frequently Asked Questions*, STATE OF N.J., https://www.nj.gov/education/crimhist/preemployment/faq.pdf [https://perma.cc/5CPJ-YQ8V]; *see also Many NJ Educators Discharged Since "Pass the Trash" Law Went Into Effect*, AYDELOTTE LAW (Aug. 5, 2021), https://www.njladylawyers.com/blog/many-nj-educators-discharged-since-pass-the-trash-law-went-into-effect [https://perma.cc/78LY-NK84] (detailing sexual misconduct arrests and convictions of teachers, school administrators, and school employees following the enactment of New Jersey's "pass the trash" law).

289. *See* Amos N. Guiora, *Sea of Destruction: Legal and Social Forces Enabling Sexual Abuse of Children*, 55 TEX. TECH L. REV. 99, 121–25 (2022) (reviewing the current state of "pass the trash" legislation). In 2015, Congress enacted the Prohibition on Aiding and Abetting Sexual Abuse, which obliges states to develop laws preventing individuals or agencies from aiding school employees, contractors, or agents in securing new jobs if they have engaged in sexual misconduct with minors. *Id.* at 122. However, less than half of the states have enacted such laws. *Id.* And only four states—Montana, North Dakota, Texas, and Wisconsin—have criminalized the practice. *Id.*

290. Research shows merely five percent of school employee sexual abuse incidents are reported. Billie-Jo Grant et al., *Passing the Trash: Absence of State*

applies solely to child abuse cases, excluding other misconduct.[291] At the same time, side-effects such as adverse impact on employee privacy and employment opportunities are present here too.[292] Thus, while such laws offer a potential alternative model, more research is needed to optimize their design.

A final model would be one akin to red flag laws in the context of gun violence, which allow firearms to be removed from those who present a risk to others or to themselves.[293] While such laws have been subject to various constitutional challenges,[294] they offer a potentially promising avenue towards reducing future dangers while monitoring for potential abuse.

Many questions remain open regarding the workability of a duty to warn, in whichever way it is administered. In particular, further thinking is required regarding the information to be disclosed,[295] the disclosure mechanism, and information validation.[296] To begin this conversation, I lay out several specific concerns and suggest preliminary ways to address them.

Laws Allows for Continued Sexual Abuse of K-12 Students by School Employees, 28 J. CHILD SEXUAL ABUSE 84, 90 (2019).

291. *See* Guiora, *supra* note 289, at 126–27 (noting that almost every state restricts mandatory reporting protections to the assault of children).

292. See discussion below regarding open questions with respect to the workability of a duty to warn in the employment context. *Infra* notes 297–310 and accompanying text.

293. *See, e.g.*, Rachel Dalafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867, 867 (2021) (finding that red flag laws are associated with reduced suicides but not with reduced homicide rates).

294. *See* Coleman Gay, Note, *"Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491, 1524–26 (2020) (examining how state courts have ruled on Second Amendment challenges to red flag laws).

295. Further questions in this context regard the temporal dimension—does the duty ever age out?—and the severity dimension—should the duty only apply to severe harm?

296. A key issue with the NPDB has been "blacklisting." *See* Nussbaum, *supra* note 281, at 305–06 ("While the ultimate purpose of the NPDB is to improve the quality of medical care, some in the medical profession view it as an unwarranted 'blacklisting' that can destroy a physician's career."); Katharine A. Van Tassel, *Blacklisted: The Constitutionality of the Federal System for Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank*, 33 CARDOZO L. REV. 2031, 2057–62 (2012) (noting the various negative consequences that doctors suffer as a result of an adverse report to the NPDB).

First, wrongdoers' privacy. As technology makes information more easily transmitted,[297] and with mounting concerns about lack of sufficient data protection,[298] disclosing information regarding prospective harm could be a risky endeavor. Risks are manifested in several ways. Some alleged wrongdoers might be falsely targeted, despite seemingly credible information about their wrongdoing.[299] Others may have caused harm in the past but now have valid interests in closure and redemption.[300] Disclosing information about the harm a wrongdoer has caused is in tension with such interests. These concerns should prompt us to not only carefully consider when should information be disclosed by informed bystanders but also to come up with mechanisms to verify the information.[301]

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297. *See generally* DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2004) (considering legal implications of the "information revolution").

298. *See generally* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701 (2010) (discussing the implications of research showing anonymization does not provide adequate privacy protection); Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687 (2020) (proposing a "comprehensive approach" to privacy given the current trend of corporations' excessive "appetite for data").

299. While research shows that false accusations are rare, they do happen. *See* Karlyn Borysenko, *The Dark Side of #MeToo: What Happens When Men Are Falsely Accused*, FORBES (Feb. 12, 2020), https://www.forbes.com/sites/karlynborysenko/2020/02/12/the-dark-side-of-metoo-what-happens-when-men-are-falsely-accused/?sh=5cebf4bd864d [https://perma.cc/N28H-8GFC] (highlighting the negative impact of false accusations on men's lives). Furthermore, sexual harassment cases are disproportionately brought against people of color. *See* Amia Srinivasan, *Sex as a Pedagogical Failure*, 129 YALE L.J. 1100, 1143 (2020) (discussing the issue in the context of higher education, highlighting an instance where, during a single academic year, fifty percent of sexual violation accusations were against Black male students at a university where barely more than four percent of the student body was Black).

300. On the right to redemption in the criminal context, see generally Terrell Carter et al., *Redeeming Justice*, 116 NW. U. L. REV. 315 (2021) (arguing that the capacity for redemption is an innate human characteristic, and that the right to redemption should be recognized by law); Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 LA. L. REV. 47 (2016) (arguing that juveniles' immaturity supports providing avenues of legal redemption for juvenile offenders).

301. One possibility is limiting the duty to certain types of torts that involve responsibility and solidarity towards others. Elsewhere, I proposed a duty to disclose owed by plaintiffs should apply only to "Social Injustice Torts." *See* Bachar, *supra* note 203, at 44–45 (arguing that in such torts, wrongdoers pose

In the employment context, because employee personnel records are often private,[302] sharing the results of an internal investigation regarding misconduct raises privacy concerns.[303] Furthermore, the cost of warning is not only individual, but also collective, as a duty to warn might generate suspicions between fellow workers. However, a budding trend towards transparency might change existing norms. In particular, mandatory employer disclosures in states like California—on issues ranging from diversity to salaries—reflect such a trend.[304] Thus, subject to adequate protections of employee data,[305] a limited disclosure requirement might be part of this legislative push.

Second, victims' privacy, wishes, and interests. What should an informed bystander do if they reasonably reach the conclusion that speaking out would go against a prior victim's choice? Should this mean a lack of duty to warn or is it evidence that the bystander did not breach the duty (because *not* warning constitutes reasonable care under the circumstances)? Here too, context matters. Regarding repeated abuse or harassment, a key

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a significant risk to third parties and society more broadly, thus justifying disclosure). Such a focus could be justified in terms of leveraging tort law to promote social justice. *See* Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. 309, 315–18 (2021) (discussing the relationship between tort law and social justice).

302. *See* CORPORATE COUNSEL'S GUIDE TO LEGAL ASPECTS OF EMPLOYEE HANDBOOKS AND POLICIES § 7:8 (2023), Westlaw CGLAEHP (noting statutory and judicial protections against disclosure of employee personnel files).

303. *Cf.* Ashby, *supra* note 189, at 144 (noting that an affirmative duty to warn will likely lead to the excessive disclosure of minor incidents of employee misconduct or unproven accusations).

304. For more on mandatory disclosures in labor and employment law, see generally Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 351 (2011) (arguing that mandatory disclosure might help employee bargaining, thus improving how labor markets operate). For statutes and ordinances addressing mandatory disclosures, see, for example, CAL. LABOR CODE § 1197.5 (West 2024) (requiring employers to retain records of wages, wage rates, job classifications, and other terms and conditions of employment for at least three years); NEV. REV. STAT. § 245.0465 (2023) (requiring county officials to provide the salary range of county positions in certain circumstances); JERSEY CITY, N.J., N.J. CODE OF ORDINANCES § 148-4.1 (2024) (requiring job listings to disclose salary ranges); 805 ILL. COMP. STAT. ANN. 5/8.12 (West 2024) (requiring public information on the racial/gender composition of members of corporate boards).

305. For concerns about a data-driven approach to hiring and promoting employees, see generally Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017).

impediment to bystander disclosures is the justified concern for a prior victim's safety. This is partly because the bystander might worry that the abuser will (wrongly) assume that the disclosure came from the victim and retaliate against them. Such concern might arise even though, as noted, victims should be excluded from the legal duty to warn. But victims may have further reasons for not wanting others to know about their abuse. While my long-term project is to challenge this self-interested silence to create greater norms of solidarity that could protect future victims,[306] courts will have to consider the risk to victims' safety and privacy as a result of specific disclosure. This risk should not affect the existence of an informed bystander's duty to warn, but it might influence the determination of whether the bystander breached their duty of care under the circumstances.

Finally, there are risks of liability for defamation and breach of contractual obligations. Disclosure of information triggered by a duty to warn will need to constitute a defense from defamation lawsuits, thus protecting informed bystanders operating under the duty from liability. Such a mechanism should also protect true informed bystanders who hold credible information but are not in a position of power or special capacity when they seek to discharge their moral duty to warn. More specifically, subject to a hearing, a good faith belief in the substance of the warning, and a good faith belief that the bystander was subject to a duty to warn should give rise to such a defense.[307] That said, concerns would still arise regarding the ability of bystanders to speak in a personalized manner about the potential wrongdoer without being subject to defamation liability. This may require adjustments as to how we understand "good faith" in such contexts.[308] Similarly, a duty to warn will need to override any conflicting

306. *See generally* Bachar, *supra* note 203 (discussing the value of solidarity between victims as a justification for disclosure duties).

307. The defense should also cover situations in which the bystander did not know a report they were making was false. *See, e.g.*, Howard S. Wolfson et al., *Statutory Immunity for Reports Filed with the National Practitioner Data Bank—What Is "Accurate" Reporting for Purposes of Immunity?*, HEALTH LAW., Aug. 2006, at 24, 25 (discussing immunity from defamation and libel claims provided to hospitals for unknowingly false reports under the NPDB).

308. We might also consider an immunity from defamation suits with respect to certain entities. For a broader discussion on twenty-first century defamation law, see generally David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261 (2010).

contractual obligations, making a non-disclosure agreement unenforceable in circumstances under which a warning is required or excluding reporting required to discharge the duty from the scope of the non-disclosure.[309] While the result could be fewer non-disclosures, such an impact is warranted with respect to agreements that conceal repeated wrongdoing.[310]

Indeed, many questions remain about the administration and feasibility of an informed bystander's duty to warn. Still, this Section aimed to submit that we can learn from existing programs that have already been implemented. It was also aimed at encouraging further discussion on some of the more contentious topics involving a duty to warn, such as victims' wishes and the possibility of defamation.

CONCLUSION

The no-duty rule has been a basic tenet of the common law of torts for ages, and it is taught as such in most first year tort law courses. And yet, over the years, this rule has been gradually eroded through ever-expanding exceptions. And rightfully so, given significant theoretical arguments supporting at least a limited duty to act to prevent harm to others. This Article undertook the task of examining a further contraction of the no-duty rule.

Prompted by the troubling reality of repeated harm kept under wraps in various contexts, the Article synthesized the rich theoretical literature regarding the duty to rescue with the doctrine on the duty to warn developed in *Tarasoff* and in its wake. The Article then built on this analysis to argue that a duty to warn should be recognized with respect to bystanders who hold credible information regarding the nature and likelihood of

309. That said, as evident regarding non-compete agreements, making such agreements unenforceable does not guarantee their disappearance. *See* John M. McAdams, *Non-Compete Agreements: A Review of the Literature* 3 (Dec. 31, 2019) (unpublished manuscript) (on file with the Minnesota Law Review) ("[N]on-competes are only somewhat less common in states where they are completely unenforceable as compared to states with stricter enforceability."); *see also* Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers*, 55 J. HUMAN RES. 1025, 1042 (2020) (finding that thirty-one percent of physicians in California have signed non-competes even though they are unenforceable in that state). This is all the more reason why a deeper cultural shift towards solidarity and social responsibility is needed.

310. For literature discussing such concerns, see *supra* note 208.

prospective harm. In so doing, the Article not only offered a novel analysis of post-*Tarasoff* doctrine, identifying four factors that courts consider when recognizing a duty to warn, but also used existing doctrine as a springboard for supporting a broader duty to warn and dealing with likely pushbacks. The Article did not stop at the theoretical analysis, though, and considered potential models for implementing the duty beyond the common law. Finally, the Article flagged several areas that will need to be further addressed, including the relationship between the duty discussed here and other legal commitments and implications for the laws of defamation and privacy.

As both technology and cultural shifts challenge traditional boundaries of information protection and sharing, the time has come for us to grapple with the scope of the *Tarasoff* duty. These developments could and should transform the existing law of torts. This Article sought to begin a discussion towards finding a path forward.

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