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Minnesota Nice - Minnesota Mean: The Minnesota Supreme Court's Refusal to Protect Sexually Abused Children in H.B. ex rel. Clarke v. Whittemore

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Minnesota "Nice"? Minnesota Mean: The Minnesota Supreme Court's Refusal to Protect Sexually Abused Children in *H.B.* ex rel. *Clarke v. Whittemore*†

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In July 1992, four girls, ages four to seven, informed the manager of their mobile home park that a fellow tenant was sexually abusing them.[1] Despite the girls' report and the park manager's knowledge that the alleged abuser had previously molested other children,[2] the manager did not alert the girls' parents or local authorities of the suspected abuse.[3] As a result, nearly one

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† H.B. *ex rel.* Clarke v. Whittemore, 533 N.W.2d 887 (Minn. Ct. App. 1995), rev'd, H.B. *ex rel.* Clark v. Whittemore, 552 N.W.2d 705 (Minn. 1996). Note: the Minnesota Supreme Court misspelled Respondent Clarke's name as "Clark." This Comment will hereinafter cite both the supreme court and the court of appeals decisions as H.B. *ex rel.* Clarke v. Whittemore or *Whittemore.*

* J.D. expected 1998, University of Minnesota Law School. B.A. 1995, St. Olaf College. I first wish to thank my colleagues at Law & Inequality: A Journal of Theory and Practice for lending this Comment their time and critical input. Special thanks go to JoLee Adamich and Chris Petersen for their tireless editorial guidance. I also wish to thank my parents, James and Francia, and sister Jeanne. By dedicating your life's work to child advocacy, you have each taught me a great deal. Finally, I wish to dedicate this Comment to the loving memory of Brian Patrick Horner. In the truest sense, Brian, I endeavored to do this by your inspiration for vigorous living. I love and miss you greatly.

1. During the summer of 1992, co-defendant Willard Whittemore befriended the four girls at Eaton Mobile Home Park. *Whittemore*, 552 N.W.2d at 707. Whittemore spent time with the girls in his garden, invited them into his trailer, gave them treats and played with them almost daily. *Id.* In July, the girls informed Colleen Arndt, the park's resident manager, that Whittemore had touched them in sexually inappropriate ways. *Id.* The children later reported to investigators that Whittemore "had touched and rubbed their genital areas, both under and over their underwear." *Id.* Subsequent medical examinations confirmed the girls' reports. *Id.* The total length of time during which the abuse took place was not disclosed.

2. *Id.* Like all other residents at Eaton Mobile Home Park, Whittemore submitted a rental application before becoming a tenant. *Whittemore*, 533 N.W.2d at 889. During the application process Whittemore informed Arndt that he had previously molested children while a resident of another mobile home park, that he had then been convicted of criminal sexual conduct and that he had served time in prison for the offenses. *Id.* Arndt nevertheless approved Whittemore's rental application, allowing him to move into Eaton Mobile Home Park in April 1992. *Id.*

3. *Id.* at 889-90.

month passed before anyone else learned of the molestations.[4] During that time, the tenant continued to abuse the girls.[5] After a thorough investigation, seventy-four year-old Willard Whittemore was charged with five counts of second-degree criminal sexual conduct.[6] Whittemore pled guilty to all five counts in 1993.[7] Shortly thereafter, the girls' parents brought civil claims against the mobile home park's owners[8] and operator,[9] alleging that they had negligently failed to report the girls' abuse.[10] The district court granted the defendant's summary judgment motion and the court of appeals, finding that a special relationship existed between Arndt and the girls, reversed.[11] On appeal, the Minnesota Supreme Court reinstated the district court's holding, concluding that the duty to warn or protect[12] arises only[13] when harm is foreseeable and when "a special relationship exists between the actor and the person seeking protection."[14] The supreme court then overruled the court of appeals' finding that a special relationship

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4. On August 22, 1992, one of the girls, S.B., complained to her mother "that she had pain in her vaginal area." *Id.* at 890. S.B.'s mother contacted the police to report the sexual abuse. *Whittemore*, 552 N.W.2d at 707. At that time, local authorities began their investigation. *Id.*

5. Upon being informed of the alleged abuse, "Arndt responded by telling the children to tell their parents, but they did not tell their parents right away. The abuse continued for approximately another three weeks," until S.B. confided in her mother, who then summoned the police. *Id.*

6. *Whittemore*, 533 N.W.2d at 890.

7. *Whittemore*, 552 N.W.2d at 707 n.3.

8. Throughout the time period relevant to this case, SLS Partnership owned the Eaton Mobile Home Park. *Id.* at 706.

9. SLS Partnership contracted with Faegre & Lyons Management Resources, Inc., which did business as Faelon Properties, to manage the Eaton Mobile Home Park. *Id.* Faelon Properties was the direct employer of Colleen Arndt, the mobile home park's manager.

10. The plaintiffs' complaint also alleged fraud. *Id.* The fraud claim alleged that the park owners and operators misrepresented the safety of the park and their role in sustaining a safe environment. *Whittemore*, 533 N.W.2d at 892. On appeal to the Minnesota Supreme Court, the plaintiffs dropped their fraud claim, focusing solely on their claim of negligence. *Whittemore*, 552 N.W.2d at 706 n.1.

11. *Whittemore*, 533 N.W.2d at 887.

12. The duty to warn or protect arises in Minnesota when "a special relationship exists, either between the actor and the third person which imposes a duty to control, or between the actor and the other which gives the other the right to protection." Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168 (Minn. 1989). At times, Minnesota courts have mixed their terminology by characterizing this duty simply as the duty to warn, the duty to protect or the duty to control. For cases applying these principles, see *infra* note 62. Because these characterizations reference the same duty, I refer to them in combination as "the duty to warn or protect."

13. *Whittemore*, 552 N.W.2d at 707. This limiting language applies to exceptions to the general common law rule, namely, that no duty exists to protect others from third-party conduct. *Id.*

14. *Id.*

existed between the park manager and the four girls.[15] In the absence of a special relationship, the park manager had no duty to report the girls' abuse.[16]

Whittemore determines the extent to which Minnesota's common law will protect known victims of child sexual abuse. For the hundreds of Minnesota children victimized annually by sexual abuse,[17] the Minnesota Supreme Court's decision in *Whittemore* is ominous. It endorses moral irresponsibility and inaction by those who are best situated to prevent the horrors of child molestation.

This Comment argues that the Minnesota Supreme Court erred in holding that the owners and operator of the Eaton Mobile Home Park had no duty to report the girls' abuse. Part I highlights the four crucial contextual elements of *H.B.* ex rel. *Clarke v. Whittemore*: Part I.A evaluates the effects of child sexual abuse on its victims and society generally, in Minnesota and nationwide; Part I.B discusses the legal history of common law negligence, specifically as it concerns the duty to warn or protect another from tortious third-party conduct; Part I.C explores Minnesota's most recent common law expansion of the duty to warn or protect; and Part I.D summarizes Indiana's common law innovations of the duty to warn as applied to child sexual abuse reporting. Part II examines the holding and reasoning of the Minnesota Supreme Court in *Whittemore*. Finally, Part III argues that the *Whittemore* court erred in finding that no special relationship existed between the park manager and the girls. Rather, the court should have found that a special relationship did exist between the parties, and that this special relationship was accompanied by a foreseeable risk of harm to the girls. When attended by public policy considerations, these factors compel placement of a duty on the manager to report the girls' abuse.

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15. *Id.* at 707 ("As to the existence of a duty . . . we . . . note the general common law rule that a person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct."). Traditionally, relationships in which a duty to warn or protect arises are those of innkeeper and guest, common carrier and passenger, and hospital and patient. *Id.* Outside of those exceptions, a duty to warn or protect arises only when "the harm is foreseeable and a special relationship exists between the actor and the person seeking protection." *Id.* (citing Erickson,447 N.W.2d at 168-69).

16. *Whittemore*, 552 N.W.2d at 708 ("[W]e are drawn to the compelling conclusion that under the circumstances here no special relationship came into existence between Arndt and the children upon which to premise a duty.").

17. *See infra* notes 24-31 and accompanying text (establishing that children under the age of eighteen are the most frequent victims of Minnesota sex offenders).

I. The Social and Legal Context of *H.B.* ex rel. *Clarke v. Whittemore*

A. The Nature and Effects of Child Sexual Abuse in Minnesota and Nationwide

Arguably the most serious social problem Minnesotans face is the frequency of sex crimes occurring annually within their state. Between 1971 and 1984, the sex crime rate in Minnesota nearly tripled.[18] Although the annual level of reported sex crimes has remained relatively steady since 1984,[19] there were from 5,875 to 6,851 sex offenses and rapes reported annually from 1990 to 1995.[20] These numbers relate only to *reported* sex crimes; the actual number of sex crimes occurring annually is unknown.[21]

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18. *See* OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, SEX OFFENDER TREATMENT PROGRAMS x (1994) [hereinafter SEX OFFENDER TREATMENT PROGRAMS]. Minnesota police officers received reports of 2,303 sex offenses in 1971, and 6,589 in 1984. *Id.* This significant rise in reports is attributed in part to the passage of mandatory child abuse reporting laws. *Id.* In support of this conclusion, the report noted that "[b]etween 1981 and 1992, adult convictions for sex offenses involving force remained at the level of 145 to 190 each year, but convictions for child sexual abuse nearly tripled, rising from 160 to 461, and convictions for intra-familial sex abuse increasing from 3 to 154." *Id.* (footnote omitted). The term "sex offenses," as it appears in this report, refers to all violations of the five statutory degrees of criminal sexual conduct that exist in Minnesota. *Id.* at 4 ("The five degrees differ primarily on three factors: whether or not there was sexual penetration, the amount of force involved, and the relationship of the offender to the victim."); *cf. infra* note 21 (defining "sex offenses" differently).

Individuals mandated by Minnesota statute to report suspected child sexual abuse include: professionals or their delegates working in "the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement;" or members of the clergy, subject to exceptions. MINN. STAT. § 626.556, subd. 3 (1996). For the statutory text on mandatory reporting, see *infra* note 37.

19. The number of reported sex offenses rose nearly threefold in Minnesota between 1971 and 1984, "but has remained relatively constant since then." SEX OFFENDER TREATMENT PROGRAMS, *supra* note 18, at x.

20. CRIMINAL JUSTICE CTR., MINNESOTA PLANNING, NUMBER OF OFFENSES KNOWN/REPORTED TO LAW ENFORCEMENT 1990 TO 1995. In arriving at these statistics, the Minnesota Criminal Justice Center evaluated the reports of two distinct offenses, defined as follows:

> Rape (does not include statutory rape): (a) Rape by Force—The carnal knowledge of a female forcibly and against her will, but excluding statutory rape and other sex offenses; (b) Assault to Rape/Attempts—All assaults and attempts to rape.
>
> Sex Offenses: This includes all sex offenses other than forcible rape, prostitution and commercialized vice. This encompasses offenses against chastity, common decency, morals and the like such as adultery and fornication, buggery, incest, indecent exposure, sodomy, carnal abuse (no force) and all attempts to commit any of the above.

Id.

Sex crimes are the seeming offenses of choice in Minnesota, comprising nearly 22% of all convictions for which Minnesota inmates are currently serving time.[22] No other criminal activity is more highly represented among Minnesota's total prison population.[23] When examined beyond its explicit significance, this figure betrays an unsettling reality. Among *victims* of sex offenders convicted in 1992, 90% were children or adolescents.[24] In other words,

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Using these definitions, the Center gathered the following statistics:

Year	1990	1991	1992	1993	1994	1995
Rapes	1,640	1,791	2,900	2,713	2,762	2,571
Sex Off's	4,738	5,060	3,657	3,726	3,516	3,304
Total	6,378	6,851	6,557	6,439	6,278	5,875

Id.

21. The statistics gathered by the National Center of Child Abuse and Neglect estimate that in 1993, 200,000 children were victimized by physical abuse, and that 130,000 of these children were victims of sexual abuse. Joseph A. Kirby, *Survey: 1 in 20 Parents Committing Child Abuse, Gallup Numbers Much Higher Than U.S. Data*, CHI. TRIB., Dec. 7, 1995, § 1, at 22. These numbers are significantly lower than those of a recent Gallup poll, concluding that over 3 million children are victims of physical abuse every year, and that 1.3 million children are sexually abused annually. *Id.*

Some of these statistical discrepancies are caused by the difficulty of collecting data on abuse. Accurate estimates of child abuse and neglect are difficult to determine, and reported statistics usually only "reflect state substantiated incidents." U.S. Department of Health & Human Services, *HHS Releases New Statistics of Child Abuse and Neglect as Child Abuse and Neglect Prevention Month Begin* (last modified July 26, 1996) <http://www.acf.dhhs.gov/news/press/1996/aprcan. html>. Studies using differing methodologies tend to conclude that a greater number of children are abused than is substantiated by the state. *Id.* For example, child sexual abuse researchers have estimated that less than one-fifth of all cases of abuse are reported. Joy Lazo, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345, 1350 n.22 (1995).

22. *See* MINNESOTA DEP'T OF CORRECTIONS, ADULT AND JUVENILE INMATE PROFILES (July 1, 1996). In categorizing the crimes for which Minnesota inmates were imprisoned as of July 1, 1996, the Department of Corrections divided inmates into adult and juvenile categories. *Id.* On that date, 4,927 adult males and females were serving time, 1,092 (22.3%) of whom were serving sentences resulting from sex offense convictions. *Id.* No other criminal activity was more highly represented among Minnesota's adult inmate population. *Id.* Among the 227 male and female juveniles incarcerated in Minnesota as of July 1, 1996, 31 (14.9%) were serving sentences resulting from sex offense convictions. *Id.* This criminal activity ranked fourth behind auto theft (20.2%), burglary (18.3%) and assault (15.9%). *Id.*

When combined, the categories of adult and juvenile offenders produce somber results. Of the 5,154 total adult and juvenile incarcerated offenders in Minnesota as of July 1, 1996, 1,123 (21.78%) were serving time for sex offenses. *Id.* This percentage far overshadowed those for homicide (16.37%), assault (14.16%) and burglary crimes (11.27%). *Id.*

23. *See id.*

24. *See* SEX OFFENDER TREATMENT PROGRAMS, *supra* note 18, at x (using information gathered from the Information and Analysis Division of the Department of Public Safety and information on criminal convictions and sentencing collected by the Minnesota Supreme Court and tabulated by the Office of Strategic Long Range Planning (for juvenile offenders) and the Sentencing Guidelines Commis-

children under the age of eighteen are the favorite targets of Minnesota sex offenders.

Among adult offenders in Minnesota, sex crimes are most commonly perpetrated by males against female children they know. In 1992, 97% of convicted adult sex offenders were male, 87% of whose victims were female.[25] Shockingly, 46% of all victims of adult sex offenders were under the age of thirteen.[26] Ninety-three percent of adult offenders had at least an acquaintance-like relationship with their victim(s).[27]

Among juvenile sex offenders, statistical patterns produce similarly sobering results. As with adults in 1992, over 90% of juveniles convicted for sex offenses in 1991 were male,[28] over 80% of whose victims were female.[29] Likewise, 95% of juvenile sex offenders had at least an acquaintance-like relationship with their victim(s).[30] An astounding 70% of juvenile sex offenders' victims were under the age of thirteen.[31]

Nationally, the effects of child sexual abuse have proven disastrous. Children who are sexually abused are 55% more likely to be arrested later in life than are persons who have never been maltreated.[32] "This is true for juvenile as well as adult arrests."[33]

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sion (for adult offenders)).

25. *See id.* at 13-14.

26. *See id.* at 14. This information contrasts with three other statistical categories for 1992: children ages 13–15 (who represent 32% of all persons victimized by adult sex offenders), children ages 16–17 (6%) and persons 18 and over (16%). *Id.* Of the 710 adult sex offenders in Minnesota in 1992, only 29 were strangers to their victims. SEX OFFENDER TREATMENT PROGRAMS, *supra* note 18, at 14. Of the 554 juvenile sex offenders in 1991, only 28 were strangers to their victims. *Id.* at 12.

27. *Id.* at 14. Specific statistical breakdowns concerning the relationships between adult sex offenders and victims for 1992 are as follows: 19% were parents or stepparents of their victims, 5% were spouses or co-habitators of their victims, 14% were other family members, 7% were persons in authority but not family members, 48% were acquaintances and only 7% were strangers. *Id.*

28. *See id.* at 11 (noting that in 1991, 96% of juvenile sex offenders were male).

29. *See id.* at 12 (reporting that in 1991, 82% of juvenile sex offense victims were female).

30. *See id.* The data regarding the relationships between juvenile sex offenders and their victims in 1991 shows that 35% of victimizers were family members of their victims, 5% were in positions of authority but not family members, 55% were acquaintances and 5% were strangers. *Id.*

31. *See id.*

32. *See* CATHY SPATZ WIDOM, NATIONAL INST. ON JUSTICE, RESEARCH IN BRIEF, VICTIMS OF CHILDHOOD SEXUAL ABUSE—LATER CRIMINAL CONSEQUENCES 4 (1995). Statistically, 26% of persons abused and/or neglected were later charged with criminal behavior as juveniles. *Id.* The juvenile arrest rate among those who had not suffered maltreatment during childhood was 16.8%. *Id.* Statistics indicate similar discrepancies in adult arrests between individuals who were and were not maltreated during childhood. *Id.*

33. *Id.*

Among property and drug-related crimes, offenders are 68% and 54% more likely, respectively, to be child sexual abuse victims than persons who have never been maltreated.[34] Similarly, persons who have suffered child sexual abuse are nearly 500% more likely to be arrested for committing sex crimes than are persons who have not been victimized as children.[35] The most troubling aspect of this finding concerns the nature of those sex crimes. Sexually abused children are nearly 3,000% more likely to be arrested for adult prostitution than are persons who were never maltreated during adolescence.[36]

Despite the disturbing nature and clearly harmful effects of child sexual abuse, Minnesota has only a limited statutory duty requiring the reporting of such abuse.[37] In fact, only a small number of persons who may have knowledge of child sexual abuse are mandated by law to contact community authorities.[38] This is so

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34. *See id.* Specifically, 14.3% of persons abused and/or neglected during childhood were later charged as juveniles with committing property crimes, while only 8.5% of persons not maltreated during childhood were similarly charged as juveniles. *Id.* This disparity also existed among adults charged with property crimes. *Id.* Roughly 8% of persons abused and/or neglected as children were arrested for drug-related offenses as adults, as opposed to 5.2% of persons who were not maltreated as children. *Id.*

35. *Id.* at 5 ("For abused and neglected children in general, the odds of being arrested as adults for a sex crime were higher than for nonvictims. Among sexually abused children, the odds were 4.7 times higher.").

36. *Id.* ("Among children who were sexually abused, the odds are 27.7 times higher than [for those who were not maltreated as children] of being arrested for prostitution as an adult."). The statistical disparities between these two groups continue in the area of juvenile runaways. The likelihood that child sexual abuse victims will become runaways is 2.4 times greater than for children who have not been maltreated. *Id.*

37. Despite its promising title, the Minnesota Child Abuse Reporting Act and its relevant guidelines severely limit legally obligatory reporting. *See* MINN. STAT. § 626.556, subd. 2-3 (1996). Specifically, the statute confines mandatory reporting to the following persons:

> Subd. 3. PERSONS MANDATED TO REPORT. (a) A person who knows or has reason to believe a child is being neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, police department, or the county sheriff *if the person is*:
>
> (1) a professional or professional's delegate who engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement;
>
> or
>
> (2) employed as a member of the clergy and received the information while engaged in ministerial duties, provided that a member of the clergy is not required by this subdivision to report information that is otherwise privileged under section 595.02, subdivision 1, paragraph (c).

Id. (emphasis added).

38. *See id.* As the statute guides, only such persons as physical and psycho-

despite Minnesota's liberal immunization of all good faith abuse reporting from potential civil and criminal liability.[39]

A wealth of literature[40] has been published in response to the detrimental impact child sexual abuse has on the physical and mental health of its victims throughout their lives.[41] Perhaps no sentiment, however, better captures the long-lasting damage of child sexual abuse than this statement made by one of its survivors:

> WHEN I FIRST BEGAN to realize what had happened to me, I remember telling people that I thought . . . it all seemed like a dream. . . . I was both remembering and forgetting. *How could that have happened to me? Why did it happen? Where was everyone else? And perhaps most important: Was he right in saying and doing those things to me . . . ?*[42]

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logical health workers, social workers, teachers, child care providers, law enforcement officials and clergy may be mandated to report suspected child sexual abuse.

39. *See id.* The Minnesota Legislature has explicitly granted immunity from potential liability resulting from abuse reporting:

> Subd. 4. IMMUNITY FROM LIABILITY. (a) The following persons are immune from any civil or criminal liability that otherwise might result from their actions, if they are acting in good faith:
>
> (1) any person making a voluntary or mandated report under subdivision 3 or under section 626.556 or assisting in an assessment under this section or under section 626.5561; . . . .

MINN. STAT. § 626.556, subd. 4 (1996).

40. *See, e.g.*, NEAL KING, SPEAKING OUR TRUTH: VOICES OF COURAGE AND HEALING FOR MALE SURVIVORS OF CHILDHOOD SEXUAL ABUSE (1995) (compiling first-hand accounts of victims' recollections of—and coming to terms with—sexual abuse experienced during childhood). Among other things, King's book describes the emotive responses of victims to their victimizers (people who were often figures of authority within the victims' lives), including rage over having been abused and the psychological effects of abuse on later episodes of intimacy and sexuality in the victim's life. *Id. See also* SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978) (establishing a dialogue about incest based upon hundreds of interviews with both male and female victims); BEVERLY GOMES-SCHWARTZ ET AL., CHILD SEXUAL ABUSE: THE INITIAL EFFECTS (1990) (analyzing research studies conducted to ascertain the initial effects of child sexual abuse upon children and families); STEPHEN D. GRUBMAN-BLACK, BROKEN BOYS/MENDING MEN: RECOVERY FROM CHILDHOOD SEXUAL ABUSE (1990) (discussing the many inner and interpersonal effects of child sexual abuse).

41. In 1989, C. Everett Koop, then Surgeon General of the United States Public Health Service, published a letter advising health professionals nationwide about the necessity of combating child sexual abuse. C. EVERETT KOOP, M.D., SC.D., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S LETTER ON CHILD SEXUAL ABUSE (1989). As stated in the letter's foreword, the appearance of child sexual abuse victims in health service offices is of growing concern. *Id.* Nationwide, "about a million children are physically maltreated and abused. Over 110,000 of these children are sexually abused. The physical and mental health consequences to these children are simply overwhelming." *Id.* Koop wrote the letter to aid health care professionals in properly identifying and treating the growing number of children who are sexually abused annually. *Id.*

42. GRUBMAN-BLACK, *supra* note 40, at 60 (emphasis added).

B. *Negligence: The Common Law Duty to Warn or Protect Another from Third-Party Conduct*

1. The Nature and Origins of Common Law Negligence and the Duty to Warn or Protect

The common law rarely imposes upon persons the duty[43] to warn or protect another from third-party conduct.[44] While courts unflinchingly regulate actual conduct injurious to others, they rarely require persons who simply refrain from helping others to act positively.[45] The philosophical foundation of this distinction is firmly embedded in the rugged conceptual landscape of independence and self-reliance.[46] Morality, it is widely believed, "should be left to one's own conscience."[47] By extension, the conversion of courts into arbiters for the enforcement of person-to-person aid has historically been rejected.[48]

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43. Determining whether a duty exists "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984). To this end, a duty must not be regarded as sacred unto itself. *Id.* at 358. Rather, it should be derived from "the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Id.*

44. *See id.* § 56, at 373.

45. *See* A.M. Linden, *Tort Liability for Criminal Nonfeasance*, 44 CANADIAN B. REV. 25, 27 (1966) (analyzing the degree to which common law nonfeasance has been shaped by criminal nonfeasance developments, if at all); *see also* KEETON ET AL., *supra* note 43, § 56, at 373 (proposing that early "courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer harm because of his omission to act").

The distinction between misfeasance and nonfeasance is widely regarded as the most deeply rooted distinction in the common law. *See* Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908). In misfeasance, "the victim is positively worse off as a result of the wrongful act. In cases of passive inaction, [or nonfeasance, the] plaintiff is in reality no worse off . . . ." *Id.* at 220. Misfeasance thus describes situations in which a plaintiff suffers new harm; nonfeasance describes situations in which the plaintiff "is merely deprived of a protection which, had it been afforded [her] would have benefited" her. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 314, cmt. c (1965) (stating that in earlier law, "the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act").

46. *See* Linden, *supra* note 45, at 29 ("The common law is said to promote rugged individualism and the independence of mankind. People who live in common law countries should be self-sufficient and shun dependency on others.").

47. *Id.* at 30.

48. *See* KEETON ET AL., *supra* note 43, § 56, at 373 ("The highly individualistic philosophy of the older common law had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from con-

Exceptions to this rule have traditionally required more than the mere necessity of protective action in order to find a duty to warn or protect.[49] Within the last century, such exceptions have typically involved situations in which a plaintiff is "particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare."[50] The duty-to-warn inquiry thus focuses on the nature of the association between plaintiff and defendant. For a plaintiff to be owed a duty, her relationship with the defendant must be "of such a character that social policy justifies the imposition of a duty to act."[51]

Only a handful of special relationships are recognized by the common law as automatically giving rise to a duty to warn or protect.[52] Such relationships include those of common carrier and passenger,[53] innkeeper and guest,[54] hospital and patient,[55] landowners who open their property to the public[56] and persons having custody of others.[57] These associations are generally deemed pro-

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verting the courts into an agency for forcing men to help one another.").

49. *See* Bohlen, *supra* note 45, at 221. *See also* RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

50. KEETON ET AL., *supra* note 43, § 56, at 374.

51. *Id.*

52. RESTATEMENT (SECOND) OF TORTS § 314A (1965), guides as follows:

> §314A. Special Relations Giving Rise to Duty to Aid or Protect.
>
> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> (a) to protect them against unreasonable risk of physical harm, and
>
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

53. *See id*; *see also* KEETON ET AL., *supra* note 43, § 56, at 383 ("[T]he duty of a carrier toward its passengers . . . require[s] it to maintain order in its trains . . . and to use reasonable care to prevent not only conduct which is merely negligent, but also physical attacks . . . on the part of other passengers . . . .").

54. *See supra* note 52; *see also* KEETON ET AL., *supra* note 43, § 56, at 383 ("A similar obligation [to that placed upon common carriers] rests upon innkeepers towards their guests . . . .").

55. *See* KEETON ET AL., *supra* note 43, § 56, at 383 ("A similar obligation [as is placed upon common carriers] rests upon . . . hospitals toward their patients. . . .").

56. RESTATEMENT (SECOND) OF TORTS § 314A.

57. *See id.*

tective in nature[58] and, therefore, subject to greater social expectations of care.

The origins of the special relationship exception are largely traceable to commercial transactions. Historically, the duty elements of "dependence" and "acceptance" arose from situations wherein the defendant stood to benefit economically from her contact with the plaintiff.[59] When plaintiffs transacted with defendants, and compromised their safety as a result, "dependence" upon the defendants for protection was often justified as part of the transaction's bargain.[60] By nature of consenting to such transactions, defendants were deemed to have "accepted" the plaintiff's entrustment.[61]

2. Minnesota's Common Law Construction of the Duty to Warn or Protect

Minnesota's construction of the duty to warn or protect embodies the same common law principles as discussed above. Generally, Minnesotans have no duty to warn or protect others from injurious third-party conduct.[62] That one's action is necessary for

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58. *See id.*

59. JOHN G. FLEMING, THE LAW OF TORTS 152 (8th ed. 1992). *See also* KEETON ET AL., *supra* note 43, § 56, at 374 (explaining that relationships in which a duty to warn or protect has been held to exist "have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.").

60. *See* Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168 (Minn. 1989) (stating that to impose a legal duty upon "A to protect B from C's criminal acts, the law usually looks for . . . a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment").

61. A review of Minnesota common law supports this proposition. With the exception of parent-child relationships, all other relationships in which a common law duty to warn was found to exist resulted from economic undertakings. *See generally* Andrade v. Ellefson, 391 N.W.2d 836 (Minn. 1986) (holding that Anoka County had a duty to protect uniquely vulnerable small children from an abusive day care provider through its system of licensure); *Erickson*, 447 N.W.2d at 165 (holding that parking ramp operators have a duty to reasonably guard against crimes occurring to patrons on ramp premises).

62. *See generally* Donaldson v. Y.W.C.A. of Duluth, 539 N.W.2d 789, 793 (Minn. 1995) (holding that the Y.W.C.A. had no duty to protect a female lodger from killing herself); Harper v. Herman, 499 N.W.2d 472, 475 (Minn. 1993) (holding that a boat operator owed no duty to protect his guest from diving headfirst into a lake and consequently becoming paralyzed); Lundgren v. Fultz, 354 N.W.2d 25, 29 (Minn. 1984) (holding that a psychiatrist owed no duty to warn his patient's murder victim of the patient's dangerous propensities). *But cf. Erickson*, 447 N.W.2d at 170 (holding that parking ramp operators have a duty to reasonably guard against crimes occurring to patrons on ramp premises); *Andrade*, 391 N.W.2d at 841-43 (holding that Anoka County had a duty to protect uniquely vul-

the protection of another does not, by itself, give rise to a duty to warn or protect.[63] Exceptions to this rule arise only when "a special relationship exists, either between the actor and the third person which imposes a duty to control, or between the actor and the other which gives the other the right to protection."[64] The nature of the relationship between plaintiff and defendant therefore provides the basis for courts to premise a duty.[65]

Once found, a special relationship must also be accompanied by a foreseeable risk of harm before a duty to warn or protect will arise.[66] The cornerstone of negligence law,[67] foreseeability is central to the imposition of a duty to warn or protect.[68] In defining foreseeability, the Minnesota Supreme Court has held that "[t]he duty to warn is not owed to statistically probable victims, but rather to specifically targeted victims."[69] For harm to be foreseeable, there must be a showing that specific persons have been specifically threatened.[70]

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nerable small children from an abusive day care provider through its system of licensure).

63. *See* Delgado v. Lohmar, 289 N.W.2d 479, 483-84 (Minn. 1979) (holding that a genuine issue of material fact existed as to whether a trespassing hunting party negligently failed to warn a landowner of its presence on his land).

64. *Id.* at 483. *See also Lundgren*, 354 N.W.2d at 27 ("In law, we are not our brother's keeper unless" a special relationship exists).

65. *See Donaldson*, 539 N.W.2d at 792 ("The existence of a legal duty depends [in part] on the relationship of the parties . . . ."); *see also Harper*, 499 N.W.2d at 474 ("We have previously stated that an affirmative duty to act only arises when a special relationship exists between the parties."). In Minnesota, special relationships have been held to exist between innkeeper and guest, common carrier and passenger, doctor and patient, on behalf of possessors of land holding it open to the public, and for "persons who have custody of another under circumstances in which that other person is deprived of normal opportunities of self-protection." *Id.* (citations omitted). *See also* KEETON ET AL., *supra* note 43, § 56; RESTATEMENT (SECOND) OF TORTS, §§ 314A-320 (1965).

66. *See Lundgren*, 354 N.W.2d at 28 ("Even if the ability to control another's conduct exists, there is no duty to control that person unless the harm is foreseeable.").

67. *See, e.g.*, N.W. and D.W. v. Anderson, 478 N.W.2d 542, 544 (Minn. Ct. App. 1992) (holding that because the acts were not sufficiently foreseeable, the defendant owed no duty to warn his tenant of a third party's criminal sexual acts).

68. *Id.* ("'The risk reasonably to be perceived defines the duty to be obeyed.'") (quoting Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (1928)).

69. Cairl v. State, 323 N.W.2d 20, 26 n.9 (Minn. 1982) (holding that the State owed no duty to warn authorities of a pyromaniacal youth's impending apartment-burning because it was not sufficiently foreseeable).

70. In this regard, Minnesota adopted its construction of foreseeability from California, concluding by example that "if a duty to warn exists, *it does so only when specific threats are made against specific victims.*" *Id.* at 26 (emphasis added).

C. *Minnesota's Recent Expansion of the Common Law Duty to Warn or Protect:* Erickson v. Curtis Investment Company

In *Erickson v. Curtis Investment Company*,[71] the Minnesota Supreme Court deviated from Minnesota's general common law recognition that no duty exists to warn or protect others from harmful third-party conduct.[72] In *Erickson*, plaintiff Garnet Erickson was sexually assaulted and raped[73] in her car while parked in a downtown Minneapolis parking ramp.[74] She consequently brought suit against the ramp's owner and operator,[75] claiming that both owed her a legal duty of protection from potential assaulters while she was on ramp premises.[76] Relying almost exclusively on public policy justifications,[77] the Minnesota Supreme Court agreed, holding that the ramp's owner and operator had a duty to protect Erickson from her attacker.[78]

In reviewing Erickson's claim, the court focused on the relationship characteristics existing between patrons and owner-

71. 447 N.W.2d 165 (Minn. 1989).

72. *Id.* at 168 ("In this case we inquire whether the duty to protect should be extended to another kind of business enterprise, specifically, a commercial parking ramp.").

73. *Id.* at 167. Co-defendant Thomas Sabo assaulted Erickson as she started her car in the Curtis parking ramp. *Id.* The attack occurred less than twelve hours after Sabo had been released from prison. *Id.* at 168. Sabo forced himself into Erickson's car through the driver's side door, clamped his hand over Erickson's mouth and raped her in the car's back seat. *Id.* at 167. During the twenty-five minute assault, Erickson managed to honk her car horn several times and to open a door, screaming. *Id.* Despite these efforts to secure help, and the fact that the assault occurred amid rush-hour parking activity, ramp security first learned of the assault only when Erickson reported it herself. *Id.* There were no signs in the ramp alerting patrons or trespassers of the presence of security officers, nor were there television cameras monitoring the premises. *Id.*

74. *Id.* at 166.

75. *Id.* In addition to suing the ramp's owner, Curtis Investment Company, Erickson sued Allright Parking Minnesota, Inc., a subsidiary of Allright Auto Parks, Inc., to whom Curtis had leased the ramp, and Leadens Investigation and Security Inc., the company Curtis retained to provide security for the ramp. *Id.*

76. *Id.*

77. *See infra* notes 91-108 and accompanying text (identifying the three specific public policy issues considered by the *Erickson* court).

78. *Erickson*, 447 N.W.2d at 166. Summary judgment motions were originally granted to all defendants. *Id.* The court of appeals reversed, finding that Allright Parking and Curtis owed Erickson a duty to make the ramp premises reasonably safe. *Id.* The court of appeals also held that an issue of material fact existed as to whether Leadens Security had performed its duties sufficiently. *Id.* The Minnesota Supreme Court affirmed both of these holdings, finding that operators and owners of commercial parking ramps must take reasonable steps to deter illegal activity on ramp premises that may cause personal harm to customers. *Id.* at 169-70. The standard of care to be provided is that "which a reasonably prudent operator or owner would provide under like circumstances." *Id.* at 170.

operators of commercial parking ramps.[79] The court's inquiry began by recognizing that "[i]f the law is to impose a duty . . . [it] usually looks for a special relationship."[80] Special relationships, the court guided, exist when one party entrusts his or her safety to another with the latter accepting that entrustment.[81] Special relationships have thus been held to exist between hospital and patient, innkeeper and guest and common carrier and passenger.[82] Common to these economic relationships is the entrustment of one party's safety to the other, with the latter having accepted that entrustment by virtue of consenting to the relationship's bargain.[83]

When deciding whether "the duty to protect should be extended to another kind of business enterprise, specifically, a commercial parking ramp,"[84] the *Erickson* court proceeded cautiously.[85] The mere existence of an economic relationship does not, alone, place a duty upon merchants to protect their customers.[86] To support this contention, the court cited Michigan[87] and New Jersey[88] cases in which drug store owners and municipal housing

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79. *Id.* at 168.

80. *Id.*

81. *Id.* (stating that to impose a legal duty upon "A to protect B from C's criminal acts, the law usually looks for . . . a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment").

82. *Id.*

83. The *Erickson* court clearly adopted this proposition by implication. After asserting that entrustment and acceptance are requisite elements of a duty to protect, the court stated, "Thus a duty to protect may be found in the innkeeper-guest and common carrier-passenger relationship. Analogous to the innkeeper-guest case is the hospital-patient relationship." *Erickson*, 447 N.W.2d at 168 (citations omitted). This assertion finds further support from the writings of legal commentators. *See supra* notes 59-61 and accompanying text (tracing the origins of "acceptance" and "entrustment" to commercial transactions).

84. *Erickson*, 447 N.W.2d at 168.

85. *See id.* (noting that in the general context of business enterprises, the law has been not only cautious but reluctant to impose a duty to protect).

86. *Id.*

87. In *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381 (Mich. 1988), a customer sued a drug store for injuries sustained during an armed robbery, (cited in *Erickson*, 447 N.W.2d at 168). "Even though the drugstore was located in an urban high crime area, the Michigan Supreme Court held that the drugstore had no duty to provide armed security guards to protect customers from criminals." *Erickson*, 447 N.W.2d at 168.

88. In *Goldberg v. Housing Authority*, 186 A.2d 291 (N.J. 1962), robbers injured a delivery man in a housing project elevator (cited in *Erickson*, 447 N.W.2d at 168). Though the high-rise was laden with criminal activity, "the New Jersey Supreme Court held there was no duty on the part of the municipal housing authority to provide police protection for its complex of buildings." *Erickson*, 447 N.W.2d at 168.

authorities, respectively, were held to have no duty to warn or protect persons on-site.[89]

The *Erickson* court then moved beyond considering the existence of a special relationship and foreseeable harm, concluding that "the question [of whether a duty exists] is one of policy."[90] The court consequently highlighted three specific policy concerns.[91] First, it noted that crime prevention is primarily a function of government.[92] If shifted to private citizens, such a duty might encourage the use of self-help remedies[93] in violation of accepted public policy.[94] Second, it observed that obvious causation and hindsight problems arise when there is a duty to protect against the conduct of third parties who are outside the duty-holder's control.[95] When determining whether this duty has been fulfilled, courts must evaluate whether defendants could have taken further measures to shield the victim from injury.[96] This inquiry, the court lamented, is fraught with speculation and hindsight.[97] The third and final policy consideration was "the cost-benefit equa-

89. *See supra* notes 87-88.

90. *See* 447 N.W.2d at 168-69. In determining whether Erickson's assault and rape were foreseeable, the court clearly misapplied precedent to reach a desired result. Foreseeability in Minnesota is established *only* upon a showing that "specific threats are made against specific victims." Cairl v. State of Minnesota, 323 N.W.2d 20, 26 (Minn. 1982). *See also* N.W. and D.W. v. Anderson, 478 N.W.2d 542, 544 (Minn. Ct. App. 1992) ("[T]he duty to warn 'is not owed to statistically probable victims, but rather to specifically targeted victims.'") (quoting *Cairl*, 323 N.W.2d at 26 n.9). Nevertheless, the court ignored this foreseeability threshold, stating instead that "the likelihood of harm is, of course, an important factor." *Erickson*, 447 N.W.2d at 170.

91. *Id.* at 169.

92. *Id.*

93. The court was concerned about vigilantism because "tort law should not impose a duty on private citizens to provide their own police and law enforcement measures." *Id.*

94. *Id.* The defendants argued that the duty to supplement government law enforcement measures with its own policing efforts should not be thrust upon the private sector. *Id.* The *Erickson* court seemed to agree: "'To shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy.'" *Id.* (quoting Williams v. Cunningham Drug Stores, 418 N.W.2d 381, 385 (Mich. 1988)).

95. *Erickson*, 447 N.W.2d at 167. The defendants urged consideration of this problem also, and again the court appeared to acquiesce. *Id.* As expressed by the court, a duty to protect against third-party conduct does not lend itself "easily to an ascertainable standard of care uncorrupted by hindsight nor to a determination of causation that avoids speculation." *Id.*

96. *Id.*

97. *Id.* ("Though resolution of most tort actions involves some hindsight (a fact which the law accepts but prefers not to discuss), the hindsight problem in duty to protect cases is exacerbated.").

tion."[98] Here, the court considered the costs of imposing a duty to protect Erickson[99] when pinpointing "how much risk is an acceptable risk for the members of the public."[100]

After weighing all relevant policy concerns,[101] the *Erickson* court concluded that "[w]e do not think the law should say the operator of a parking ramp owes no duty to protect its customers."[102] The parking ramp in question was a large commercial facility in a downtown metropolitan area.[103] Structurally, it contained several levels and stairwells, places particularly suited to attracting thieves and vandals.[104] These characteristics presented unique opportunities for criminal activity "different from that presented out on the street and in the neighborhood generally."[105]

In creating this new duty, the court qualified it's ruling in terms of reasonableness.[106] Ramp operators and owners must use reasonable care, or that which a "reasonably prudent operator or owner would provide under like circumstances."[107] Implicit in this requirement is a consideration of the risks of harm to customers that are known or should be known by ramp operators and owners.[108]

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98. *Id.*

99. The *Erickson* court confined its evaluation of "costs" to a discussion of the monetary costs involved in taking reasonable steps to deter criminal, on-site activity capable of causing bodily harm to parking ramp patrons. *Id.* at 169-70. For example, "[t]o post security guards at each parking ramp level 24 hours a day might be the most effective crime deterrent, but the *cost* may be prohibitive for both the property owner and the customer." *Id.* at 169.

100. *Id.* (reminding that "we do not live in a risk-free society," the *Erickson* court expressed concern that the duty, if any, imposed on Curtis not be cost prohibitive to both ramp owner and patron). The costs involved in providing a duty to warn must be considered and weighed against the utility of the duty itself. *Id.*

101. "Relevant policy concerns" refers to the ability of parking ramp operators to be free from liability for assaults occurring on ramp premises, on the one hand, and the ability of consumers to park in commercial garages free from such assaults, on the other.

102. *Erickson*, 447 N.W.2d at 169.

103. *Id.*

104. *Id.* ("The [structure's] interior, with its many levels . . . provides places in which to hide or to lurk, especially if the interior is dimly lit. . . . The cars, left unattended, attract thieves and vandals, and criminal activity. . . .").

105. *Id.*

106. *Id.* at 170.

107. *Id.*

108. The requisite care to be provided is a function of, among other things, "the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening." *Id.*

D. J.A.W. v. Roberts: *Indiana's Model for Special Relationship Inquiries in Child Sexual Abuse Reporting*

In *J.A.W. v. Roberts*,[109] the Indiana Court of Appeals directly addressed the common law duty to warn or protect when it involves the reporting of child sexual abuse.[110] After suffering eleven years of child sexual abuse,[111] J.A.W. brought suit against four people[112] whom he alleged had knowledge of his abuse while it was occurring.[113] In determining whether the defendants owed J.A.W. a common law duty to report his abuse, the court weighed three factors: the relationships between J.A.W. and the defendants, the foreseeability of harm to J.A.W. and public policy considerations.[114] Ultimately, the court held that a genuine issue of material fact remained as to whether one defendant owed a "common law duty to report the allegations of [J.A.W.'s] sexual abuse to the authorities."[115]

The *J.A.W.* court recognized that in a negligence action alleging third-party nonfeasance,[116] "the duty to act must arise from

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109. 627 N.E.2d 802 (Ind. Ct. App. 1994).

110. *Id.*

111. *Id.* at 806. J.A.W.'s sole custodial parent died when he was three years old. *Id.* He was then adopted by his paternal grandmother. *Id.* At age eight, J.A.W. was removed from his grandmother's custody and placed into foster care. *Id.* During his first month with Edward and Marguerite Bramblett, J.A.W.'s new foster parents, he was sexually molested by his foster father. *Id.* This abuse continued for the next eleven years, including an undisclosed time during which Edward Bramblett permitted other men to sexually molest J.A.W. *Id.* Ultimately, three men pled guilty to sexually molesting J.A.W. *Id.* In his original complaint, J.A.W. included numerous theories for relief; however, on appeal, he only challenged the trial court's order concerning his negligence claim. *Id.* at 808 n.4.

112. The appeal originally listed as defendants Joseph Bottorff, Gordon Chastain, James Collins, Richard Francis, Fran Gummerson, Sharon Miller, Loretta Roberts, Nicholas Sanders and Mark Wright; however, the *J.A.W.* court only reviewed the summary judgments issued on behalf of five defendants. *Id.* at 806-07. Due to a procedural technicality, the appeals of only four persons were ultimately heard: Joseph Bottorff, Gordon Chastain, Richard Francis and Loretta Roberts. *Id.* at 807-09.

113. *Id.* at 807.

114. *Id.* at 809.

115. *Id.* at 813. Specifically, the court ruled that summary judgment on behalf of one defendant, Richard Francis, was inappropriate because there existed "a genuine issue of material fact as to whether Francis enjoyed a special relationship with J.[A.]W." *Id.* Francis was a clergyman from whom J.A.W. claimed to have received counsel and advice regarding his sexual abuse. *Id.* at 811. If Francis enjoyed a special relationship with J.A.W., then two of the three requisite factors—special relationship, foreseeability and public policy considerations—would favor imposition of a common law duty to report J.A.W.'s alleged abuse. *Id.* at 813.

116. Recall that nonfeasance describes the omission or failure to act, as opposed to misfeasance, which pertains to active misconduct resulting in positive harm. *See supra* note 45 (differentiating misfeasance from nonfeasance).

a special relationship between the parties."[117] Though lacking a formal test for defining special relationships,[118] Indiana courts have recognized that such relationships exist between innkeeper and guest, nursing home and patient, and teacher and student.[119] Common to these examples "is the level of interaction or dependency between the parties that surpasses what is common or usual. Under those circumstances the relationship is characterized as 'special.'"[120]

In determining whether the interaction between J.A.W. and the defendants surpassed what is common or usual, the court asserted that special relationship inquiries are "fact sensitive."[121] It consequently undertook a three-pronged, fact-driven investigation. First, it evaluated whether J.A.W. had ever lived with any of the defendants in the same household.[122] Second, it sought to determine whether J.A.W. had specifically communicated knowledge of his abuse to the defendants.[123] Finally, it examined whether J.A.W. had specifically sought advice or counseling from the defendants regarding the abuse.[124] After applying these inquiries to all four defendants, the court concluded that a genuine issue of material fact remained as to whether one defendant, Richard Francis, enjoyed a special relationship with J.A.W.[125]

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117. *J.A.W.*, 627 N.E.2d at 809.

118. *Id.* ("[O]ur research has revealed no cases specifically defining the term 'special relationship.'").

119. *Id.* (citing cases where special relationships were found to exist).

120. *Id.*

121. *Id.* at 810.

122. *Id.* at 809. This particular inquiry was undertaken with regard to only one defendant, Loretta Roberts. *Id.*

123. *Id.* This second question was asked generally of all four defendants. *Id.* ("[B]y J.[A.]W.'s own admission, J.[A.]W. never told Roberts of the molestation."); *id.* at 810 ("[T]he record reveals Bottorff possessed knowledge of Bramblett sexually assaulting J.[A.]W."); *id.* ("[T]he record shows Chastain had knowledge of J.[A.]W. being assaulted by Bramblett."); *id.* at 811 ("According to J.[A.]W., he sought help from Francis concerning the sexual abuse he was suffering from Bramblett and others.").

124. Again, this third and final inquiry was undertaken with regard to all four defendants. *Id.* at 809 ("[B]y J.[A.]W.'s own admission . . . [he] never told Roberts of the molestation nor sought her advice and counsel on the matter."); *id.* at 810 ("[T]he record does not show that Appellee Bottorff 'undertook counseling [J.A.W.] with regard to the child molestations that he was enduring.'"); *id.* at 810 n.5 (with regard to Chastain, the record "is silent concerning J.[A.]W. seeking advice on how to get away from Bramblett"); *id.* at 811 ("J.[A.]W. contends Francis advised him that at sometime in the future J.[A.]W. could move from Bramblett's home, but in the meantime J.[A.]W. should pray to make sure his soul was saved.").

125. *Id.* at 813.

The second issue the court addressed was whether the harm to J.A.W. was foreseeable.[126] Here, the court's inquiry focused on two factors: whether J.A.W. was a foreseeable victim and whether the sexual abuse he endured was reasonably foreseeable.[127] The court therefore "examine[d] what forces and human conduct should have appeared on the scene, and . . . weigh[ed] the dangers likely to flow from the challenged conduct in light of these forces and conduct."[128] When applied, this inquiry revealed that all four defendants knew of J.A.W.'s sexual abuse while it was occurring.[129] The defendants consequently should have known that their failure to report J.A.W.'s abuse "created an unreasonable risk that the abuse would continue," making his further abuse foreseeable.[130]

The third and final evaluation undertaken by the court concerned public policy.[131] Though reluctant to create a common law duty for all persons to report their knowledge of child sexual abuse,[132] the court acknowledged that negligence law is malleable. "Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."[133] To this effect, the court agreed with J.A.W.'s assertion that imposing civil liability would encourage timely reporting of child sexual abuse and prevent harms stemming from the failure to report.[134] Furthermore,

126. *Id.* at 811.

127. *Id.* ("In analyzing the foreseeability component of duty, we focus on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable.").

128. *Id.* at 812 (citing Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991)).

129. *Id.*

130. *Id.*

131. *Id.* at 812-13.

132. *Id.* at 813. Here, the court noted that the Indiana Legislature has already made known its concern for child abuse victims by making it a Class B misdemeanor for persons who knowingly fail to report suspected abuse to local protection and law enforcement agencies. *Id.* at 813. Like the majority of states, Indiana's legislature has been reluctant to codify a civil remedy against knowing adults who fail to report child sexual abuse. *Id.* Only Arkansas, Colorado, Iowa, Michigan, Montana, New York and Rhode Island had codified such a law as of the date on which *J.A.W.* was decided. *Id.* In the absence of such codification, the court of appeals opined that to provide a civil action would "'misdirect judicial time and attention from the very real problems of children in need of services in favor of pursuing collateral individuals, who are presumably capable of responding in money damages, on the ground that they knowingly failed to make an oral report.'" *J.A.W.*, 627 N.E.2d at 813 (quoting Borne v. Northwest Allen County Sch. Corp., 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989)).

133. *Id.* at 812 (quoting Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991) (citations omitted)).

134. *Id.* at 812-13.

the court commented that "the foreseeability of continued abuse weighs in favor of imposing a common law duty to report alleged child abuse to the authorities."[135]

After weighing the relationships, the issue of foreseeability, and public policy considerations, the court held that defendant Richard Francis may have had a duty to report J.A.W.'s abuse.[136] If Roberts enjoyed a special relationship with J.A.W., he would necessarily have assumed a greater responsibility to report the boy's abuse.[137] In support of this conclusion, the court emphasized that special relationships are of the utmost importance to the child who entrusts to another the secret of his or her abuse.[138] They imbue "to the child a sense of security and trust. *For the child, the stakes are high.*"[139] This responsibility, the court emphasized further, is neither troublesome nor costly.[140] Indeed, "the adult is committing an even greater disservice to the child when the adult fails to make a report of the alleged abuse."[141]

II. Examining the Minnesota Supreme Court's decision in *H.B.* ex rel. *Clarke v. Whittemore*

In *H.B.* ex rel. *Clarke v. Whittemore,*[142] the Minnesota Supreme Court held that despite her knowledge of ongoing child sexual abuse,[143] a trailer park manager owed no duty to report the molestations of four child tenants.[144] Generally, the common law does not recognize a duty to warn or protect others from harmful third-party conduct.[145] Exceptions to this rule arise only when an-

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135. *Id.* at 812.

136. *Id.* at 813. Specifically, the court singled out Richard Francis as a defendant upon whom a duty may be placed with regard to the reporting of J.A.W.'s sexual abuse, and found that summary judgment in his favor was improperly granted. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (emphasis added).

140. *Id.*

141. *Id.*

142. 552 N.W.2d 705 (Minn. 1996).

143. Upon being informed of the alleged abuse, "Arndt responded by telling the children to tell their parents, but they did not tell their parents right away. The abuse continued for approximately another three weeks," until S.B. confided in her mother, who then summoned the police. *Id.* at 707.

144. *Whittemore,* 552 N.W.2d at 709-10 ("As regrettable as it is that Arndt did not take the simple step of notifying the children's parents of Whittemore's conduct, we conclude that the factual circumstances did not create a duty on her to do so."). *See also supra* note 143.

145. *See supra* note 62 and accompanying text (citing Minnesota case law supporting the assertion that generally, there is no duty to warn or protect another

other's harm is foreseeable and a special relationship exists between either the defendant and the party seeking protection, or between the defendant and the party whose conduct must be controlled.[146] Because the court refused to recognize a special relationship between the park manager and the girls, no duty to report the girls' abuse was owed.[147]

In determining whether Colleen Arndt, the rental park manager, owed a duty to report the girls' abuse, the court focused solely on whether a special relationship existed between the parties.[148] The circumstances giving rise to a special relationsip in Minnesota have been addressed by the supreme court on several occasions. Most recently, in *Erickson v. Curtis Investment Company*,[149] the duty to warn or protect was expanded to include owners and operators of commercial parking ramps.[150] In *Erickson*, the court found that unique circumstances compelled it to impose a duty upon owner-operators of parking ramps to exercise reasonable care in preventing criminal activity from occurring on-site.[151] Similarly, in *Andrade v. Ellefson*,[152] a duty was placed on Anoka County to protect children from an abusive day care provider.[153]

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from third-party conduct).

146. *See supra* note 12 (identifying special relationships as exceptions to the general rule of no duty to warn or protect); *see also H.B* ex rel. *Clarke v. Whittemore*, 533 N.W.2d 887, 890-91 (Minn. Ct. App. 1995) (holding in part that "a duty to warn and protect [exists] when: (1) the harm is foreseeable; and (2) a 'special relationship' exists between either the defendant and the party whose conduct needs to be controlled, or between the defendant and the foreseeable victims of the third party's conduct") (citing Cairl v. State, 323 N.W.2d 20, 25 n.7 (Minn. 1982)).

147. *See supra* notes 15-16 and accompanying text (referencing the *Whittemore* court's finding of no special relationship and, hence, no duty).

148. *See Whittemore*, 552 N.W.2d at 707-10. The duty to warn or protect is contingent upon the presence of two factors: a special relationship and foreseeable risk. *Id.* at 707. By disproving the existence of a special relationship, the defendants defeated the plaintiffs' claim of negligence, eliminating the need for a determination of whether the girls' abuse was foreseeable. *Id.* at 707-10.

Traditionally, relationships on which duties are imposed are those of common carrier and passenger, innkeeper and guest, and hospital and patient. *Whittemore*, 553 N.W.2d at 708 (citing Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993)). Exceptions to this rule "typically involve [relationships with] some degree of dependence," making them "special." *Id.*

149. 447 N.W.2d 165 (Minn. 1989).

150. *Whittemore*, 552 N.W.2d. at 707-08 (discussing *Erickson*).

151. *Id.* Those unique circumstances included, among other things, the ramp's accessibility, downtown location and natural attraction of car thieves. *Id.* Furthermore, "[t]he parking ramp presented a 'particular focus or unique opportunity for criminals and their criminal activities . . . to some degree . . . different from that presented out on the street and in the neighborhood generally.'" *Id.* at 708 (quoting *Erickson*, 447 N.W.2d at 169).

152. 391 N.W.2d 836 (Minn. 1986).

153. *Id.* at 842-43 ("[W]e held a duty existed on the part of Anoka County [in *Anadrade*] . . . because of the county's licensure and inspection responsibilities.")

The plaintiffs in *Andrade* were children in a child care program with "little opportunity to protect themselves,"[154] thus giving rise to a special relationship between the children and the county.[155] Conversely, no duty to warn or protect was found by the supreme court in *Harper v. Herman*.[156] There, the court held that no special relationship existed between a boat owner and a guest who injured himself while diving because the owner did not have custody of his guest "under circumstances in which . . . [the guest] was deprived of normal opportunities to protect himself."[157] Likewise, in *Donaldson v. Y.W.C.A. of Duluth*,[158] the court found that even though the Y.W.C.A. had knowledge that a lodger was in danger of committing suicide, it had no duty to prevent the act.[159] In the absence of a caretaking or custodial relationship between the parties, the Y.W.C.A. had no duty to protect the woman from killing herself.[160]

After comparing and contrasting the facts of *Whittemore* with *Erickson*, *Andrade*, *Harper* and *Donaldson*, the court concluded that "no special relationship came into existence between Arndt and the children upon which to premise a duty."[161] Foremost among the *Whittemore* court's conclusions were three distinguishing characteristics. First, unlike the defendants in *Erickson*, Arndt did not accept the children's entrustment of their safety.[162] Rather, she specifically rejected the girls' entrustment by telling them to report the abuse to their parents.[163] Second, in contrast

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Andrade's holding had special relevance to *Whittemore* in that, as in *Whittemore*, "the plaintiffs seeking protection were small children." *Whittemore*, 552 N.W.2d. at 708.

154. *Id.* (discussing *Andrade*).

155. *Id.* at 842-43; *see supra* note 153.

156. 499 N.W.2d 472 (Minn. 1993).

157. The *Whittemore* court recalled its holding in *Harper*:

> Generally, a special relationship giving rise to a duty to warn is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. Under this rule, a special relationship could be found to exist between the parties only if Herman had custody of Harper under circumstances in which Harper was deprived of normal opportunities to protect himself. These elements are not present here.

Whittemore, 552 N.W.2d. at 707-08.

158. 539 N.W.2d at 789, (Minn. 1995).

159. *Whittemore*, 552 N.W.2d. at 707-08 (discussing *Donaldson*).

160. *Id.* ("[E]ven where a Y.W.C.A.'s employee had actual knowledge that one of the Y.W.C.A.'s lodgers was in distress, it did not have a duty to prevent her from committing suicide.").

161. *Id.*

162. *Id.*

163. *Id.* at 708-09 (discussing the *Erickson* decision, the *Whittemore* court held

with the defendants in *Andrade*, Arndt never exercised control over the girls' daily welfare.[164] She was merely the resident caretaker of the Eaton Mobile Home Park[165]—nothing more.[166] Finally, again contrary to the defendants in *Andrade*, Arndt did not have custody of the children under circumstances in which they were deprived of the opportunity to protect themselves.[167] In addition to finding that no custodial relationship existed, the court deemed it questionable at best "that the children were unable to protect themselves."[168] For eventually, the girls did protect themselves by reporting their abuse to their parents.[169]

The court also dispelled notions that a special relationship arose between Arndt and the children by statute.[170] Though relevant, section 327.20, subdivision 1(1) of the Minnesota Code merely requires trailer parks to make a resident caretaker available to park tenants at all times.[171] In the court's words, the statute "provides no support whatsoever . . . that from it a special relationship should arise between Arndt and the children which would form the basis of a duty on Arndt to protect the children."[172] Application of the statute to find a special relationship therefore im-

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that no special relationship—and hence no duty—existed between Arndt and the children: "Unlike *Erickson*, here there was [among other things] no acceptance by Arndt of the children's entrustment. . . . [I]t was specifically rejected when Arndt instructed the children to tell their parents about Whittemore's abuse.").

164. *Id.* at 709 ("Respondents' dependence on *Andrade* is . . . flawed because even though the parties seeking protection in both cases [were] vulnerable children, here the children were not in Arndt's custody, and unlike *Andrade*, she exercised no control over their daily welfare.").

165. *Id.* ("[T]here is no dispute that Arndt was the [trailer park's] caretaker.").

166. Nothing in the factual record suggests that Arndt was the children's caretaker or that she "had any authority or responsibility for the children." *Id.*

167. *Id.* In acknowledging the custody requirement, the *Whittemore* court recalled its holding in *Harper v. Herman*, where it considered whether a special relationship existed between a boat owner and guest upon which to premise a duty. *Id.* at 708 (citing Harper v. Herman, 499 N.W.2d 472 (Minn. 1993)). Holding that no such relationship existed, the *Harper* court stated: "[A] special relationship could be found to exist between the parties only if Herman had custody of Harper under circumstances in which Harper was deprived of normal opportunities to protect himself." *Id.* at 708 (quoting *Harper*, 499 N.W.2d at 474).

168. *Id.* at 709.

169. *Id.*

170. *Id.*

171. *See* MINN. STAT. § 327.20, subd. 1(1) (1996) ("A responsible attendant or caretaker shall be in charge of every manufactured home park . . . at all times. . . . In any manufactured home park containing more than 50 lots, the attendant, caretaker, or other responsible park employee, shall be readily available at all times in case of emergency.").

172. *Whittemore*, 552 N.W.2d at 709.

properly expands the statute's scope, amounting to "a legal misapprehension of the circumstances."[173]

III. A Roadmap for the Future

Whittemore threatens to create a climate of social irresponsibility disastrous to the lives of Minnesota's citizens. By failing to appreciate the unique nature and social significance of child sexual abuse, the supreme court's ruling severely limits victims' collective ability to compel abuse reporting. Until such time as *Whittemore*'s test for special relationships in cases of child sexual abuse reporting is properly modified, Minnesota children will continue to suffer unnecessarily from the primary and secondary effects of sexual abuse.

The following analysis uncovers the erroneous assumptions upon which *Whittemore* is based while simultaneously suggesting a more reasoned roadmap for judicial evaluation of that case's facts.

A. Minnesota's Common Law Test for Special Relationship: An Obsolete Method of Determining Duties to Warn or Protect in Child Sexual Abuse Cases

In determining whether Arndt owed a duty to protect the four girls from being sexually abused by a third party, the *Whittemore* court focused exclusively on whether a special relationship existed between Arndt and the girls.[174] Primarily, this inquiry sought to determine if Arndt stood in a special position to the children under circumstances in which they were deprived of normal opportunities of self-protection.[175] The degree of dependence between the parties was therefore heavily scrutinized.[176] Specifically, the court focused on whether Arndt had custody of the girls,[177] whether Arndt had control over the girls' daily welfare[178] and whether Arndt had accepted the entrustment of the girls' welfare.[179]

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173. *Id.*

174. *Id. at* 707-08.

175. *Whittemore*, 552 N.W.2d at 708.

176. *Id.* at 708 ("Instances where a special relationship has created a duty on the part of a defendant to protect a plaintiff typically involve some degree of dependence.") (citing RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965)).

177. *Id.* at 708-09; *see also supra* notes 166-67and accompanying text.

178. *Id.* at 708-09; *see also supra* notes 164-65 and accompanying text.

179. *Id.* at 709; *see also supra* text accompanying notes 162-63. The court's main concern in evaluating these various elements was based on notions of liberty and self-reliance. "An adult who does not stand in a caretaking relationship with a child should not have thrust upon her an ill-defined legal responsibility to take

As applied in *Whittemore*, Minnesota's current special relationship inquiry failed to contemplate the unique factual characteristics of child sexual abuse victims. Despite the *Whittemore* court's unsupported contention that the girls—all of whom were under the age of eight[180]—should have taken "care of themselves,"[181] they were powerless to halt their sexual victimization.[182] Commentators agree that child sexual abuse renders its victims both incapable of knowing that their abuse is wrong and of being able to stop it.[183] Contrary to the court's opinion, the girls' dependence upon Arndt for protection was therefore not misplaced. By entrusting to Arndt knowledge of their sexual abuse, the girls became dependent upon her for protection under circumstances in which they were otherwise deprived of normal opportunities for self-defense. Such circumstances regularly give rise to special relationships and consequent duties to warn or protect.[184]

'some reasonable action' . . . because the child chose to report mistreatment to her." *Whittemore*, 552 N.W.2d at 709.

180. *See supra* text accompanying note 1 (summarizing the circumstances surrounding the girls' sexual abuse, including their ages when the abuse took place).

181. *Whittemore*, 552 N.W.2d at 709. Justice Stringer, who authored the majority opinion in *Whittemore*, callously commented in dictum: "We recognize a feeling of shame and fear about telling their parents . . . [of the abuse,] but we decline to graft an exception to the common law rule of no duty *simply because the personal feelings of the victims might inhibit their taking care of themselves.*" *Id.* The court, however, offered no support for the ability of such young victims to care for themselves.

182. The unique vulnerability of the girls in *Whittemore* rendered them defenseless. First, each of the girls was under eight years of age at the time of their abuse. *Id.* at 707. Second, the girls' victimizer was an adult who exercised considerable power over them by virtue of their "friendship." *Id.*; *see also id.* at 711 (Gardebring, J. dissenting).

183. In her dissent, Justice Gardebring admitted "that children are, as to sexual abuse, deprived of the normal opportunities to protect themselves." *Id.* at 711 (Gardebring, J., dissenting). Justice Gardebring also observed that because MINN. STAT. § 626.556, subd. 1 (1996) requires mandatory reporting of child sexual abuse by certain individuals, it serves as a legislative acknowledgment that children are generally incapable of stopping their own sexual abuse. *Id.* at 710 ("It is this pattern of secrecy . . . that is behind the requirement of state law that certain individuals with frequent contact with children are required to report to public authorities any abuse described to them by children."). *See also* GRUBMAN-BLACK, *supra* note 40, at vi (stating that whether termed "sexual abuse or sexual assault," the sexual victimization of children is always undertaken by someone "in a role of power and control . . . toward a boy [or girl] who either didn't know it was wrong or couldn't 'make it stop'"); KING, *supra* note 40, at 20 ("As children we [victims of sexual abuse] learn to blame ourselves and keep our trauma secret. . . . Children are utterly dependent, powerless, and unable to understand adult sexuality."); BUTLER, *supra* note 40, at 5 (observing that "incestuous assault" refers to "sexual contact or other explicit sexual behavior that an adult family member imposes on a child, who is unable to alter or understand the adult's behavior because of his or her powerlessness").

184. *See supra* notes 49-50 and accompanying text (elucidating the proper circumstances under which special relationships are typically held to exist).

The *Whittemore* court also erred by tacitly endorsing Arndt's ability to refuse the girls' dependence on her for protection.[185] Although customer-merchant relationships do not automatically create duties to warn or protect,[186] the duty elements of dependence and acceptance have historically arisen from economic relationships.[187] By transacting with each other, commercial actors are presumed to consent to certain levels of protection as part of the transaction's bargain.[188] But whereas the parties in economic relationships are presumed to have independent bargaining power, the girls in *Whittemore* were without the ability to actively bargain to whom they could entrust knowledge of their abuse.[189] By allowing Arndt to refuse the girls' entrustment, the court consequently placed a wholly unrealistic burden on victims of child sexual abuse[190]—that they should continue to spread knowledge of their abuse with the hope that, ultimately, someone might accept their entrustment. Sexually abused children are both physically and psychologically ill-equipped to fend for themselves in this market-

185. *Whittemore*, 552 N.W.2d at 708-09 (stating that the girls' entrustment of their protection to Arndt "was specifically rejected when Arndt instructed the children to tell their parents about Whittemore's abuse").

186. *See supra* notes 86-89 and accompanying text (recalling the *Erickson* court's recognition that economic relationships do not automatically create special relationships).

187. *See supra* notes 60-61 and accompanying text (tracing the origins of "dependence" and "acceptance" to commercial transactions).

188. *See id.*

189. Despite the absence of statistical corroboration, the literature on child sexual abuse divulges that a significant number of victims remain silent about their abuse because of retaliatory threats made by their victimizers. *See* GRUBMAN-BLACK, *supra* note 40, at 38 ("Sometimes the perpetrator will threaten to sabotage or destroy an important relationship or harm the boy's parents. *If you tell, it'll kill your mother. If you tell, I'll hurt your parents, and then nobody will be around to take care of you.*"); KING, *supra* note 40, at 12 ("Often the boy is threatened with harm to himself or others if he 'tells' and is intimidated into keeping silent about the abuse."). In instances of incest, the ability of children to halt their own abuse is often further exacerbated by the politics of the family. BUTLER, *supra* note 40, at 12 ("But what happens when the assailant is an uncle, older brother or father? In that situation, it is not so easy . . . [to] know whom to protect and whom to defend, especially if confronting the offender means that the family unit and its economic foundation will be threatened.").

190. Recall that nearly half of all sex crimes committed by adults in Minnesota in 1992 targeted children who, like the girls in *Whittemore*, were thirteen years of age or younger. *See supra* note 26 and accompanying text (revealing that 46% of all adult sex offenses committed in Minnesota in 1992 targeted children under the age of fourteen). Nearly three-fourths of all juvenile sex offense in Minnesota in 1991 targeted that same age group. *See supra* note 31 and accompanying text (revealing that 70% of all juvenile sex offenses committed in 1991 in Minnesota targeted children under the age of fourteen).

place of abuse reporting that the *Whittemore* decision has created.[191]

Finally, in concluding that a duty to warn or protect was in part contingent upon whether Arndt had actual custody of the girls,[192] the court again disregarded the factual uniqueness of child sexual abuse. In 1992, only 7% of all adult sex offenses reported in Minnesota were perpetrated by persons who were strangers to their victims.[193] That same year, 84% of adult sex offenses involved victims under the age of eighteen.[194] Perhaps as many as one-third of those adult sex abusers were living with their victim(s).[195] These statistics make evident that a significant percentage of child sexual abuse is committed each year by persons who are actually charged with their victim's custody. By making the duty to report child sexual abuse contingent in part upon custody, the court asks custody-holders who abuse those in their charge *to report themselves*. In effect, this absurd requirement ensures that children being abused by their custody-holders are never owed a duty to have their abuse reported and stopped.[196] Surely such children need not be twice victimized—both by their custody-holders *and* by the *Whittemore* court's illogical devotion to custody as a prerequisite to a duty to warn or protect.

B. J.A.W. v. Roberts: *A Model for Determining Special Relationships in Child Sexual Abuse Cases*

Like the Minnesota Supreme Court in *H.B.* ex rel *Clarke v. Whittemore*,[197] the Indiana Court of Appeals in *J.A.W. v. Roberts*[198]

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191. *See supra* notes 40-41 (highlighting the mental and physical consequences of child sexual abuse on its victims).

192. *See supra* note 167 and accompanying text (detailing the Minnesota Supreme Court's determination that custody is essential to duties to warn or protect).

193. *See supra* note 26 (concluding that in 1992, persons eighteen years of age or older represented 16% of all victims of adult sex offenses in Minnesota).

194. *See supra* note 26 and accompanying text.

195. This figure was inferred from the following statistics. Of adult sex offenders convicted in 1992, 133 were either a parent or stepparent of their victim(s). *Id.* at 14. Likewise, 38 were either a spouse of or a co-habitator with their victim(s). *Id.* Finally, 97 adult offenders were described as "other family." *Id.* This total number (268) was then divided by the total number of adult offenders (710). The statistical result suggests that perhaps as many as 37% of all adult sex abusers convicted in 1992 were living with their victims. Note: this information does not include juvenile sex offense statistics for 1992 due to their unavailability. *Cf. id.* at 12 (stating that in 1991, 193 of the 554 convicted juvenile sex offenders (totaling 34.8%) were family members of their victims).

196. This assertion applies only to common law requirements. The statutory duty to report child abuse still applies under MINN. STAT. § 625.556. For the statutory text, see *supra* note 37.

197. 552 N.W.2d 705 (Minn. 1996).

maintained that duties to warn or protect will not be imposed absent a special relationship between the parties involved.[199] But unlike the *Whittemore* court, the *J.A.W.* court admitted that whether a special relationship exists is "fact sensitive and dependent on the level of interaction or dependency between the parties that surpasses what is common or usual."[200] In determining whether a special relationship existed between J.A.W. and the defendants, the *J.A.W.* court evaluated three factors: whether the parties lived in the same household, whether there was specific communication of the abuse between the parties and whether J.A.W. sought advice or counsel from the defendants regarding the abuse.[201] Rather than embody a rigid test,[202] these factors evinced a sweeping investigation into whether, *in fact*, a special relationship existed.

The *J.A.W.* court's special relationship inquiry is preferable to that of the *Whittemore* court in three crucial ways. First, whereas the *Whittemore* court premised the existence of a special relationship in large part upon the presence of custody,[203] the *J.A.W.* court implicitly acknowledged that custody is irrelevant.[204] The omission of this criterion consequently allowed the *J.A.W.* court to avoid the misbegotten assumption that those having custody of children are not, themselves, the sexually abused child's worst enemy.[205]

Second, the *J.A.W.* analysis is a judicially honest acknowledgment that interaction and dependency are "fact sensitive" issues.[206] By rigidly adhering to common law precedent,[207] the *Whit-*

198. 627 N.E.2d 802 (Ind. Ct. App. 1994).

199. *Id.* at 809 ("Absent a special relationship between a plaintiff and a defendant, we will not impose a duty on the defendant to take affirmative steps to prevent harm to the plaintiff.").

200. *Id.* at 810.

201. *See supra* notes 122-24 and accompanying text (identifying the three main inquiries undertaken by the *J.A.W.* court).

202. In acknowledging that no explicit test exists for determining the existence of a special relationship, the *J.A.W.* court stated that "our research has revealed no cases specifically defining the term 'special relationship.'" 627 N.E.2d at 809.

203. *See supra* note 166 and accompanying text (detailing the Minnesota Supreme Court's determination that custody is essential to duties to warn or protect).

204. Not once did the *J.A.W.* court address the issue of custody when determining the existence of a special relationship between J.A.W. and the defendants. *J.A.W.*, 627 N.E.2d. at 809-11.

205. *See supra* notes 189-91 and accompanying text (maintaining that a significant percentage of child sexual abuse victims are abused by their custody-holder(s)).

206. *See supra* note 121 and accompanying text (citing the *J.A.W.* court's assertion that whether a special relationship exists is "fact sensitive").

207. *See supra* Part III.A (arguing that Minnesota's special relationship inquiry

temore court's analysis was rendered obsolete in engaging the nuances of child sexual abuse reporting.[208] By contrast, the *J.A.W.* analysis undertook a boundless evaluation of whether a special relationship existed between J.A.W. and the defendants.[209] This flexible, fact-driven evaluation does justice to child sexual abuse victims whose predicaments were not previously anticipated by common law duty inquiries.[210]

Finally, the *J.A.W.* analysis is desirable because it embodies a moderate change in the common law. A primary concern involving the duty to warn or protect is that liberty in general will be curtailed by compelling persons to protect against conduct they did not initiate.[211] This fear is minimized by the subtle changes embodied in *J.A.W.*[212] Rather than create a general common law duty for all people to report their knowledge of child sexual abuse,[213] *J.A.W.* stands for the modest proposition that previous common law tests for the existence of a special relationship—including that applied by the *Whittemore* court—are incapable of dealing with child sexual abuse reporting. The *J.A.W.* analysis thus embraces the special relationship requirement[214] while simultaneously affording greater latitude in determining the existence of a special relationship.

When applied to the facts of *Whittemore*, the *J.A.W.* analysis seeks to determine whether the level of interaction and dependence between Arndt and the girls surpassed what is common or

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is an obsolete method of determining duties to warn or protect in cases of child sexual abuse reporting).

208. *See id.*

209. *See supra* notes 121-25 and accompanying text (recalling the sweeping special relationship inquiry undertaken by the *J.A.W.* court).

210. While researching this topic, I was particularly struck by the seeming innocence with which most commentaries on the common law duty to warn or protect have been written. Clearly, the application of this doctrine to child sexual abuse reporting was not contemplated until recently. *See supra* notes 43-45 (citing commentators whose evaluations of the duty to warn or protect do not contemplate that doctrine's use in the reporting of child sexual abuse).

211. *See supra* notes 46-48 and accompanying text (illustrating how the common law seeks to promote rugged individualism).

212. These changes include the ways in which the *J.A.W.* special relationship inquiry differs from that of *Whittemore*.

213. In addressing this very issue, the *J.A.W.* court concluded that it was not convinced "that extending a civil remedy to a victim of abuse or neglect against all persons who know of child abuse and fail to report child abuse is good public policy." *J.A.W.*, 627 N.E.2d at 813. Its primary concerns were that general liability would misdirect the time and efforts of the courts from the more pressing matters of children in need of services. *Id.*

214. *See supra* note 137-41 and accompanying text (referencing the special relationship analysis of the *J.A.W.* court).

usual.[215] To that end, *J.A.W.* instructs that a broad inquiry may be employed to uncover the factual circumstances surrounding the relationship between Arndt and the four girls. Such an inquiry may include, but is not confined to, a determination of whether the parties lived together, whether they regularly shared communications, and whether they exchanged advice or counsel regarding the molestations.[216]

At first glance, it appears questionable whether the *J.A.W.* analysis uncovers a relationship between Arndt and the girls that surpassed what is common or usual. Although the parties did not live in the same household, they were neighbors living in the same mobile home park.[217] Similarly, Arndt and the girls were friends—not mere acquaintances—who appeared very comfortable with and used to their informal adult-child relationship.[218] Finally, the girls specifically sought Arndt out at her home so as to receive advice and counsel regarding their sexual victimization.[219]

Unlike in *Whittemore*, however, the special relationship analysis in *J.A.W.* would allow admission of evidence of the parties' relationship under section 327.20, subdivision 1(1) of the Minnesota Code. That statute requires trailer parks to make a resident caretaker available to park tenants at all times in case of emergency.[220] The *Whittemore* court rejected use of the statute on the grounds that it provided an insufficient basis upon which to premise a special relationship between Arndt and the girls.[221] Ap-

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215. *J.A.W.*, 627 N.E.2d at 809 ("[O]ur inquiry must focus on whether there existed a level of interaction or dependency . . . that surpasses what is common or usual which we may characterize as a special relationship.").

216. *See id.* at 809-11; *see also supra* notes 122-124 and accompanying text (highlighting the three-pronged, fact-driven special relationship inquiry of the *J.A.W.* court).

217. H.B. *ex rel.* Clarke v. Whittemore, 552 N.W. 2d 705, 707 (Minn. 1996) ("[T]he children came to park manager Arndt's home and told her, in effect, that Whittemore had been touching them in an inappropriate sexual manner.").

218. As one girl, S.B., explained in an interview with a police officer, her relationship with Arndt was that of friends—not mere park manager and tenant. "We went over to Colleen's [Arndt's] house, my friend's house . . . [t]hat's the manager, manager of the park, she said, if [Whittemore] doesn't stop it he'll be kicked out of the park, and we're like, yes . . . because he won't have to do it anymore all the time." H.B *ex rel.* Clarke v. Whittemore, 533 N.W.2d at 887, 889 (Minn. Ct. App. 1995).

219. *See id.*; *see also supra* note 217.

220. For the text of MINN. STAT. § 327.20, subd. 1(1), *see supra* note 171.

221. *See Whittemore*, 552 N.W.2d at 709 ("[A]s to the respondent's argument that we should premise a special relationship on Minn. Stat. sec. 327.20, subd. 1(1) (1996), requiring a trailer park to have a resident caretaker, . . . [t]he statute requires nothing more and certainly provides no support whatsoever . . . that from it a special relationship should arise."); *see also supra* note 171.

plication of the *J.A.W.* analysis alleviates this concern by merely evaluating the statute as evidence of the level of interaction between Arndt and the girls[222]—not as the sole basis upon which to premise a special relationship.[223] When considered in this light, the statute strongly suggests that a special relationship existed between Arndt and the girls. Because Arndt was the trailer park manager, she was required by statute to be "readily available at all times in case of emergency."[224] She was the one to whom reports of injury and crisis in the mobile home park were to be made. Though not automatically creating a special relationship, this statutory requirement provides further evidence that Arndt's relationship with the girls surpassed what is common or usual. When evaluated together, these factors make evident that the girls' relationship with Arndt was "special" within the meaning of *J.A.W.*

C. *Minnesota's Foreseeability Threshold Is Decisively Satisfied in* H.B. *ex rel.* Clarke v. Whittemore

The *Whittemore* court's conclusion that no special relationship existed obviated "the need to address the issue of foreseeability."[225] Once judged to exist, however, a special relationship must be accompanied by foreseeable harm in order for a duty to warn or protect to exist.[226] In Minnesota, foreseeability is satisfied when courts find that specific threats have been made against specific persons.[227] As applied to *Whittemore*, foreseeability can only be es-

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222. *See supra* notes 121-25 and accompanying text (summarizing *J.A.W.*'s analysis of whether the interaction between the parties involved surpassed what is common or usual).

223. Evaluation of the statute in this manner was offered by Justice Gardebring in her dissenting opinion:

> I believe the existence of a duty to children living in the park is reinforced by the statutory obligation on the park owner to provide a resident manager. . . . [The statute] provides in part that '[a] responsible attendant or caretaker shall *be in charge* of every manufactured home park' and further that the caretaker '*shall be readily available at all times in case of emergency.*' Is there anyone who would *not* consider the ongoing criminal sexual abuse of children an emergency to be dealt with expeditiously?

Whittemore, 552 N.W.2d at 711 (Gardebring, J., dissenting) (emphasis added).

224. MINN. STAT. § 327.20, subd. 1(1) (1996).

225. *See Whittemore*, 552 N.W.2d at 709 n.5; *see also supra* note 148 (acknowledging that by disproving the existence of a special relationship, the defendants defeated Clarke's negligence claim, eliminating the need for a determination of whether the girls' abuse was foreseeable).

226. *See supra* notes 43-44 and accompanying text (stating that the common law generally does not recognize a duty to warn of or protect others from injurious third-party conduct). *But see Whittemore*, 552 N.W.2d at 707 (stating that exceptions to this rule arise when "the harm is foreseeable and a special relationship exists between the actor and the person seeking protection") (citations omitted).

227. *See supra* notes 69-70 and accompanying text (noting that in Minnesota,

tablished if Arndt knew that the girls were specific targets of Whittemore's sexual misconduct.

Fulfillment of the foreseeability threshold appears problematic when merely considering Arndt's knowledge of Whittemore's prior criminal history.[228] That Whittemore had previously molested children elsewhere evinced a statistical probability that he would re-offend at the Eaton Mobile Home Park.[229] But as previously held by the Minnesota Supreme Court, *only specifically targeted victims*—not statistically probable victims—are owed duties to warn or protect.[230] Consequently, the girls' abuse was not foreseeable when based solely on the defendants' knowledge of Whittemore's criminal history.

When evaluated in conjunction with the girls' specific report of abuse, however, Arndt's knowledge of Whittemore's past decisively satisfies the requisite level of foreseeability. The girls specifically sought Arndt out at her home to apprise her of Whittemore's unwelcome and inappropriate sexual touchings.[231] The court of appeals properly concluded that this differentiated the case from previous Minnesota duty to warn cases in that "the person who could have intervened here had actual knowledge of the damage that had already occurred and that would certainly continue to occur unless someone interceded on behalf of the children."[232] In light of the girls' specific report of abuse, Whittemore's likelihood of reoffending at the Eaton Mobile Home Park was more than probable—it was *foreseeable.*

D. Public Policy Reasons Favor Placing a Duty on Arndt to Report the Girls' Abuse

Minnesota's most recent expansion of the common law duty to warn or protect occurred in *Erickson v. Curtis Investment Company*,[233] in which the court held that whether such a duty exists is

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foreseeability is satisfied when specific threats are made against specific victims).

228. Recall that upon applying to become a tenant at the Eaton Mobile Home Park, Whittemore "told Arndt that several years earlier he had pled guilty to a charge of criminal sexual conduct after being accused of molesting several children at the trailer park where he then lived." *Whittemore*, 552 N.W.2d at 707.

229. *See* H.B. *ex rel.* Clarke v. Whittemore, 533 N.W.2d 887, 892 (Minn. Ct. App. 1995).

230. *See supra* notes 69-70 and accompanying text (citing the Minnesota Supreme Court's definition of foreseeability).

231. *See Whittemore*, 552 N.W.2d at 707 ("In late July 1992, the children came to park manager Arndt's home and told her, in effect, that Whittemore had been touching them in an inappropriate sexual manner.").

232. *Whittemore*, 533 N.W.2d at 892.

233. 447 N.W.2d 165 (Minn. 1989).

ultimately a question of public policy.[234] When weighing policy considerations, the *Erickson* court balanced three areas of concern: whether imposing a duty to warn or protect would encourage vigilantism,[235] whether causation problems would make the imposition of such a duty unadministerable[236] and whether the costs of imposing that duty would ultimately outweigh the duty's benefits.[237]

Despite the clear acknowledgment in *Erickson* that public policy concerns necessarily inform duty inquiries, the Minnesota Supreme Court in *Whittemore* addressed no such policy concerns.[238] Instead, the court summarily stated that an adult who is not a sexually abused child's caretaker should not have "thrust upon her" a legal duty to report that child's abuse simply because the child chose to inform her of it.[239] Left wholly unaddressed was the weighing of both conflicting types of social conduct at issue: the ability of Arndt to escape liability for failing to report the girls' abuse and the girls' ability to compel Arndt to stop their abuse by requiring her to report it.

When applied to the *Whittemore* facts, the *Erickson* public policy inquiry first seeks to determine whether requiring Arndt to report her knowledge of the girls' sexual abuse would have encouraged vigilantism.[240] Surely it would not have. By finding that Arndt owed the girls a duty to report their abuse, the *Whittemore* court would not have required her to supply private police or law enforcement measures.[241] Such a duty merely would have man-

234. *Id.* *See also supra* note 90 and accompanying text (recalling the *Erickson* court's holding that public policy issues ultimately govern whether a duty to warn or protect exists).

235. *See Erickson*, 447 N.W.2d at 169; *see also supra* notes 92-94 and accompanying text (summarizing the first of three public policy evaluations in *Erickson*).

236. *See Erickson*, 447 N.W.2d at 169 (determining whether the failure to provide further security precautions "in fact permitted the crime to occur"). This goes directly to the issue of causation, namely, whether the defendant's "failure to provide . . . further security precautions (e.g., more guards, television monitors, and signs)" was the cause of the plaintiff's injury. *Id.*

237. *See id.* (setting forth the "the cost-benefit equation" as the third policy consideration and determining whether the costs of imposing a duty to post 24-hour guards on ramp premises would be cost prohibitive for both ramp owner and customer); *see also supra* notes 98-100 and accompanying text (summarizing the third and final public policy evaluation in *Erickson*).

238. Despite the court's earlier admission in *Erickson* that the question of whether a duty to warn exists is inherently one of public policy, the supreme court never explicitly addressed public policy issues in *Whittemore*. *See Whittemore*, 552 N.W.2d at 705.

239. *Id.* at 709.

240. *See supra* notes 92-94 and accompanying text (summarizing the first of three public policy evaluations in *Erickson*).

241. The advocation of self-help remedies by shifting police duties to the private

dated that Arndt forward her knowledge of the girls' abuse to persons able to halt or investigate the abuse.[242]

The second *Erickson* policy inquiry concerns whether placing a duty upon Arndt to report the girls' abuse lends itself to an effective causation determination.[243] As admitted by the *Whittemore* court, the girls' abuse continued after they reported the abuse to Arndt but stopped once their parents learned of the illegal sexual activity.[244] Determining causation in Arndt's case therefore presents little difficulty. The girls' abuse would have stopped earlier had Arndt promptly conveyed her knowledge of the abuse either to the girls' parents or to law enforcement officials. Causation is thus established and easily determined despite judicial concerns to the contrary.

The final and most comprehensive *Erickson* policy inquiry involves whether a duty to warn, once placed on Arndt, survives the "cost-benefit equation."[245] On this point, the facts of *Erickson* and *Whittemore* are in stark contrast. Unlike in *Erickson*,[246] the court's duty inquiry in *Whittemore* involved little potential for the defendant to incur noticeable monetary costs.[247] By reporting the girls' abuse, Arndt would merely have faced the prospect of losing Whittemore as a tenant. But it is equally plausible that Arndt stood to lose more tenants—and money—by *not* reporting Whittemore's illegal activity. Furthermore, Minnesota's Child Abuse Reporting Act completely immunizes Arndt and those similarly situated from

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sector was deemed void by the *Erickson* court as against public policy. *Erickson*, 447 N.W.2d at 169-70.

242. As acknowledged by the *Whittemore* court, the only action required of Arndt had a duty to warn been placed upon her would have been the conveyance of her knowledge of the abuse to persons capable of stopping it. *See Whittemore*, 552 N.W.2d at 709-10 ("As regrettable as it is that Arndt did not take the simple step of *notifying the children's parents of Whittemore's conduct*, we conclude that the factual circumstances did not create a duty on her to do so.") (emphasis added).

243. *See supra* notes 95-97 and accompanying text (summarizing the second of three public policy evaluations in *Erickson*).

244. *See Whittemore*, 552 N.W.2d at 707 (observing that after the initial abuse was reported to Arndt, the girls' abuse continued "for approximately another three weeks until August 22, 1992, when S.B. told her mother about it, and upon S.B.'s mother reporting the abuse to the police. . .").

245. *Erickson*, 447 N.W.2d at 169 ("Presumably we do not live in a risk-free society; if this is so, a cost-benefit analysis is unavoidable."). *See also supra* note 43 and accompanying text (discussing the balancing of the plaintiff's and defendant's interests).

246. *See supra* note 99 (discussing the costs of heightening security at the parking ramp).

247. In neither the court of appeals decision nor the supreme court decision is there a discussion of the potential for Arndt to incur financial loss upon reporting the girls' abuse. *See* H.B. *ex rel.* Clarke v. Whittemore, 533 N.W.2d 887 (Minn. Ct. App. 1995); *Whittemore*, 552 N.W.2d at 705.

potential civil or criminal liability resulting from reports of child sexual abuse made in "good faith."[248] Little, if any, monetary costs could have resulted from placing upon Arndt a good faith duty to report the girls' abuse.

The benefits to be derived from placing a duty on Arndt are both numerous and of great social significance. The most obvious benefit involves stopping the girls' abuse. Had Arndt swiftly warned the girls' parents of Whittemore's conduct, the girls would not have been subjected to another month of sexual abuse.[249] Though not easily quantifiable, one month less of physical and psychological pain would have meant much to the lives and well-being of the girls, all of whom were under the age of eight.[250]

No less weighty are the societal benefits to be harvested generally from placing a duty to warn upon Arndt and those like her. Children under the age of thirteen are the overwhelming targets of sex crimes in Minnesota.[251] But the harms stemming from that abuse are felt by everyone. A national study reveals that persons sexually abused as children have significantly greater propensities to commit crimes later in life than persons who were never maltreated as children.[252] In Minnesota, those secondary criminal effects are invariably absorbed by the greater state community. For the sake of their children and of their communities, all Minnesotans have a compelling interest in demanding that persons such as Arndt report their knowledge of child sexual abuse immediately.

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248. *See supra* note 39 and accompanying text (stating that all persons making good faith reports of child sexual abuse are immune from any resulting civil or criminal liability).

249. *See supra* notes 4-5 and accompanying text (explaining that the girls' abuse continued for three weeks after their initial report to Arndt).

250. We may infer much from the following statement made by S.B. to a police officer: "We went over to Collene's [Arndt's] house, my friend's house . . . [t]hat's the manager, manager of the park, she said, if Bill doesn't stop it he'll be kicked out of the park and we're like, yes . . . *because he won't have to do it anymore all the time.*" *Whittemore*, 533 N.W.2d at 889 (emphasis added). For sources regarding the physical and psychological effects of child sexual abuse, see *supra* note 40 and accompanying text. As explained by former Surgeon General C. Everett Koop, "The physical and mental health consequences to . . . children [who are sexually abused] are simply overwhelming." KOOP, *supra* note 41.

251. *See supra* notes 190 and accompanying text (recalling the specific percentages of adult and juvenile sex offenses perpetrated against children under the age of fourteen in 1992 and 1991, respectively).

252. *See supra* notes 32-36 and accompanying text (outlining the specific ways in which victims of child sexual abuse are more likely to commit crimes than are persons who have never been maltreated).

Conclusion

Resolution of the core issues in *Whittemore* necessarily involves an informed evaluation of factual and public policy considerations. The existence of a duty to warn or protect is not absolute but, rather, dependent upon fact-specific circumstances. In seeking to evaluate such circumstances, a broad inquiry is required to fully appreciate the unique nature of the relationships between the parties involved. This is especially true in cases of child sexual abuse reporting.

The Minnesota Supreme Court failed to recognize the importance of such an inquiry in *Whittemore*. Rather than modify its approach when determining special relationships in the area of child sexual abuse reporting, the court blindly adhered to precedent when reviewing a situation—the sexual abuse of children—not previously contemplated by the common law. In so doing, the court failed to take notice of the legal innovations of its neighbor states, and compromised the safety of thousands of defenseless Minnesota children.