Case Comments

Abandonment of Children As a Civil Wrong: *Burnette v. Wahl*

Our society has historically treated abandonment, along with other forms of child abuse or neglect, as a criminal matter. Legislatures have imposed criminal sanctions on parents who abandon their children,[1] and have provided administrative procedures by which children can be removed from their natural family, if necessary, and placed in a foster or adoptive home.[2] Despite the unquestionable damage to children caused by abandonment,[3] no American legislature or court has ever allowed a child to recover in tort for such damage. In the recent case of *Burnette v. Wahl*,[4] the Oregon Supreme Court maintained this unanimity by refusing to recognize a civil action based on abandonment.

This Case Comment will analyze *Burnette* and the argument for treatment of abandonment as a civil wrong in terms of current legal doctrine both in Oregon and elsewhere. The Comment concludes that abandonment should give rise to a civil cause of action in children against their parents.

I. Background: The Changing Legal Status of Children

In early Roman law, a child was treated as a chattel of its father.[5] All interests of the child were vested in the father, who was permitted under the doctrine of *jus vitae necisque* to punish his child's misconduct as he saw fit—even by banishment, slavery, or death.[6] Eventually the law grew to recognize property interests in the child, and later, personal interests as well. The doctrine of *jus vitae necisque* was abrogated by the time of Justinian,[7] but the law continued to consider children as both property and persons, a status similar to that of Blacks under American slavery.[8]

Despite this legal handicap, children were able, in both England and America, to sue their parents for matters relating to property and, under English common-law, for personal torts as well.[9] In 1891, however, the

1. *E.g.*, Or. Rev. Stat. § 163.535 (1979).
2. *E.g.*, Or. Rev. Stat. § 418.015 (1979).
3. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 32-34 (1973).
4. 284 Or. 705, 588 P.2d 1105 (1978).
5. Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177 (1916).
6. J. Muirhead, Law of Rome 27 (3rd ed. 1916).
7. *Id.* at 377.
8. Comment, 46 Fordham L. Rev. 670, 739 (1978).
9. C. Cairns, Eversley's Domestic Relations 491 (5th ed. 1937).

Mississippi Supreme Court held that parents were immune from suit by their children for intentional torts.[10] This parental immunity doctrine was soon adopted by other states and extended to negligence actions.[11]

The rationale for this immunity is far from clear. Some courts state that parental immunity prevents the danger of fraud in prosecution of stale claims, since statutes of limitations are often tolled during the plaintiff's minority.[12] Immunity is also said to prevent depletion of the "family exchequer" and the possibility that the defendant-parent will succeed, through heirship, to a cause of action against himself.[13] Frequently the parent-child relationship is analogized to that of a husband and wife, in which suits are similarly barred.[14] Finally, it is feared that permitting such suits will result in interruption of domestic tranquility, intrusion into domestic governance, or erosion of parental discipline and control.[15]

Whatever the doctrinal underpinnings of parental immunity, it quickly spread throughout the United States. The difficulties with the doctrine soon became manifest. Courts held that the immunity barred suit for such abuses of parental authority as rape[16] and cruel, inhuman treatment.[17] In an effort to relieve the harshness of such a strict rule, courts quickly recognized a series of exceptions, permitting suits in cases in which the child was emancipated[18] or the tort was intentional.[19] Some courts allowed a child to bring suit against the estate of a dead parent[20] or against a parent in his business capacity.[21]

The crazy-quilt pattern of immunity resulting from these exceptions suggests a widespread hostility to the general rule of parental immunity. This hostility has led some courts to eschew ill-reasoned, artificial exceptions and abrogate the immunity. In 1963, Wisconsin became the

---

10. Hewellette v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891).

11. *See, e.g.*, Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1929); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

12. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

13. *Id.*

14. *Id.*

15. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

16. McKelvey v. McKelvey, 11 Tenn. 388, 77 S.W. 664 (1903).

17. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

18. *See, e.g.*, Carricato v. Carricato, 384 S.W.2d 85 (Ky. 1964); Weinberg v. Underwood, 101 N.J. Super. 448, 244 A.2d 538 (1968); Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964); Logan v. Reaves, 209 Tenn. 631, 354 S.W. 2d 789 (1962).

19. *See, e.g.*, Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Mahuke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

20. *See, e.g.*, Davis v. Smith, 253 F.2d 286 (3d Cir. 1958); Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).

21. *See, e.g.*, Trevarton v. Trevarton, 378 P.2d 640 (Colo. 1963); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

first state to abrogate the doctrine, retaining immunity for exercises of parental control and authority, and for parental discretion with respect to such matters as food and care.[22] In what appears to be a trend, a number of other states similarly have abrogated the immunity. Some, like Wisconsin, have retained a small corner of the immunity to protect parents from suit for reasonable exercises of their authority and discretion.[23] Others have abrogated the immunity entirely, although generally recognizing that in applying the standard of reasonableness in a negligence action, the parental relationship must be considered.[24] Similarly, in the case of an intentional tort, parents are normally given certain privileges in dealing with their children, such as the privilege to discipline.[25] Thus, as to both intentional and negligent torts, protection still is afforded the parent whose treatment of his child, although perhaps unwise, is within the bounds of reasonableness.

Oregon has yet to abrogate parental immunity. The Oregon courts have recognized, however, an exception permitting suits for intentional torts.[26] The issue of the existence and scope of the immunity, therefore, did not surface in *Burnette*, although it may prove fatal to a similar case in another jurisdiction. A suit for abandonment may be maintained, however, even in jurisdictions that retain some form of parental immunity if the suit falls within an applicable exception, such as the intentional torts exception utilized in *Burnette* or the emancipated child exception.

Abrogation or limitation of parental immunity has not only permitted suits that previously would have been actionable *absent* the parental relationship, but also has opened the door to consideration of the rights and duties that exist *because* of the family relationship. These rights and duties have received little examination in the legal literature in the short time since parental immunity first was abrogated. A few post-immunity cases, however, have recognized the need for definition of tort duties existing between parent and child. In *Holodook v. Spencer*,[27] for example, the New York Court of Appeals, although holding that a parent's negligent failure to supervise his child was not actionable by the child, nonetheless treated the issue as one of first impression that, until then, had eluded consideration due to parental immunity.

Those courts that have refused recovery for such novel tort actions between parent and child have been motivated by considerations not relevant to a case of abandonment. The court in *Holodook* feared that permitting intrafamily suits might lead to fraud and collusion in cases in

22. Gollar v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

23. *See, e.g.*, Ourada v. Knahmuhs, 221 N.W.2d 659 (Minn. 1974).

24. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 948, 92 Cal. Rptr. 288 (1971).

25. RESTATEMENT (SECOND) OF TORTS § 147 (1965).

26. Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950).

27. 36 N.Y.2d 35, 324 N.E.2d 338 (1974).

which parents were insured.[28] If the parents were not insured, such suits might destroy family harmony.[29] Recognition of such a tort, together with the New York rule of apportionment of damages between concurrent tortfeasors, might discourage parents from prosecuting their children's tort claims against a third party.[30] Finally, the court deemed child-raising such a difficult task that almost all parents could be said to have been negligent in some regard.[31] The court felt that recognition of a tort action to redress conduct so common would be ill-advised.[32]

These considerations, however, are not relevant in a case of abandonment. It is doubtful that insurance would protect parents from suit for the willful tort of abandonment, and the danger of fraud, therefore, is minimal. Family harmony certainly will suffer no more from an abandonment suit than it would suffer from the abandonment itself. Abandonment is, moreover, such a radical, even criminal, departure from the standard of parental conduct expected by society that recognition of a tort action will impose no widespread, additional burdens on parents.

Burnette, therefore, is a unique case. It must be considered in the context of the steadily expanding notion of the rights of children and the relatively recent movement toward abrogation of parental immunity. It is the first judicial examination of a child's right to enforce through a civil action an age-old moral and criminal duty imposed on parents.

II. THE BURNETTE DECISION

Plaintiffs in *Burnette* were five children, aged two through eight, who brought suit through their guardian *ad litem* against their mothers for emotional injury caused by abandonment. Plaintiffs advanced four separate theories to justify their recovery: first, that defendant's violation of a statutory, criminal duty to support and care for their children constituted a tort; second, that defendants had intentionally inflicted severe emotional injury on their children; third, that defendants had alienated the bonds of affection that normally exist between parent and child; and, finally, that the court should recognize abandonment of children as a common-law tort. The circuit court sustained demurrers to the complaint and dismissed the action. On appeal, the Oregon Supreme Court affirmed, rejecting each of plaintiffs' theories.

Unfortunately, the factual background of the abandonments alleged in *Burnette* is unavailable since the case never went to trial. This background would have been interesting because of the light it would have shed on the extent of plaintiffs' injuries. As the dissent noted, however, "the

28. *Id.* at 46, 324 N.E. 2d at 343.
29. *Id.* at 46, 324 N.E.2d at 344.
30. *Id.* at 46-47, 324 N.E.2d at 344.
31. *Id.* at 45-46, 324 N.E.2d at 343.
32. *Id.* at 45-47, 324 N.E.2d at 343-44.

case would have been the same if a child had been deliberately abandoned in an unheated mountain cabin and lost a limb to frostbite or suffered other permanent injuries from lack of food or pneumonia."[33] This may overstate the case somewhat, since it appears that plaintiffs were seeking recovery solely for emotional injury.[34] It is true, however, that the circumstances in which the children were abandoned were irrelevant in the majority's treatment of the case. The following analysis will accept the allegations of the complaint as true. It should be noted, however, that this type of action may pose substantial problems of proof, such as showing the nature and extent of plaintiffs' emotional injuries.

III. *Burnette* ANALYZED: THE PLAINTIFFS' FOUR THEORIES

A. *Violation of Statutory Duty*

The complaint in *Burnette* alleged that defendants had violated four statutes that establish minimum standards of parental care for children.[35] These statutes forbid abandonment of a child, child neglect, and criminal non-support, and impose a duty on parents to support their children. Plaintiffs argued that violation of these statutes constituted a per se tort. The phrase "per se tort" is legal shorthand meaning that proof of violation of criminal statutes permits—or, in most jurisdictions, requires—a finding of civil liability.[36] The Oregon Supreme Court noted that the legislature had established a Children's Services Division, of which the plaintiffs were

---

33. 284 Or. 705, 730-31, 588 P.2d 1105, 1119 n. 5 (1978) (Linde, J. dissenting).

34. The *Burnette* majority noted that "Although these allegations of parental failure allege lack of support and physical care along with affectional neglect, from the allegations of injuries in the complaint and the statements made in plaintiffs' brief, it appears that the injuries claimed are solely emotional and psychological." *Id.* at 708-09, 588 P.2d at 1108.

35. OR. REV. STAT. § 109.010 (1977) provides:

> Duty of Support. Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances.

OR. REV. STAT. § 163.535 (1977) provides:

> Abandonment of a Child. (1) A person commits the crime of abandonment of a child if, being a parent, lawful guardian or other person lawfully charged with the care or custody of a child under 15 years of age, he deserts the child in any place with intent to abandon it.
>
> (2) Abandonment of a child is a Class C felony.

OR. REV. STAT. § 163.545 (1977) provides:

> Child neglect. (1) A person having custody or control of a child under 10 years of age commits the crime of child neglect if, with criminal negligence, he leaves the child unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child.
>
> (2) Child neglect is a Class A misdemeanor.

OR. REV. STAT. § 163.555 (1977) provides:

> Criminal Nonsupport. (1) A person commits the crime of criminal nonsupport if, being the parent, lawful guardian or other person lawfully charged with the support of a child under 18 years of age, born in or out of wedlock, he refuses or neglects without lawful excuse to provide support for such child.
>
> . . .
>
> (3) Criminal nonsupport is a Class C felony.

36. The following courts, for instance, hold that evidence of an unexcused violation of a criminal statute is conclusive on the issue of negligence: Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E.2d 896

wards, and had charged it to provide "care, . . . protective services . . . and such services for the child as the division finds to be necessary."[37] The court interpreted these terms to include an obligation to provide emotional nurturing, and reasoned that since the legislature had enacted "a vast panoply of procedures, both civil and criminal, to insure that children receive proper nurturing, support and physical care,"[38] its failure to provide specifically for a private cause of action implied that the statutes were not intended to create civil liability.[39] The court concluded: "It is obvious that had the legislature intended a civil action it would have provided one, as legislatures many times do."[40]

As authority for this point, the court cited Dean Prosser's noted commentary on the law of torts. Prosser criticizes the rationale of many courts that, in viewing a statute's silence on a civil remedy, purport to find an implied intent to provide for tort liability. Prosser states: "In the ordinary case this is pure fiction concocted for the purpose. The obvious conclusion can only be that when the legislators said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it."[41] The *Burnette* court ignored the former alternative and interpreted the legislature's silence as a conscious refusal to establish a civil action. It is at least as reasonable to infer, however, that the Oregon legislators, accustomed to the bar of parental immunity, simply did not consider the possibility of a civil suit.[42]

The *Burnette* court's citation of Prosser is misleading since the court fails to employ his analysis. Although Prosser questions the reasoning of courts that impose civil liability on the basis of criminal legislation, he concludes: "Perhaps the most satisfactory explanation is that courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind."[43] Rather than seeking to divine the intention of the legislature,

---

(1951); Hardaway v. Consolidated Paper Co., 366 Mich. 190, 114 N.W.2d 236 (1962); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); White v. Gore, 201 Va. 239, 110 S.E.2d 228 (1959).

A minority of courts hold that such a violation is only evidence of negligence. *See, e.g.*, Amsterdam Cas. Co. v. Novick Transfer Co., 274 F.2d 916 (4th Cir. 1960) (applying Maryland law); Gill v. Whiteside-Hemby Drug Co., 197 Ark. 425, 122 S.W.2d 597 (1939); Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 167 N.E. 235 (1929); Chiapparine v. Public Service R. Co., 91 N.J.L. 581, 103 A. 180 (1918).

37. 284 Or. at 710, 588 P.2d at 1108, citing Or. Rev. Stat. § 418.015 (1977).

38. 284 Or. at 710, 588 P.2d at 1108.

39. *Id.* at 710, 588 P.2d at 1109.

40. *Id.*

41. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 191 (4th ed. 1971).

42. One of the statutes alleged to have been violated in *Burnette* was enacted prior to recognition, in 1950, of an exception to parental immunity permitting suits for intentional torts. That statute is OR. REV. STAT. § 109.010 (1977) imposing a duty of support on parents. The three criminal statutes, *supra* note 35, were enacted in 1971. 1971 OR. LAWS c. 743 §§ 173-75. Given the lack of precedent for recognition of a civil action for abandonment, it is likely that, when they enacted these criminal statutes, the Oregon legislators did not consider the impact of the 1950 decision limiting immunity to a case of abandonment.

43. W. PROSSER, *supra* note 41, § 36, at 191.

Prosser would look to criminal legislation as a source of tort liability whenever the criminal statute is designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm that in fact occurred.[44] This approach is similar to that taken by most courts,[45] including the Oregon court on previous occasions.[46]

On the basis of Prosser's two-pronged analysis, the *Burnette* court could have held that violation of the four Oregon statutes regulating child care gives rise to tort liability. It is clear that the plaintiffs were in the class of persons intended to be protected. It is not as clear, however, whether the statutes seek to protect children from emotional injury.[47] Physical injury may be the most obvious consequence of abandonment, but it is by no means the only one. Emotional injury is so common among abandoned children[48] that it is reasonable to conclude that the statutes sought to prevent emotional as well as physical injury.

The Restatement (Second) of Torts approaches the issue of violation of a statutory duty differently than Prosser, but arguably dictates the same result. Section 874A of the Restatement provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.[49]

The comments to this Restatement provision indicate that, when faced with a criminal statute silent on the matter of civil responsibility, courts first should determine whether the legislature in fact had some specific, yet unexpressed, intention regarding civil liability. If so, that intention must govern.[50] But if, as is most probable here, the legislature's silence indicates that it had no specific intention, the court must make a policy decision and provide the remedy sought if it is "consistent with the legislative provision, appropriate for promoting its policy and needed to assure its effectiveness."[51] The Restatement suggests that it is appropriate, in this regard, for a court to consider the following: The nature of the legislative provision; the adequacy of existing remedies; the significance of the

---

44. *Id.* at 200.

45. *See, e.g.*, Alsaker v. De Graff Lumber Co., 234 Minn. 280, 48 N.W.2d 431 (1951); De Haen v. Rockwood Sprinkler Co., 258 N.Y. 350, 179 N.E. 764 (1932); Hutto v. Southern R. Co., 100 S.C. 181, 84 S.E. 719 (1915); Kalkopf v. Donald Sales & Mfg. Co., 33 Wis. 2d 247, 147 N.W.2d 277 (1967); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1923).

46. *See, e.g.*, Cutsforth v. Kunza, 267 Or. 423, 517 P.2d 640 (1973).

47. I accept the Burnette majority's assertion that the alleged injuries were solely emotional. *See* note 34, *supra.*

48. *See, e.g.*, GOLDSTEIN, *supra* note 3, at 34.

49. RESTATEMENT (SECOND) OF TORTS § 874A (1979).

50. *Id.*, comment d.

51. *Id.*, comment h.

purpose that the legislative body is seeking to effectuate; the extent of the resultant change in the tort law; the burden that the new cause of action will place on the courts; and the extent to which the tort action will supplement or interfere with existing remedies and means of enforcement.[52]

Judged by these standards, the Oregon statutes probably should have been held to create a tort action. Specific, narrowly-drawn criminal statutes are the most appropriate statutory source of implied civil actions. Unlike a constitutional provision, which may be intended only as a broad statement of policy, these statutes precisely define a standard of conduct to which all must adhere. It is reasonable, therefore, to hold those who breach this standard of conduct liable civilly as well as criminally. Criminal liability alone will not redress adequately the injury caused by abandonment since the existing criminal remedies do nothing to recompense the child, even though his injuries may be quite severe.[53] The goal of preventing and remedying these injuries is vital, for they may permanently damage the child[54] and, ultimately, society as well.[55]

Recognition of a tort action, as sought by plaintiffs in *Burnette*, would effect a change in the tort law, but the change would be far from drastic. No case in Oregon or elsewhere has ever decided whether parents owe their children a civil duty of support; such cases were seldom brought while parental immunity remained a bar to intra-family suits. Recognition, therefore, does not require that precedent be overruled, only that it be expanded upon by legal enforcement of a longstanding moral duty.[56] Moreover, recognition would not unduly burden the courts. Precise statistics are unavailable, but it is a safe bet that abandonment is much less common than other occurrences that currently give rise to tort actions, such as negligent driving or battery.

The court in *Burnette* did not follow the Restatement analysis, but it did express great concern with one of the Restatement's considerations: the extent to which establishing a civil action for damages would interfere with the legislative scheme. In particular, the court feared incursion into what it found to be a general theme running throughout the Oregon Juvenile Code; namely, that children are to be provided for in their natural homes whenever possible. When this is not possible, a means is provided for divesting the parents of their rights and removing the children from

52. *Id.*

53. *See, e.g.*, GOLDSTEIN, *supra* note 3, at 34.

54. *Id.*

55. *Id.*

56. It may be argued that when a court holds an action barred by parental immunity, it implicitly holds that defendant owes no duty to plaintiff—that is, that immunity negates duty. It is more accurate, however, to consider the immunity as preventing enforcement of any duty that defendant may owe plaintiff. As Prosser expresses it: "[I]mmunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of the particular defendant, or of interests which he represents, he is given absolution from liability." W. PROSSER, *supra* note 41, at 970.

their natural family. The court in *Burnette* believed that "tort actions such as the present ones might well be destructive of any plans the social agencies and juvenile court might have for these children."[57]

Although it is indeed a policy of the Oregon statutes to keep children in their natural homes whenever possible, recognition of a tort action need not be destructive of this policy. The complaint in this case alleged that the plaintiff children had been abandoned and deserted by their parents "maliciously, intentionally, and with cruel disregard of the consequences."[58] Under these circumstances, it is unlikely that these children could ever be reunited with their natural families. Moreover, by enacting criminal statutes preventing such desertions, the legislature may be said to have abandoned any hope of reconciliation in such cases. Any conflict could be eliminated by requiring that children be removed from their family before beginning a civil action. The *Burnette* court found it "significant" that the complaint failed to allege that defendants' parental rights had been terminated,[59] but this appears not to have been crucial. In any case, it should not have been. The very nature of a claim for abandonment suggests that the parental relationship has ceased to exist in fact, if not in law.

Criminal statutes are most often applied to tort actions in negligence cases. They are considered, in that context, to be a legislative definition of the requisite standard of care. Indeed, Prosser appears not to have considered the application of a statutory duty to intentional torts.[60] It is a mistake, however, to confine this doctrine to negligence cases. The Restatement position clearly is not so limited.[61] There are few cases, however, applying criminal statutes to actions for intentional torts. The relative paucity of such cases is explained by the distinctive character of *Burnette*. Most intentional torts, like battery, derive from a duty that was long recognized in both civil and criminal law. Some, like intentional infliction of emotional distress, impose a duty that evolved slowly, often finding expression first in a civil action. In contrast, the duty at issue in *Burnette* has been recognized both criminally and morally for thousands of years, but, until recently, civil suits have been barred by parental immunity.

In those states that have abrogated or limited parental immunity, the question becomes whether this venerable duty should be recognized by the civil as well as the criminal law. The criteria proposed by both Prosser and the Restatement suggest that it should be. Refusal to permit tort recovery

57. 284 Or. at 714, 588 P.2d at 1108.

58. *Id.* at 708, 588 P.2d at 1107.

59. *Id.* at 714, 588 P.2d at 1110.

60. *See*, W. PROSSER, *supra* note 41, § 36, at 190.

61. RESTATEMENT (SECOND) OF TORTS §§ 286-88C (1965) deal with when a court may adopt the requirements of a legislative enactment as the standard of conduct of a reasonable person in a negligence action. *C.f.* RESTATEMENT (SECOND) OF TORTS § 874A (1979) (when a court may recognize a cause of action based on violation of a statute).

in an abandonment case is to ignore the emphasis our society places on a parent's duty to her child—an emphasis reflected in the criminal statutes. The dissent in *Burnette* expressed the relationship between criminal and civil duties of support in these terms:

> Jurisprudentially it might be said that parents have a duty not to abandon and desert their young children because ORS 163.535 makes it a crime to do so, but a legislator would surely think ORS 163.535 should make it a crime to abandon and desert a child because the parent's existing duty—the duty to the child, not to the state—deserved governmental reenforcement. It is the parent's duty thus recognized under Oregon law that plaintiffs invoke in these cases.[62]

The majority opinion in *Burnette* purported to scrupulously apply established tort doctrine and defer to the expressed will of the legislature, but it actually twisted or ignored both. Traditional legal doctrine permits, if it does not require, recognition of a tort action for abandonment on the basis of Oregon's criminal statutes. The silence of the legislature should not be interpreted as hostility to a tort action, for the moving force behind the Oregon child care statutes and similar statutory schemes in other states is an appreciation of the damage caused by abandonment. This damage cannot be remedied adequately by criminal sanctions alone. Imposition of civil liability, therefore, would be appropriate.

B. *Alienation of Affections*

Alienation of affections is a tort that seeks to protect a person's interest in the family relationship. Traditionally, the essence of the tort was an impairment of the marital relation by depriving the plaintiff of his spouse's affections, including love, society, companionship, and comfort.[63] It is most generally brought against a meddling parent or lover.[64] This tort was recognized as early as 1866 by New York,[65] and was ultimately adopted at common law by every state except Louisiana.[66]

Alienation of affections and other torts that seek to protect such relational interests evolved from an ancient common-law action for enticing away a servant, thereby depriving the master of a quasi-proprietary interest in the servant's services.[67] Damages could be recovered only for loss of services, even in the context of a family relationship. Gradually, however, the law came to recognize the legitimacy of interests in companionship and affection as well. In some jurisdictions these

62. 284 Or. at 728-29, 588 P.2d at 1118 (Linde, J. dissenting).

63. *See, e.g.*, Sullivan v. Valiquette, 66 Colo. 170, 180 P. 91 (1919); Hudima v. Hudima, 131 Conn. 281, 39 A.2d 890 (1944); Johnson v. Richards, 50 Idaho 150, 294 P. 507 (1930); Annarina v. Boland, 136 Md. 365, 11 A. 84 (1920); Grobart v. Grobart, 5 N.J. 161, 74 A.2d 294 (1950).

64. *See, e.g.*, Sullivan v. Valiquette, 66 Colo. 170, 180 P. 91 (1919); Hudima v. Hudima, 131 Conn. 281, 39 A.2d 890 (1944); Annarina v. Boland, 136 Md. 365, 11 A. 84 (1920).

65. *See* Heermance v. James, 47 Barb. 120 (N.Y. 1866).

66. *See* Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927).

67. W. PROSSER, *supra* note 41, § 124, at 873.

interests have come to overshadow or replace the original interest in services.[68]

The common law permitted only the husband to maintain an action for alienation of affections. The wife was afforded no such protection, in part because she lacked capacity to sue in her own behalf. The common law also reflected the prevailing belief that women were not entitled to any services from their husbands and could not, therefore, recover for the loss of such services.[69] As society's conception of women and marriage changed, so did the law; today in almost all states a wife may recover for alienation of affections.[70]

Courts have recently begun to consider the question whether children may recover against one who has alienated the affections of a parent. Fifteen courts have refused to recognize such a cause of action.[71] Two more courts have held such suits barred by so-called "heart-balm" statutes,[72] which prohibit actions alleging sexual misbehavior—such as criminal conversation, seduction, and alienation of affections—on the premise that these types of actions are unduly susceptible to abuses such as threatening suit with concomitant publicity in order to force an unjust settlement.[73] Only four courts have allowed children to recover for alienation of a parent's affection.[74] Oregon has not yet ruled on this question.

Even in those states that allow to children a cause of action for alienation of affections, a conceptual leap is required to apply it to abandonment situations. In those cases that have permitted children to recover, the children sued third persons who allegedly had enticed their parents away from the family, thus depriving the children of the services, companionship, and affection due them.[75] In *Burnette* the children sought to recover from the abandoning parents themselves. Plaintiffs thus sought an expansion of the doctrine beyond that presently recognized by any

---

68. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651 (1930).

69. Holbrook, *supra* note 68.

70. *Id.* Maine has construed its statute to prohibit suits by the wife for alienation of affections. Farrell v. Farrell, 118 Me. 441, 108 A. 648 (1920); Howard v. Howard, 120 Me. 479, 115 A. 259 (1921).

71. *See* Edler v. MacAlpine-Downie, 180 F.2d 385 (D.C. Cir. 1950); Brookley v. Ranson, 376 F. Supp. 195 (N.D. Iowa 1974); Lucas v. Bishop, 224 Ark. 353, 273 S.W.2d 397 (1955); Coulter v. Coulter, 73 Colo. 144, 214 P. 400 (1923) (Plaintiff was adult child); Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947); Whitcomb v. Huffington, 180 Kan. 340, 304 P.2d 465 (1956); Cole v. Cole, 277 Mass. 50, 177 N.E. 810 (1931); Kleinow v. Ameika, 19 N.J. Super 523, 88 A.2d 31 (1952); Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y.S. 912 (Sup. Ct. 1934); Roth v. Parsons, 16 N.C. App. 646, 192 S.E.2d 659 (1972); Kane v. Quigley, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964); Nash v. Baker, 522 P.2d 1335 (Okla. Ct. App. 1974); Garza v. Garza, 209 S.W.2d 1012 (Tex. Ct. App. 1948); Wallace v. Wallace, 155 W. Va. 569, 184 S.E. 327 (1971); Scholberg v. Itnyre, 264 Wis. 211, 58 N.W.2d 698 (1953).

72. *See* Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.2d 984 (1948); Katz v. Katz, 197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950).

73. W. PROSSER, *supra* note 41, § 124, at 887.

74. *See* Daily v. Parker, 152 F.2d 174 (7th Cir. 1945) (applying Illinois law); Russick v. Hicks, 85 F. Supp. 281 (W. D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949).

75. *See* note 74 *supra*.

court. Although recognizing the lack of precedent for this application of the alienation of affections doctrine, plaintiffs argued that "it would be anomalous to recognize a right to recover as against a third party, but refuse to enforce a right where the fault is greater—against the deserting parent himself."[76]

The doctrine of alienation of affections has undergone a profound transformation since its appearance in the early common law, and it may well be anachronistic in our society in which divorce is increasingly commonplace. It is certainly "anomolous," as plaintiffs said, to allow a man's wife and children to recover damages for loss of his affections from a third-party temptress and yet deny recovery for the same injuries when the husband acts without outside encouragement. Perhaps a person's interest in the continued love, society, companionship, and comfort of a spouse or parent can best be dealt with in actions for divorce, child support, or even abandonment, brought against the family member himself. But stretching the old and probably outmoded doctrine of alienation of affections to fit abandonment cases is like pounding a nail with a wrench. It will damage the doctrine without accomplishing the desired end.

The alienation of affections doctrine certainly does have some relevance to a case of abandonment. In applying the doctrine to children, courts have determined that a child's relationship with his parents should be a legally-protected interest. As one court said in allowing a child recovery for alienation of affections:

> Defendant's conduct resulted in the destruction of the children's family unit—that fortress within which they should find comfort and protection at least until they reach maturity—and deprived them of the unstinting financial support heretofore contributed by their father, as well as the security afforded by his affection and presence. . . . [T]he minor children herein have a right to protect their relationship with their parents and are properly entitled to seek damages from one who has destroyed their family unit.[77]

The court quoted above expressed concern for the children's interest in their father's earnings, an interest not implicated in *Burnette*, but the court clearly seeks to protect other interests as well, particularly the children's right to their parents' love and moral support. If children's interest in their family relationship is sufficient to permit recovery from a stranger who has interfered with that relationship, then it should also be sufficient to permit recovery from a parent who has destroyed that relationship. The alienation of affections cases cited by plaintiffs are clearly distinguishable from *Burnette*, but the reasoning underlying them does support a crucial premise of the plaintiffs' case: a child's legal interest in his parental relationship deserves legal protection.

---

76. Appellant's Brief and Abstract of Record at 16-17, Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978).

77. Johnson v. Luhman, 330 Ill. App. 598, 606-07, 71 N.E.2d 810, 814 (1947).

C. *Intentional Infliction of Emotional Distress*

The early common law afforded no independent protection to a person's interest in peace of mind. Damages for infliction of emotional distress could be recovered only if a defendant's conduct constituted some independent tort, such as assault,[78] battery,[79] false imprisonment,[80] or seduction.[81] *Wilkinson v. Downton*,[82] an English case decided in 1897, is generally considered a watershed in this area of the law. In *Wilkinson*, a practical joker told plaintiff that her husband had broken both his legs in an accident and was lying in a public house in need of assistance. The court held the defendant liable for the plaintiff's resulting emotional injury.[83] By the middle of this century, American courts generally had come to recognize a cause of action for intentional infliction of emotional harm, a doctrine that proved remarkably flexible. Liability has been found for such disparate wrongs as spreading a false rumor that plaintiff's son had hanged himself;[84] bringing a mob to plaintiff's door at night with a threat to lynch him;[85] and wrapping and delivering a dead rat instead of a loaf of bread to a person who obviously expected the latter.[86]

The Restatement of Torts initially refused to recognize the existence of such a tort.[87] In 1948, however, the editors reversed themselves by recognizing the tort with few limits.[88] The Restatement (Second) of Torts retained the general doctrine, but limited its scope. The revised formulation was adopted by the Oregon Supreme Court in *Pakos v. Clark*:[89] "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . ."[90]

There are basically three separate elements in this articulation of the tort: the defendant's conduct must be extreme and outrageous; he must act intentionally or recklessly; and severe emotional distress must result. All three of these elements are satisfied when a parent abandons his child.

"Extreme and outrageous conduct" is an imprecise standard. It is intended to be a general statement of principles, not a litmus paper test.

---

78. *See, e.g.*, Klien v. Klien, 158 Ind. 602, 64 N.E. 9 (1902).

79. *See, e.g.*, Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).

80. *See, e.g.*, Godsden Gen. Hosp. v. Hamilton, 212 Ala. 531, 103 So. 553 (1925).

81. *See, e.g.*, Anthony v. Norton, 60 Kan. 341, 56 P. 529 (1899).

82. 2 Q.B. 57 (1897).

83. *Id.* at 59.

84. Bielitski v. Obadiak, 61 Dom. L. Rep. 494 (Can. 1921).

85. Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930).

86. Great A. & P. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931).

87. RESTATEMENT OF TORTS § 46 (1934).

88. RESTATEMENT OF TORTS § 46 (Supp. 1948) provides: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

89. 253 Or. 113, 453 P.2d 682 (1969).

90. *Id.* at 122, 453 P.2d at 686 (*quoting* RESTATEMENT (SECOND) of TORTS § 46(1) (1965)).

Some insight into the meaning of the phrase can be gained from an examination of the American cases that impose liability. The holdings of these cases have been summarized in the comment to section 46 of the Restatement, which provides:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[91]

The Oregon Supreme Court found this statement to be imprecise and contradictory and proposed a simpler, though arguably no more precise, test in *Rockhill v. Pollard*:[92] the defendant's conduct must be "outrageous in the extreme."[93]

Rockhill contains a far more significant contribution, however. The court held a physician liable for ejecting plaintiff and her obviously injured, 10-month old baby from his office in the dead of winter, without adequate treatment. Such conduct was "outrageous in the extreme," the court concluded, in part because of the relationship of the parties—a physician may be held to a stricter standard of conduct toward his patients than a layman would be toward a stranger.

Similarly, in judging a child's claim for intentional infliction of emotional distress, courts should demand more from parents than from strangers. Conduct that merely is insensitive when engaged in by a stranger may become extreme and outrageous if done by a parent. It is not necessary to recite a paean to motherhood to assert that the relation of mother to child is among the most sacred in our society, a status indicative of its importance. Any abandonment of a child threatens physical harm, but when a child is abandoned by his mother, the chances are greatly increased that severe emotional injury will result. The emotional injury may be more serious than its physical counterpart; it may result even though the child's physical needs are met. In any case, it may manifest itself long after the physical effects of abandonment have disappeared.[94]

If the facts alleged in *Burnette* are not outrageous, it is difficult to imagine what would be. The *Burnette* court refused to allow recovery, fearing that such a precedent would prove difficult to contain.[95] A recovery in *Burnette*, the court asserted, would permit a child to recover damages when its parents divorce thereby causing the child emotional injury.[96] Divorce clearly is qualitatively different from abandonment, and liability

91. RESTATEMENT (SECOND) OF TORTS § 46, comment d (1965).
92. 259 Or. 54, 485 P.2d 28 (1971).
93. *Id.* at 60, 485 P.2d at 31.
94. *See, e.g.*, Goldstein, *supra* note 3.
95. 284 Or. at 716, 588 P.2d at 1110.
96. *Id.*

in such a case could be avoided by holding it to be not "outrageous." Indeed, the recent increase in the incidence of divorce in our society, cited by the majority, itself is evidence that divorce is no longer considered "utterly intolerable in a civilized community."[97]

Parents who desert their children may not intend specifically to injure them. Such parents, however, do act in deliberate disregard of a high probability that their children will suffer emotional distress. This disregard is sufficient to satisfy the Restatement definition of recklessness,[98] and meets the second of the three elements of the tort.

In order to recover for intentional infliction of emotional distress, some states require plaintiff to prove physical as well as emotional injury.[99] Once physical injury is shown, however, recovery is permitted for both physical and emotional damage.[100] Those courts that require physical injury probably do so to discourage fraudulent claims. They consider physical harm to be independent evidence of the claimed emotional damage. It is not surprising, therefore, that these courts often find the physical injury requirement met by a relatively minor physical manifestation.

There is some danger of fraudulent claims when emotional injury alone is held compensable. Such emotional injury is typically proved solely through plaintiff's testimony. To require physical injury as an absolute condition for recovery, however, is an example of judicial overkill. Such a requirement results in an arbitrary denial of recovery to the class of emotionally damaged plaintiffs who, luckily or unluckily, avoided physical injury. Prosser suggests that when physical injury is lacking, the courts properly may require a greater showing of outrageous conduct; the more outrageous the conduct, the more believable the plaintiff's claim of emotional injury.[101]

Section 46 of the Restatement permits recovery for "emotional distress" even in the absence of physical injury. Indeed, recovery is permitted for a wide range of emotional ailments, as indicated by the comments to section 46:

> The rule stated in the Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea.[102]

97. RESTATEMENT (SECOND) OF TORTS § 46, comment d (1965).

98. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

99. *See, e.g.*, Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936); Carrigan v. Henderson, 192 Okla. 254, 135 P.2d 330 (1943); Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954); Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953).

100. *See, e.g.*, cases cited in note 99 *supra*.

101. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 53 (1956).

102. RESTATEMENT (SECOND) OF TORTS § 46, comment j (1965).

This definition of "emotional distress" should be adequate, in a typical case, to recompense a child for the variety of emotional disturbances caused by abandonment.

The tort of intentional infliction of emotional distress is a relatively recent growth in the law. It is difficult to determine what will be the limits of this growth, but the tort clearly appears to reach the conduct alleged in *Burnette*. Indeed, the defendants' conduct is more reprehensible and the plaintiffs' injuries more serious in *Burnette* than in many previous cases in which liability has been found. Certainly a parent who abandons her children is more despicable than a practical joker, even one with a taste for the macabre. The momentary upset suffered by one who unexpectedly discovers a dead rat in her groceries pales in comparison to the trauma suffered by an abandoned child. Thus, the court in *Burnette* should have held that the complaint stated a cause of action for intentional infliction of emotional distress.

D. *Common-Law Tort*

No case in any jurisdiction has been found recognizing a tort for parental desertion, either as a common-law tort or under one of the other theories advanced by the plaintiffs in *Burnette*. Such suits traditionally have been barred by parental immunity. Only recently, as this immunity has been limited or abrogated, have courts begun to consider the substantive issue of the rights and duties that exist because of the family relationship. Indeed, no case other than *Burnette* has reached the question whether parents owe their children a civil duty to provide care.[103] To recognize a civil action for abandonment, therefore, a court must be willing to break new legal ground—something courts notoriously have been hesitant to do. The scant attention this issue has received, however, suggests that the common law of abandonment is worthy of reconsideration and ripe for change.

Change is sometimes regarded as anathematic to the common law, but the common law is not, and should not be, static. As our society changes, the law must change as well. Indeed, the Oregon Supreme Court has itself expressed similar sentiments: "This court has not felt unduly restricted by the boundaries of pre-existing common-law remedies. We have not hesitated to create or recognize new torts when confronted with conduct causing injuries which we feel should be compensated."[104]

Why, then, did the court in *Burnette* refuse to recognize a tort of abandonment? One answer certainly is found in the traditional hesitancy of courts to intrude in family relationships. This hesitancy was responsible, in part at least, for the development of intra-family immunities and

103. *But see* Dunlap v. Dunlap, 84 N.H. 352, 355, 150 A. 905, 906 (1930) ("Cases of mere nonfeasance as to the performance of moral duties of support, etc., are not in point here. There is no liability because there has been no breach of legal duty.") (dictum).

104. Nees v. Hocks, 272 Or. 210, 215, 536 P.2d 512, 514 (1975).

remains a useful policy in some cases today. Some aspects of the family relationship clearly deserve judicial deference. Parents certainly should be given wide latitude in raising their children—determining when and how to discipline them, regulating their conduct, and supervising their education. The law should impose no liability on parents for good-faith errors of judgment in performing these parental functions.[105] But courts should not refuse, and have not refused, to question all manner of parental conduct.

The recent trend toward abrogation of parental immunity indicates an increasing willingness on the part of courts to allow tort claims in cases in which the damage to the family is minimal and the essence of the tort is unrelated to the exercise of parental discretion. Thus, for instance, courts have created exceptions to the immunity doctrine in cases in which the child is emancipated, or the suit is against the estate of a dead parent or against a parent in his business capacity.[106] In the first two cases the family relationship has, in a sense, ceased to exist. In the latter case, the probable existence of insurance makes it unlikely that a suit would interfere with the family. Some courts have created an exception to parental immunity for suits based on intentional torts.[107] Others, in abrogating the immunity, have continued to bar suit for reasonable exercises of parental authority and discretion.[108] Both approaches are founded on a deference to exercises of parental discretion.

The considerations that counsel such deference are inapplicable when a child brings suit for abandonment. Abandonment of a child results in the utter destruction of the family relationship; permitting the child to bring suit for the abandonment cannot further damage the relationship. As the *Burnette* dissent noted, "the parents have in fact ended the family unit, so that solicitude about not impairing it by litigation may sacrifice the children's legal rights to a pious hope."[109] Abandonment is no mere exercise of parental discretion nor error of parental judgment. Rather, it is a complete abdication of responsibility for the child. A person who has thus turned his back on his parental duties should not be permitted to invoke his parental status to shield himself from tort liability.

Abandonment is thought to cause a wide range of emotional problems in children. In children from birth to 18 months, any separation from the mother, even for the short period when the baby is put in the care of a babysitter, can lead to food refusals, digestive upsets, sleeping difficulties, and crying.[110] In children under five, abandonment may produce distress, anxiety, and a profound diminution in the quality of their next attachments. Children abandoned at this age often grow up as

105. *See, e.g.*, Ourada v. Knahmuhs, 221 N.W.2d 659 (Minn. 1974).
106. *See* notes 18-21 and accompanying text *supra*.
107. *See* note 19 and accompanying text *supra*.
108. *See* notes 22-25 and accompanying text *supra*.
109. 284 Or. at 729, 588 P.2d at 1118 (Linde, J. dissenting).
110. GOLDSTEIN, *supra* note 3, at 32.

persons unable to maintain warm contacts with others. They have been known to suffer regressions in their toilet training and a loss or lessening of their ability to communicate verbally.[111] When parents abandon school-age children, the children may respond by abandoning their parents' demands, prohibitions, and social ideals. This response may, in turn, result in antisocial, delinquent, or even criminal behavior.[112] The effects of abandonment are most difficult to see in adolescents, but may include interference with the establishment of the child's independent adult identity.[113] Perhaps the most disheartening result of abandonment is that adults who were themselves abandoned may treat their own children no better.[114] Thus, the sins of the fathers are visited on the sons.

The real debate in *Burnette*, however, is not over the damage caused by abandonment, but rather, over the best way to remedy that damage. Is the imposition of civil liability the best way to deal with the problem of abandonment? It is possible that the potential for civil liability would act as a deterrent, but this argument is not particularly persuasive. When parents abandon their child, they violate one of the oldest and most cherished precepts of our society. It is doubtful, therefore, that the possibility of civil liability will be effective in restraining such parents.

Another argument for imposition of civil liability is based on the Oregon Constitution, which contains a provision similar to provisions found in the constitutions of many states: "[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation."[115] This provision, however, cannot reasonably be read to mean that every injury must be remedied. Many injuries are not, and should not, be recognized by the law. If the provision is read to mean only that all injuries recognized as such by the law must be remedied, it does no more than state a facet of due process doctrine.

This constitutional provision is a slender reed on which to base tort liability, but it does state, perhaps too broadly, an important tenet of tort law. Culpable conduct causing injury to another, if not protected by privilege, defense or immunity, should give rise to tort liability. A wrong should not go unremedied merely because it is not within the definition of any previously recognizable cause of action. Section 870 of the Restatement (Second) of Torts reflects this principle. It provides: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."[116]

111. *Id.* at 33.
112. *Id.* at 33-34. *See* Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957).
113. GOLDSTEIN, *supra* note 3, at 34.
114. *Id.*
115. OR. CONST. art. I, § 10.
116. RESTATEMENT (SECOND) OF TORTS § 870 (1979).

The generality of this provision may detract from its persuasive value, but the principle underlying section 870 certainly warrants consideration in the case of abandonment.

Aside from the general concept that wrongs such as abandonment should be righted, there are several more narrow considerations urging recognition of a civil cause of action for abandonment. The criminal law can be effective in protecting the rights of children only if the authorities are willing to invoke it. Friends or relatives of the children or the children themselves may recommend criminal action to the local prosecutor, but the ultimate decision to prosecute is not in their hands. Criminal prosecutions not only require a higher degree of proof than their civil counterparts, but they often demand proof of something more than just desertion. Many states, including Oregon, define abandonment in terms of the parent's intent.[117] A parent may desert the child for a time and yet incur no criminal liability—despite the damage caused his child.[118] In sum, when no civil action for abandonment is permitted, the child has no independent means of enforcing his right to parental love and care. Indeed, in the absence of a means of enforcing such a right, it is probably meaningless to assert that any right exists. The child is then left without his parents and without any civil remedy, while an action against the parents may be brought, if at all, only at the discretion of the state. There is no one to speak for the child.

In its present state, the law draws arbitrary distinctions between those injuries to a child that are compensable and those that are not. In most states, for instance, a child may recover against his parents for battery.[119] If the child is abandoned, the wrong may be more grievous, the harm more severe, and yet the child is denied recovery. Even broken bones may heal in time, but the emotional damage caused by abandonment may never heal, even if the child is later placed in a foster or adoptive family.[120]

Moreover, the interests asserted by plaintiffs in *Burnette* have been deemed worthy of legal protection in other contexts. For instance, an increasing number of states permit children, as plaintiffs in wrongful death actions, to recover non-pecuniary losses such as lost society and companionship, mental anguish, grief and sorrow.[121] Similarly, a few jurisdictions permit children to recover non-pecuniary damages in actions for alienation of affections.[122] Courts have thus recognized the legitimacy

117. OR. REV. STAT. § 163.535 (1977) and *In re* Welfare of Staat, 287 Minn. 501, 178 N.W.2d 709 (1970). *Contra*, Hendricks v. Curry, 401 S.W. 2d 796 (Tex. Civ. Ct. App. 1966).

118. *See* notes 110-14 and accompanying text *supra.*

119. Parents, of course, may discipline their child by corporal punishment, but if the punishment exceeds that which is reasonably necessary under the circumstances, the child may recover for the battery. *See, e.g.*, Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944); State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903).

120. GOLDSTEIN, *supra* note 3, at 22-26.

121. S. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 3.1 (2d ed. 1975). Oregon, however, does not permit recovery for such non-pecuniary losses. Scott v. Brogani, 157 Or. 549, 73 P.2d 688 (1937).

122. *See* note 74 *supra.*

of a child's interest in the continuation of his family relationship. The argument for legal protection of that interest is certainly no less compelling in a case of abandonment than in a case of wrongful death or alienation of affections. The defendant in a wrongful death action may have been unaware that his victim had children, and yet he is held liable for interference with the parent-child relationship. An abandoning parent, on the other hand, knowingly ends that relationship and yet escapes civil liability.

The case for recognition of a civil action for abandonment is stated most succinctly by Henry Foster and Doris Freed in an essay entitled, "A Bill of Rights for Children."[123] They write: "A child has a moral right and should have a legal right: 1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult . . ."[124] It is fitting that the authors chose to express this right first, for the right to love and nurturing is of paramount importance. The overwhelming importance of this right demands that the law afford redress for its denial.

IV. CONCLUSION

Plaintiffs were unsuccessful in *Burnette*, but their complaint arguably stated a cause of action both for a tort arising from violation of a criminal statute and for intentional infliction of emotional distress. Moreover, as a policy matter, plaintiffs stated a strong case for recognition of a new tort of parental abandonment. In denying recovery, the Oregon Supreme Court may have been reacting to the novelty of the cause asserted. As states continue to abrogate or limit parental immunity, more such suits will likely be brought, forcing wider consideration of the issues raised by *Burnette* and perhaps resulting in recognition of a civil cause of action for abandonment.

Robert M. Pfeiffer

123. Henry H. Foster, Jr. and Doris Jonas Freed, *A Bill of Rights for Children*, in THE YOUNGEST MINORITY (S. Katz ed. 1974).

124. *Id.* at 318.