Campbell Law Review

Volume 5
Issue 2 *Spring 1983*

Article 6

1983

Criminal Law - A New Means to Combat Child Abuse?

Janet Coleman

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Criminal Law Commons, and the Family Law Commons

Recommended Citation
Janet Coleman, *Criminal Law - A New Means to Combat Child Abuse?*, 5 Campbell L. Rev. 415 (1983).

This Note is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

CRIMINAL LAW—A NEW MEANS TO COMBAT CHILD ABUSE? *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

INTRODUCTION

Recently child abuse has been brought forcefully to society's attention and the nation has become aware of the severity and the pervasiveness of the problem. Only now are efforts being made to combat the incidents and results of such abuse, through social services, courts, counseling, and other available means. The legal system has also recognized the problem and dealt with it in its own manner.

In the past parents were not held criminally or civilly liable for their failure to act in caring for their children.[1] Liability was imposed only in those instances where "criminal liability would have existed absent the parent-child relationship."[2] Before the legislatures enacted child abuse and neglect statutes, a parent could raise his children as he believed appropriate, but was never permitted to inflict serious harm on his child in the guise of punishment.[3] The child could not sue his parent civilly for injuries inflicted by the parent due to the intra-family immunity doctrine.[4]

Yet, in the 1960's and 1970's legislatures, through child abuse and neglect statutes, clarified and made enforceable the duty of the parent to protect his children from harm or abuse.[5] In North Carolina and in most states, the statutes impose a criminal penalty for abuse and also punish the failure to prevent abuse, which was not previously a crime.[6] In addition, many states have imposed liability by abrogating the intra-family immunity doctrine almost en-

1. N.C. GEN. STAT. §§ 14-316.1, 14-318.2, 14-318.4 (1981), (G.S. 14-316.1 says that any one who knowingly or willfully causes a juvenile to be in a place or condition, or commit an act whereby he could be adjudicated delinquent or abused shall be guilty of a misdemeanor. G.S. 14-318.2 says any parent of a minor child who inflicts physical injury or allows injury to be inflicted, shall be guilty of a misdemeanor. G.S. 14-318.4 says any parent who intentionally inflicts serious injury upon a child is guilty of a class I felony.); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971).

2. Bowers v. State, 283 Md. 115, 389 A.2d 341, 348 (1978).

3. 67A C.J.S. *Parent and Child* §§ 11 & 12 (1978).

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971).

5. N.C. GEN. STAT. §§ 14-316.1, 14-318.2, 14-318.4 (1981).

6. *Id.*

Published by Scholarly Repository @ Campbell University School of Law, 1983

Campbell Law Review, Vol. 5, Iss. 2 [1983], Art. 6

tirely, or at least in cases of gross negligence or willful abuse of the child.[7]

In *State v. Walden*, a mother was convicted of assault with a deadly weapon inflicting serious bodily injury, for failing to intervene when her boyfriend assaulted her child.[8] The court found that her nonfeasance was criminal, and was equivalent to aiding and abetting or encouraging the perpetrator of a crime.[9] In most states, aiders and abettors are indicted and punished as principals.[10]

Until recently, under general tort law a minor child could not sue his parent for personal torts, whether intentional or negligent.[11] The reason for this rule was to guarantee family harmony and to maintain parental discipline within the home.[12] But the parent does have a legal duty to protect his children from any harm which he should have been aware of when exercising ordinary care.[13] Early criminal law also recognized this legal duty.[14] The *Walden* court indicated that a breach of this duty can lead to criminal sanction,[15] in that a parent must attempt to prevent abuse of his children if he has a reasonable opportunity to do so and a failure to do so is criminally punishable. North Carolina, through N.C. Gen. Stat. § 14-318.2, already requires parents to protect their children from harm, but the *Walden* decision appears to require more.[16] Now, rather than merely attempting to protect the child, it appears a parent must take all reasonable steps to prevent the abuse if he is present when it occurs, or he will be found to have acquiesced in the criminal intent of the perpetrator of the harm and thus be guilty as a principal.[17] The criminal law has finally begun to parallel the civil law in holding the parent liable for child abuse, whether done by the parent himself or by someone standing *in loco parentis*.[18]

This note will examine *Walden* in light of prior North Caro-

---

7. 67A C.J.S. *Parent and Child* § 127 (1978).
8. 306 N.C. 466, 293 S.E.2d 780 (1982).
9. *Id*; *see also* State v. Scott, 289 N.C. 712, 720, 224 S.E.2d 185, 190 (1976).
10. 22 C.J.S. *Criminal Law* § 85 (1961).
11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971).
12. *Id.*
13. 67A C.J.S. *Parent and Child* § 144 (1978).
14. Hughes, *Criminal Omissions*, 67 YALE L. J. 590 (1958).
15. 306 N.C. at 473, 293 S.E.2d at 787.
16. N.C. GEN. STAT. § 14-318.2 (1981).
17. 306 N.C. at 476, 293 S.E.2d at 787.
18. N.C. GEN. STAT. §§ 14-316.1, 14-318.2, 14-318.4 (1981).

lina law, in relation to the new law it creates, as well as the policy interests involved in this area of criminal liability.[19]

THE CASE

A neighbor of the defendant, who lived in an adjoining apartment, testified that on December 8, 1979, he heard a child crying and a popping sound he believed to be that of a child being beaten.[20] The noises continued for several hours and began again the next morning.[21] The neighbor called the police who came and questioned the neighbor and the woman in the apartment where the defendant lived; the police officers then went to obtain a search warrant.[22] When the police returned, they observed five children with cuts and bruises on their bodies, huddled in a corner of the apartment.[23]

The defendant, the mother of the children, was indicted for assault with a deadly weapon, inflicting serious bodily injury, in violation of N.C. Gen. Stat. § 14-32.[24] The children testified that Bishop Hoskins, who lived with them and their mother, had previously beaten all of them, and had beaten one child, Lamont, the morning of December 8th with a leather belt.[25] Each child said that during the beating that morning their mother was in the room with Bishop and Lamont, but did not say anything or do anything to stop the beating.[26] The defendant testified that the children's father, not Bishop, had forced his way into the apartment and beaten the child over her objections.[27] The defendant was convicted by a jury and sentenced to five to ten years in prison.[28] The court of appeals reversed, finding the trial court erred by instructing the jury that they could convict the defendant if they

19. Another important issue in this case was whether the trial court should have denied the defendant's motion to dismiss the case because of the Speedy Trial Act, N.C. GEN. STAT. § 15A-701 (Cum. Supp. 1981). This issue is beyond the scope of this note and will not be discussed here, but the supreme court held that there was no error in the trial court on this issue.

20. 306 N.C. at 469, 293 S.E.2d at 782.

21. *Id.*

22. *Id.* at 470, 293 S.E.2d at 783.

23. *Id.*

24. *Id.* at 469, 293 S.E.2d at 782.

25. *Id.* at 470, 293 S.E.2d at 783.

26. *Id.*

27. *Id.*

28. *Id.* at 469, 293 S.E.2d at 782.

found "that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so."[29] The court of appeals ordered a new trial based on these errors.[30] The supreme court reversed and sent the case back with orders to reinstate the trial court's verdict.[31] The court held that a parent's failure to take all reasonably possible steps to protect his child, while he is present, from an attack by another person constitutes an omission by the parent indicating his consent and contribution to the crime being committed.[32] Thus, the parent is guilty as an aider and abettor.[33]

Background

North Carolina's law on aiding and abetting and the development of the laws relating to child abuse by parents have followed substantially the same course as the law in other jurisdictions.[34]

A. *North Carolina Law*

In North Carolina, the mere presence of the defendant at the scene of the crime is rarely sufficient for the defendant to be found guilty as an aider and abettor to the crime.[35] Since as early as 1849, North Carolina courts have required that the defendant at least contribute in some way to the commission of the crime.[36] The intention to assist in the crime had to be communicated to the perpetrator for the defendant to be held guilty.[37] He could be found guilty if he in some way encouraged the perpetrator of the crime, even though he did not actually participate in its commission.[38] Yet, if the bystander is a friend of the perpetrator, and knows that

---

29. *Id.* at 471, 293 S.E.2d at 784.

30. *State v. Walden*, 53 N.C. App. 196, 280 S.E.2d 505 (1981).

31. 306 N.C. at 479, 293 S.E.2d at 788.

32. *Id.* at 476, 293 S.E.2d at 787. (In this note, the terms "principal" and "aider and abettor" are synonymous.)

33. *Id.*

34. People v. Bunting, 104 Ill. App. 3d 291, 432 N.E.2d 950 (1982) (accomplice accountability); Bigbee v. State, 173 Ind. App. 3d 462, 364 N.E.2d 149 (1977) (aiding and encouraging); State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976) (aiding and abetting); Annot., 6 A.L.R. 4th 1066 (1981).

35. State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Rankin, 284 N.C. 219, 200 S.E.2d 182 (1973).

36. State v. Hildreth, 31 N.C. (9 Ired.) 440, 444 (1849).

37. State v. Hargett, 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961).

38. State v. Aycoth, 272 N.C. 48, 51, 157 S.E.2d 655, 657 (1967).

his presence will be regarded as encouragement, then his presence alone is sufficient for conviction of the bystander.[39] Even when the courts have deemed presence a contribution to the commission of the crime, they have imposed the requirement that the bystander have knowledge that his presence will be regarded as encouragement by the perpetrator.[40] Therefore, a friendly relationship between the bystander and the perpetrator, standing alone is ordinarily insufficient to hold the bystander guilty as an aider and abettor.[41]

Before *Walden*, no criminal case in North Carolina had held that a parent had an affirmative duty to take reasonable steps to protect his child from harm. However, one case did hold that it is the moral and legal duty of the father to provide for the protection, maintenance, and education of his children.[42] Similar duties are now required by statute.[43] *State v. Cauley*,[44] a North Carolina case similar to *Walden*, upheld a verdict finding the mother of an abused child guilty of aiding and abetting her husband in committing assault with a deadly weapon on the defendant wife's three year old child. The mother was in the room during the commission of the assault, and she was found to have encouraged the perpetrator by laughing, cursing, and telling the child to walk.[45] Yet, the court in *Cauley* did not discuss the parent's duty to her child. *Walden* can be distinguished from *Cauley* because in *Walden* the defendant failed to do or say anything. This difference is significant because the *Walden* court interpreted silence as encouragement to the perpetrator, which no previous North Carolina court

---

39. State v. Scott, 289 N.C. 712, 720, 224 S.E.2d 185, 190 (1976); State v. Horgett 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961).

40. 255 N.C. at 415, 121 S.E.2d at 592 (quoting State v. Holland, 211 N.C. 284, 189 S.E. 761 (1937)).

41. 289 N.C. at 720, 224 S.E.2d at 190. (This was a homicide case in which the husband of the defendant was murdered by the defendant and her boyfriend was present at the time the crime was committed but he did not give any assistance nor was there evidence that he knew that his presence would be seen as encouragement. The court held that his motion for nonsuit should have been granted.)

42. In Re TenHoopen, 202 N.C. 223, 226, 162 S.E.2d 619, 620 (1932). The *TenHoopen* Court cites in support of this proposition Newsome v. Bunch, 144 N.C. 15, 56 S.E. 509 (1907); In Re Turner, 151 N.C. 474, 66 S.E. 431 (1909); In Re Means, 176 N.C. 307, 97 S.E. 39 (1918).

43. N.C. GEN. STAT. §§ 14-316.1, 14-318.2, 14-318.4 (1981).

44. State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956).

45. *Id.* at 710, 94 S.E.2d at 922.

had done.

North Carolina has generally followed the majority of states, both in enacting the reporting statutes and other child abuse statutes,[46] and in beginning to abrogate the parent-child immunity which in the past prevented children from suing their parents for harm caused by the parents' ordinary negligence.[47] In North Carolina, until fairly recently, an unemancipated child could not maintain an action against his parent based on ordinary negligence.[48] This rule extended to a step-parent standing *in loco parentis*.[49] In 1975 the North Carolina Legislature enacted a statute which remains the state's only abrogation of the parent-child immunity.[50] This statute allows the child to sue the parent when the parent's negligent operation of a motor vehicle causes the child injury.[51] Only when the child is injured by such negligence can he sue his parent in North Carolina. Parents have only been criminally liable for injuries they cause their children when the injury was reported to the local state prosecutor who could then bring charges against the parent for assault or other applicable crimes. The misdemeanor child abuse statute is the only punishment available for failure to prevent abuse, regardless of the severity of the child's injury.[52]

B. Other States

Most states have now enacted child abuse and neglect statutes similar to the North Carolina statutes.[53] The law on aiding and abetting is also substantially similar.[54] Mere presence at the scene of the crime or acquiescence in the commission of a crime have been held insufficient to constitute aiding and abetting under most

46. National Study of the Incidence and Severity of Child Abuse and Neglect, U.S. Dept. of Health and Human Services, 1981 p.1.

47. Annot., 6 A.L.R. 4th 1066 (1981).

48. Morgan v. Johnson, 24 N.C. App. 307, 308, 210 S.E.2d 503, 504 (1974).

49 *Id.*

50. N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1981).

51. Snow v. Nixon, 52 N.C. App. 131, 133, 277 S.E.2d 850, 851 (1981).

52. N.C. GEN. STAT. § 14-318.2 (1981).

53. N.C. GEN. STAT. § 14-318.2, 14-318.4 (1981); Child Abuse and Neglect, ILL. REV. STAT. ch. 23, §§ 2054, 2368 (Supp. 1982); IND. CODE ANN. § 31-6-11-3 (1980).

54. People v. Bunting, 104 Ill. App. 3d 291, 432 N.E.2d 950 (1982); Bigbee v. State, 173 Ind. App. 3d 462, 364 N.E.2d 149 (1977); 22 C.J.S. *Criminal Law* § 85 (1961).

circumstances.[55]

Mere presence may be sufficient for conviction when it is regarded by the perpetrator as encouragement, especially when the bystander is present and fails to disapprove or oppose the crime.[56] Lack of disapproval may be considered by the trier of fact in determining whether that person assented to the criminal act.[57] The bystander thereby aids and abets the crime by lending his countenance and approval.[58] In *Walden* the mother gave such criminal approval. In its charge to the jury, the trial court stated that the jury could find the defendant guilty if they found that she was present when the crime was committed and that her failure to respond encouraged Hoskins to commit the crime.[59] The supreme court in *Walden* stated that the parent's failure to take reasonable steps to prevent the abuse showed the parent's consent and contribution to the crime,[60] thus consistently holding with recent case law in other states.[61]

Another exception to the rule that mere presence at the scene of the crime is not sufficient to constitute aiding and abetting arises when the bystander has a legal duty to the victim of the crime.[62] The common law imposes certain duties upon persons standing in personal relationships to others, and action may be required by these persons to protect others against threatened acts by third persons.[63] One of these relationships is that of parent and child, and a parent may be guilty of a crime by failing to act in a hazardous situation.[64]

---

55. Pruitt v. State, 166 Ind. App. 67, 333 N.E.2d 874, 881 (1975). (Negative acquiescence is not specifically defined in the case law but can be said to mean that the bystander does nothing to aid in the commission of the crime but merely stands by passively.)

56. People v. Gray, 87 Ill. App. 3d 142, 408 N.E.2d 1150, 1154 (1980). (The court held that proof of common purpose could be inferred from the accused's presence at the commission of the crime, without opposing the crime.)

57. People v. Reed, 104 Ill. App. 3d 331, 432 N.E.2d 979, 985 (1982); Mobley v. State, 227 Ind. 335, 85 N.E.2d 489, 492 (1949).

58. *Id.*

59. 306 N.C. at 471, 293 S.E.2d at 784.

60. *Id* at 476, 293 S.E.2d at 787.

61. 104 Ill. App. 3d 331, 432 N.E.2d at 985; 227 Ind. 335, 85 N.E.2d at 492.

62. State v. Smolin, 221 Kan. 149, 557 P.2d 1241, 1246 (1976).

63. R. PERKINS, CRIMINAL LAW at 597 (2d ed. 1969). W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 26, at 184 (1972).

64. W. LAFAVE, *supra* note 63. (No North Carolina case had held this way in a criminal case.)

Published by Scholarly Repository @ Campbell University School of Law, 1983

The *Walden* court found an Australian case, *Rex v. Russel*,[65] persuasive on the issue of the legal duty of the parent to the child. In *Rex v. Russell*, the father did not attempt to interfere when his wife drowned herself and their two young sons. The Australian court held that a parent has a moral duty to protect his children from harm, and the father's failure to intervene could be seen as indicating his assent and encouragement to his wife's conduct.[66] The court upheld the father's conviction as an aider and abettor to manslaughter.[67] The defendant had a duty to act affirmatively and take all reasonable steps necessary to prevent the commission of the crime.[68] Failure to do so established his guilt.[69]

Other states' courts have held that a parent must act to protect his child from abuse. In *State v. Zobel*,[70] the Supreme Court of South Dakota held that the parent cannot refuse to help his children when it is reasonably within his power to do so. In *Zobel* the wife had previously been convicted of assaulting her children and the husband told the court when she received probation that he would prevent her from assaulting the children again.[71] But while the husband was out of the house, the wife seriously assaulted both children, and when the husband returned one of the children was dead.[72] The court upheld the husband's conviction of second degree manslaughter on the ground that by his failure to intervene, to protect the children, and to see that the children got enough food and adequate medical attention, he became a party to his wife's actions.[73] Although the *Zobel* holding is similar to that in *Walden*, the facts of the two cases are different in that in *Walden* the mother was at home, and in the room when her child was assaulted. The *Zobel* court implied that because the father knew of his wife's past abuse of the children, he should not have allowed them to be put in a situation where they could be harmed. *Walden*, as did *Zobel*, held that a parent must take all reasonable steps to protect his child from assault and cannot passively observe

65. Rex v. Russell, [1933] VICT. L. R. 59 (Aus. 1932) (seriatim opinion).
66. *Id.* at 67.
67. *Id.* at 83.
68. *Id.* at 76.
69. *Id.*
70. 81 S.D. 260, 134 N.W.2d 101 (1965).
71. *Id.* at 103.
72. *Id.* at 104.
73. *Id.* at 108.

the assault.[74] Yet *Walden* did not discuss whether the mother should have removed her children from an environment where they were in danger of abuse from Hoskins as a part of the parental duty to protect her child.

In *Smith v. State*,[75] a recent Indiana case, the Indiana Court of Appeals held that a parent is charged with an affirmative duty to care for his child, and the absence of actual knowledge that danger may exist is no defense because the parent has an affirmative duty to discover any danger, and then act in a reasonable manner. In *Smith*, the defendant was the mother of the child.[76] She was present while her boyfriend abused the child and did nothing to intervene except protest verbally.[77] The court held that a parent has a duty to keep his child from dangerous situations, and to remove the child from such situations.[78] The defendant's felony conviction for child neglect was upheld because of her failure to remove the child from the dangerous situation.[79] The *Walden* court did not say, as did *Smith*, that the parent has an affirmative duty to discover possible danger, but did hold that parents must act reasonably under the circumstances of each case to prevent harm to their children.[80]

According to early tort law, minor children could not sue their parents for intentional or negligent torts.[81] Courts have begun to make inroads upon this immunity, and one of the first changes allows the child to recover when his parent intentionally or wilfully inflicts injuries upon him.[82] The recent trend regarding parent-child immunity has been complete abrogation, except as to exercises of parental control and authority, or parental discretion with respect to such matters as food and care.[83]

Parents have always had the privilege of disciplining their

---

74. 306 N.C. at 475, 293 S.E.2d at 786.

75. Smith v. State, 408 N.E.2d 614 (Ind. App. 1980); *accord*, Eaglen v. State, 249 Ind. 144, 231 N.E.2d 147, 150 (1967).

76. 408 N.E.2d at 617.

77. *Id.*

78. *Id.* at 622.

79. *Id.*

80. 306 N.C. at 475, 293 S.E.2d at 786.

81. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971).

82. *Id.*

83. *Id.* (Even with this exception, under the facts in *Walden* the parent might have been immune from suit if she had claimed that she was exercising discretion as to the child's care.)

Campbell Law Review, Vol. 5, Iss. 2 [1983], Art. 6

children, and were allowed to use reasonable force in doing so.[84] The privilege includes using any corporal punishment which is reasonable under the circumstances.[85] But the parent cannot in punishing his child, inflict cruel and abusive punishment without losing his parental privilege.[86] If the parent loses his privilege of discipline, he is then subject to criminal sanctions.[87]

In addition to the disciplinary privilege, parents are allowed to exercise broad authority and discretion in the raising of their children.[88] Because the judiciary is reluctant to interfere with family autonomy,[89] the courts will interfere with this discretion only when necessary for the protection of the children.[90] Generally the standard of care to which the parent is held in the care of his child is that of a reasonable parent, considering his special relationship to the child.[91] A parent can be found civilly liable for failure to exercise reasonable care for the child's protection against unreasonable risk of injury.[92] In determining whether or not the parent is liable for such failure, all circumstances will be considered, including the likelihood of the child's recognition of the possible risk of injury to himself and whether or not such injury was reasonably foreseeable to his parent.[93] Thus parents do have some obligation under the civil law to protect their children from harm, and in many states, can now be sued by their children for damages.[94]

ANALYSIS

The court's holding in *State v. Walden* was based on the common law and the statutorily created duty that a parent must act affirmatively to foresee when his child is in danger of being harmed.[95] The legislature has attempted through the use of stat-

84. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 27 (4th ed. 1971).

85. *Id.*

86. State v. Liggett, 84 Ohio App. 225, 83 N.E.2d 663, 664 (1948); Commonwealth v. Kramer, 371 A.2d 1008, 1011 (Pa. Super. 1977).

87. 67A C.J.S. *Parent and Child* § 12 (1978).

88. Convery v. Maczka, 163 N.J. Super. 411, 394 A.2d 1250, 1252-53 (1978); 67A C.J.S. *Parent and Child* § 11 (1978).

89. *In Re* Zenick, 129 N.E.2d 661, 665 (Ohio Juv. Ct. 1955).

90. 67A C.J.S. *Parent and Child* § 15 (1978).

91. 163 N.J. Super. at -, 394 A.2d at 1253; 67A C.J.S. *Parent and Child* § 144 (1978).

92. 163 N.J. Super. at -, 394 A.2d at 1253.

93. *Id.*, 394 A.2d at 1253-54.

94. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 56, 122 (4th ed. 1971).

95. 306 N.C. at 475, 293 S.E.2d at 786; N.C. GEN. STAT. § 14-318.2 (1981),

utes to deter child abuse,[96] and the *Walden* court has tried to further this legislative intent by providing additional criminal sanctions and by imposing a stricter duty upon parents than that previously found in North Carolina law.[97] *Walden* imposed felony penalties for a parent's failure to act when the crime committed upon the child was a felony. Previously in North Carolina the mother in *Walden* would have only been civilly liable for such nonfeasance,[98] or only suffer punishment for a misdemeanor.[99] The court stated that a parent's failure to intervene to prevent an assault upon his child will be construed as encouragement to the perpetrator of the assault.[100] Thus the parent can be found guilty of aiding and abetting in the assault, and convicted as a principal.[101] The court said that intervention would be required if reasonable

---

(the statute states that a parent who allows physical injury to be inflicted upon his child is guilty of a misdemeanor.); R. PERKINS, CRIMINAL LAW at 597 (2d ed. 1969).

96. N.C. GEN. STAT. §§ 14-316.1, 14-318.2, 14-318.4, 7A-543 (1981); § 110-116 (1978). (Under G.S. 110-116, now repealed, the legislative intent and purposes were: The Legislature recognizes the growing problem of child abuse and neglect and that children do not always receive appropriate care and protection from their parents or other caretakers acting in loco parentis. The primary purpose of requiring reports of child abuse and neglect is to identify any children suspected to be neglected or abused and to assure that protective services will be made available to such children and their families as quickly as possible to the end such children will be protected, that further abuse or neglect will be prevented, and to preserve the family life of the parties involved where possible by enhancing parental capacity for good child care.)

97. State v. Mapp, 45 N.C. App. 574, 581, 264 S.E.2d 348, 354 (1980). (In this case the mother of a small child was convicted of second degree murder, child abuse and child neglect, and the court of appeals upheld the conviction. The court held that the parent failed to exercise reasonable diligence in the care of the child as required by N.C. GEN. STAT. § 14-316.1, which makes the parent guilty of a misdemeanor. But the court did not say that the parent is criminally liable for failure to act when the child is in danger from a third person, because in this case the parent herself committed the abuse.) State v. Cauley, 244 N.C. 701, 710, 94 S.E.2d 915, 922 (1956). (In this case the mother was found guilty of assault with a deadly weapon with intent to kill because the trial court found she had encouraged the perpetrator of the crime by laughing and cursing; the supreme court reversed and remanded for a new trial, and did not discuss the parent's duty to protect the child.)

98. State v. Reddish, 269 N.C. 246, 152 S.E.2d 89 (1967). (Civil negligence is not enough to establish criminal responsibility.)

99. N.C. GEN. STAT. § 14-318.2 (1981).

100. 306 N.C. at 476, 293 S.E.2d at 787.

101. *Id.* (Aiders and abettors are considered principals, and so are equally guilty. State v. Small, 301 N.C. 407, 412, 272 S.E.2d 128, 132 (1980)).

under the circumstances.[102] Reasonableness is a jury question to be determined upon the facts of each case.[103] The legislature provided only a misdemeanor penalty for failure to act under similar circumstances.[104] The felony child abuse sanction applies only when the parent himself is the perpetrator of the abuse.[105] The parent thus must intervene to avoid felony penalties being imposed upon him and to protect his child from harm by others.[106] The parent has always had a duty to protect his child from harm,[107] but now he must act affirmatively to prevent such harm when he is aware of the danger and present at the scene of the crime.[108] Thus the duty of the parent to act is no greater than before, yet now, due to *Walden*, the penalties for failure to act are more severe.

Walden expands the law of aiding and abetting in North Carolina by expressly stating that because of the legal duty a parent owes to a child, a bystander parent can be charged as a principal solely because he is present at the scene of the crime.[109] Before *Walden*, the jury could find the defendant (parent) guilty only if it found that the defendant said or did something showing his consent to the criminal purpose and contribution to its executive, but now a parent's mere presence without opposing the crime may be sufficient.[110] The failure of a parent who is present to take all reasonably possible steps to prevent his child from being assaulted by another person is deemed consent by the parent to the crime.[111] The jury may infer that the parent has consented to the crime and need not inquire into how the silent parent's presence was viewed by the perpetrator.[112] The law is expanded in that a bystander parent can no longer watch passively while his child is abused. In the past in North Carolina, the parent only could not actively encourage the perpetrator, but now must actively discourage the commission of the crime in order to avoid being charged with aid-

---

102. 306 N.C. at 475, 293 S.E.2d at 786.
103. *Id.*
104. N.C. GEN. STAT. § 14-318.2 (1981).
105. N.C. GEN. STAT. § 14-318.4 (1981).
106. 306 N.C. at 476, 293 S.E.2d at 787.
107. *In Re* TenHoopen, 202 N.C. 223, 226-27, 162 S.E. 619, 620 (1932). (The court held that a father has a duty to protect, maintain and educate his children.)
108. 306 N.C. 474, 293 S.E.2d 785.
109. *Id.* at 476, 293 S.E.2d at 787. (The parent will be charged as a principal if he fails to take reasonable steps to prevent the harm to his child.)
110. *Id.*
111. *Id.*
112. *Id.*

ing and abetting. The scope of the law is expanded in another sense because the courts will no longer have to inquire into how the bystander's presence is viewed by the perpetrator. The court will merely assume that if the bystander is a parent and the victim is his child, the parent's presence without protest or intervention is consent to the crime by the actual perpetrator. Thus the parent bystander no longer has a defense that the abuser was not encouraged in his commission of the crime by the parent's silent presence at the scene.

The court did not discuss whether this holding will apply to all cases where there is a legal duty to act. It appears that the holding is limited to the facts of *Walden*, or at least to those situations where a parent fails to take affirmative steps to protect his child from harm by a third person.[113] The court may have limited its holding because traditionally the state and its agents have been reluctant to interfere in the autonomy of the family.[114] Parental rights are given great deference, due to both the constitutionally protected right of privacy, under the Due Process Clause of the Fourteenth Amendment, and the state's goal of protecting the family entity as the basic unit of society.[115] The state will interfere with this family autonomy only when necessary to protect the welfare of a child, limiting the intrusion to what is necessary under the circumstances.[116] If the court had attempted to expand the scope of the *Walden* rule it might have intruded unnecessarily upon the family. Such an intrusion might have occurred if it had held that siblings have a similar legal duty towards each other.

Walden attempts to address an area not included in the legislation to date. The felony child abuse statute does not address a parent's failure to act, yet a misdemeanor penalty may not be sufficient to do justice when serious harm has been done to a minor child due to a negligent or unconcerned parent. The General Assembly's purpose in enacting the child abuse statutes was to deter the rising incidences of such abuse.[117] Parents have a right to pun-

113. *Id.*

114. 67A C.J.S. *Parent and Child* § 15 (1978).

115. *In Re* Marriage of Allen, 28 Wash. App. 637, 626 P.2d 16, 22 (1981); U.S. CONST. amend, XIV, § 1.

116. *In Re* Surney, 94 Wash. 2d 757, 621 P.2d 108, 110 (1980); 67A C.J.S. *Parent and Child* § 15 (1978).

117. The purpose is not stated in the current child abuse statutes but was clearly stated in N.C. GEN. STAT. § 110-116 (1978), repealed in 1979. *See supra* note 96.

ish their children, but this right is not unlimited, and if the punishment is unreasonable or excessive, it may constitute an assault or a battery.[118] The state has a vital and legitimate interest in protecting its children from harm, and may act reasonably to further this interest.[119] Because of this legitimate state interest, most states have now enacted child abuse statutes with varying degrees of penalties for such abuse.[120] Many of these statutes are reporting statutes.[121] The statutes require doctors who treat the children or social service workers who are aware of the abuse to report the matter to police or other authorities, who then act upon this information. The child abuse statutes imposing criminal penalties are used only after an investigation of the complaint is made.[122] The legislature realized that there was a need for harsher penalties than those provided under the misdemeanor statute and so enacted the felony child abuse statute.[123] But the felony statute does not deal with the fact situation that was before the *Walden* court.[124] The court thus provided the necessary, more severe punishment for parents who allow their children to be abused. Now parents can be held criminally liable for aiding and abetting a third person who abuses their children merely by failing to intervene when they have reasonable opportunity to do so. By such failure they can receive several years in prison, which is not possible under the North Carolina misdemeanor statute.[125]

The court could be accused of exceeding its authority by attempting to legislate. The General Assembly simply may not have seen the need to impose a felony penalty for failure to act, al-

118. State v. Thorpe, 429 A.2d 785, 788 (R.I. 1981); State v. Coombs, 381 A.2d 288, 289 (Me. 1978). (Excessive, immoderate corporal punishment may result in criminal liability.)

119. *In Re* Sherol A. S., 581 P.2d 884, 888 (Okla. 1978); 43 C.J.S. *Infants* §§ 92, 93 (1978).

120. Child Abuse and Neglect, ILL. REV. STAT. ch. 23 §§ 2054, 2368 (Supp. 1982); IND. CODE § 31-6-11-3 (1980). (These two jurisdictions were chosen as representatives because of the large number of cases they have had on child abuse.)

121. N.C. GEN. STAT. § 7A-543 (1981).

122. N.C. GEN. STAT. §§ 14-318.2, 14-318.4 (1981).

123. N.C. GEN. STAT. § 14-318.4 (1981). (The problem was that the felony child abuse elements did not always fit into the elements of other criminal offenses.)

124. The felony child abuse statute only deals with the person who inflicts the abuse upon the child, and in *Walden* the mother was not the actual perpetrator of the abuse.

125. N.C. GEN. STAT. § 14-318.2 (1981).

though it certainly recognized the need for harsher penalties when more serious injuries are inflicted upon a minor child.[126] Courts should not interfere in matters of family autonomy or make policy on these matters, and any interference should come from the legislature.[127] But here the legislature had already made the policy decision that in certain cases the state would have to interfere in order to protect the health and welfare of its children. The *Walden* court did not exceed its authority; it merely expanded the construction of the bystander exception to the general rule of aiding and abetting. It is very important that parents not use their children as whipping posts, and a state should use all reasonable means to alleviate such abuse.

Although the issue was not before the *Walden* court, it should have discussed the parental privilege to punish and how this would affect a parent's criminal liability in a similar case. Part of a parent's legal duty towards his child is to control the behavior of that child, and in doing so a parent can inflict reasonable punishment upon his child.[128] But this parental privilege is lost and criminal sanctions can be imposed when the parent goes beyond reasonable punishment and inflicts serious or excessive abuse.[129] What is reasonable depends upon the circumstances, including the misconduct being punished and the degree of harm done to the child.[130] In controlling their children, parents are permitted to do what would otherwise be tortious conduct.[131] In addition, those persons standing *in loco parentis* have the right to inflict reasonable punishment upon the child.[132] It seems obvious due to its length and severity that the abuse inflicted upon the child in *Walden* was not reasonable punishment, no matter how seriously the child had misbehaved. Yet if the court had considered that the defendant was not aware that Hoskins would be so abusive, the outcome of the case might have been different. The court might not have found that the defendant had totally neglected her parental duty, and thus might have imposed a less severe sentence. The court's failure to

126. N.C. GEN. STAT. § 14-318.4 (1981). *See supra* note 124.

127. Skinner v. Whitley, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972); Paige v. Biry Const. Co., 61 Mich. App. 480, 233 N.W.2d 46, 49 (1975).

128. State v. Liggett, 84 Ohio App. 225, 83 N.E.2d 663, 664 (1948); 67A C.J.S. *Parent and Child* § 12 (1978).

129. People v. Jennings, _ Colo. _, 641 P.2d 276, 278 (1982).

130. *Id.*

131. *Id.*; Gibson v. Gibson, 92 Cal. Rptr. 288, 479 P.2d 648, 652 (1971).

132. _ Colo. at _, 641 P.2d at 278-79.

Published by Scholarly Repository @ Campbell University School of Law, 1983

Campbell Law Review, Vol. 5, Iss. 2 [1983], Art. 6

deal with this question leaves the scope of *Walden* uncertain. Of course if a parent knew that a third person was about to abuse his child he would have to try to prevent it. But what consequences will the parent suffer if he allows a stepparent or other to punish the child and the punishment is abusive? Under the *Walden* holding it appears that at the moment the parent becomes aware of the abuse he would be required to intervene, but this is not certain.

The effect of the criminal child abuse statute in curbing child abuse is as yet unknown, but as shown through the rising number of reported cases the problem continues.[133] *Walden* provides another means by which police and other state officials can act against child abuse.

Because the issue of notification was not properly before the court, *Walden* did not address how the proper authorities will be notified of child abuse so that criminal charges may be brought against the parent. This problem is addressed by the reporting statute.[134] But despite the reporting statute and *Walden*, it may be very difficult to encourage family and friends to make complaints. Although no one likes child abuse or encourages it, most people do not want to report crimes committed by members of their own family. One of the first things most children learn in school is not to inform on their friends, and this credo is usually carried through life. Only now the law is beginning to prompt such informing. It is difficult to foresee whether society can overcome its reticence for such conduct. Also, another problem may well come out of the encouragement to inform by the law. In theory it would be a very positive development if people watched their neighbors to guarantee that they were not hurting each other. But as with all good things, such surveillance can be carried too far. Does society want to become a nation of watchdogs? Is the law encouraging the first steps toward an Orwellian society, with Big Brother watching? The legislature could partially remedy the problems, at least in the area of child abuse, by expanding the reporting statutes and providing a penalty for those who fail to report suspected child abuse. This solution might lead us towards Big Brother, but the problem of child abuse must be dealt with in whatever manner available. Perhaps the problem should also be publicized, so that family and friends will be aware that it can happen in any family.

Under *Walden* a parent must act when he has a reasonable

---

133. *See* Appendix
134. N.C. GEN. STAT. § 7A-543 (1981).

opportunity to do so, but the court stated that this did not mean that parents have a legal duty to place themselves in danger of death or great bodily harm.[135] The court did not precisely define what lengths the parents must go to to protect his children from abuse by a third person. It did say that what is reasonable will be a question for the jury.[136]

Under the criminal law, a parent has a duty to protect his children from unlawful attack.[137] The amount of force he can use is limited to what is necessary to stop the attack.[138] Yet the law does not specify how much force the parent must use. In dealing with the failure to act in general, the law says that one is not criminally liable for such failure when he is physically incapable of performing, but a parent may have to take a greater chance with his own life to save his child.[139] Under tort law a parent is not guility of contributory negligence if he fails to exercise extraordinary precautions to guard his child from danger.[140] When *Walden* is considered in light of these authorities, it appears that the parent of a child in danger of being abused by a third person may have to do everything that he is physically able to do, in order for a jury to find that he acted reasonably under the circumstances. The court may have intended the parent to use extreme force to prevent the abuse if the parent was faced with the use of extreme force upon his child. To avoid the imposition of a criminal penalty for failure to intervene, the parent must attempt to prevent the abuse by whatever means are best suited to the circumstances.

CONCLUSION

In *State v. Walden*, the North Carolina Supreme Court held that if a parent who is present fails to take all steps reasonably possible to protect his child from abuse by another, the parent has shown his consent and contribution to the crime. Thus the parent may be found guilty as an aider and abettor and convicted as a principal to the crime committed. *Walden* imposes an affirmative duty upon the parent to do something to prevent the crime or he may be guilty of a felony. Prosecutors can now charge parents who

135. 306 N.C. at 475, 293 S.E.2d at 786.
136. *Id.* at 476, 293 S.E.2d at 786.
137. R. PERKINS, CRIMINAL LAW at 1018-19 (2d ed. 1969).
138. *Id.* at 1013.
139. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 26, at 189 (1972).
140. 67A C.J.S. *Parent and Child* § 144 (1978).

Published by Scholarly Repository @ Campbell University School of Law, 1983

Campbell Law Review, Vol. 5, Iss. 2 [1983], Art. 6

fail to intervene with a felony which was previously not possible under the current child abuse felony statute.[141]

Walden expands the exception to the general rule that mere presence at the scene of the crime can be seen as encouragement of the perpetrator only when the bystander is aware that the perpetrator views his presence as such encouragement,[142] and is the first case in North Carolina to do so in the area of child abuse. The court in *Walden* addressed an area neglected by the legislature when they enacted the child abuse statutes. Questions remain as to whether the holding will be an effective deterrent of child abuse and whether the parent must assume great personal risk to protect his child to avoid criminal liability. A question also remains as to whether it is desireable to create a nation of informants. *Walden* had added to the means by which the state can prosecute child abusers and those parents who allow the abuse, thus helping in the battle against child abuse. *Walden* has expanded the duty of a parent towards his child. Parents can no longer passively watch as their children are abused by others, and expect to escape with only a slap on the wrist.

Janet Coleman

141. N.C. GEN. STAT. § 14-318.4 (1981).

142. State v. Scott, 289 N.C. 712, 721, 224 S.E.2d 185, 190 (1976).

Coleman: Criminal Law - A New Means to Combat Child Abuse?

APPENDIX

NUMBER OF CHILDREN REPORTED TO THE NORTH CAROLINA CENTRAL REGISTRY

(Mandatory Child Abuse Reporting Law passed 1971.)

Abused		Neglected		Both N & A		Total		Deaths: A	N	A/N
Reported	Confirmed	Reported	Confirmed	Reported	Confirmed*	Reported	Confirmed			
				July 1, 1971-June 30, 1972						
1100	657	5775	3740			6875	4397	25	3	
				July 1, 1972-June 30, 1973						
1602	746	8462	5351			10064	6097	10	13	
				July 1, 1973-June 30, 1974						
1900	711	9572	4987			11278	5635	8	11	
				July 1, 1974-June 30, 1975 *						
1946	1050	9331	4724			11277	5774	13	12	
				July 1, 1975-June 30, 1976						
2112	1068	10547	4984	1309	221	13968	6273	4	9	
				July 1, 1976-June 30, 1977						
2180	987	9415	5047	3916	320	15511	6354	8	2	
				July 1, 1977-June 30, 1978						
3426	1389	13265	5267	1989	780	18686	7438	7	5	
				July 1, 1978-June 30, 1979						
3589	1548	14505	6175	2110	900	20204	8623	4	6	
				July 1, 1979-June 30, 1980						
4831	1910	18452	7855	2711	1126	25994	10891	6	7	3
				July 1, 1980-June 30, 1981						
5093	1963	19970	8451	2454	1007	27518	11421	6	4	2
				July 1, 1981-June 30, 1982						
5301	1956	19417	8141	2263	864	26981	10961	4	5	4

* Category of Both Neglect and Abuse added 12-1-75.