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BYSTANDER EMOTIONAL DISTRESS: MISSING AN OPPORTUNITY TO STRENGTHEN THE TIES THAT BIND

*What is truth?: Inertia.*¹

INTRODUCTION

In 1989, thirty-nine year-old Darlene Trombetta was crossing Wurz Avenue in Utica, New York with her fifty-nine year-old aunt, Phyllis Fisher, when she realized that the truck approaching them would not stop. After failing to pull Fisher out of the truck's path, she watched as her aunt, who had raised her since her mother's death, was struck and killed instantly.² Darlene filed an action against the trucking company, seeking damages for the negligent infliction of emotional distress.³ The trial court allowed her claim to go forward, but on appeal the appellate division found that she had failed to state a cause of action and reversed. This decision was affirmed by the state's highest court.⁴

The New York Court of Appeals rejected Darlene's claim on the ground that because she was not an immediate family member, she could not recover for the emotional injuries she allegedly suffered as a result of the accident. More broadly, the court grounded its refusal on the argument that allowing a

¹ FRIEDRICH NIETZSCHE, *THE WILL TO POWER* (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1967), reprinted in *EXISTENTIALISM*, at 72 (Robert C. Solomon ed., 1974).

² Phyllis Fisher had cared for Darlene Trombetta since Darlene's mother died when Darlene was eleven, and Darlene thought of her "as her mother." *Trombetta v. Conkling*, 154 Misc. 2d 844, 845, 586 N.Y.S.2d 461, 461 (Sup. Ct. Onside County 1992), *rev'd*, 187 A.D.2d 213, 593 N.Y.S.2d 670 (4th Dep't), *aff'd*, 82 N.Y.2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678 (1993).

³ "The range of mental or emotional injury subsumed within the rubric 'emotional distress' and for which damages [in California] are presently recoverable 'includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.'" *Thing v. La Chusa*, 771 P.2d 814, 816 (Cal. 1989) (citation omitted).

⁴ *Trombetta*, 82 N.Y.2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678.

non-immediate family member to recover in these circumstances would expose all tort defendants to potentially unlimited liability.⁵ The court's dismissal came despite its acknowledgment of the severe harm Darlene had suffered,⁶ and contrary to its definitions of family membership in other contexts.⁷ The decision underscored the court's historic hostility to claims for negligent infliction of emotional distress and limited the class of bystander⁸ plaintiffs in negligently inflicted emotional distress actions to that select group that are both subject to the same harm as the injured person⁹ and are members of the injured person's "immediate family."¹⁰

This two-pronged rule that the court of appeals applied—a person must be within the "zone of danger" and be an immediate family member to maintain a negligently inflicted emotional distress action—often results in the denial of recovery to a person who suffered an injury at the hands of a negligent actor. Some courts and commentators have marshalled arguments against rules like New York's, arguing that such rules produce arbitrary results.¹¹ Others argue that although a rule

⁵ *Id.* at 554, 626 N.E.2d at 655, 605 N.Y.S.2d at 681 (citing *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969)).

⁶ *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d 653, 655, 605 N.Y.S.2d 678, 680 (1993).

⁷ *Id.* The court has often defined a family member functionally rather than formally. See *infra* text accompanying notes 248-259.

⁸ A bystander is a person who is not directly physically injured, but who suffers emotional harm as the result of the negligent infliction of *physical* harm to another. Bystanders can be related to the person who suffers the harm, or may be complete strangers.

⁹ To maintain a negligently inflicted emotional distress action in New York, the plaintiff must have been situated so that he or she could have been subjected to the same injury that befell the victim, but need not have actually suffered any injury. *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984). This is the "zone of danger" rule, as discussed *infra* in text accompanying notes 67-84.

¹⁰ This term was defined in *Bovsun* as those within the first degree of consanguinity. *Bovsun*, 61 N.Y.2d at 233 n.13, 461 N.E.2d at 850 n.13, 473 N.Y.S.2d at 364 n.13. In *Trombetta*, the New York Court of Appeals rejected the plaintiff's claim, but stopped short of rejecting all other claims. It is therefore unclear whether only those identified in *Bovsun* may recover, or whether others such as unmarried couples could, under the proper circumstances, recover.

¹¹ See, e.g., Judge Keating's dissent in *Tobin v. Grossman*, 24 N.Y.2d 609, 619-21, 249 N.E.2d 419, 424-25, 301 N.Y.S.2d 561, 562-63 (1969); Andrew J. Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute between California and New York*, 51 ST. JOHN'S L. REV. 1, 9-11 (1976).

like New York's may not always produce a universally favored result, such a rule promotes stability and guards against the specter of unlimited liability to third parties.¹² This Note suggests that cases like Darlene Trombetta's should be decided under a different rule of law.

This Note proposes to examine the action for damages for negligently inflicted emotional distress to bystanders as it has been interpreted in New York, and suggests an alternative approach to liability. Courts have denied liability on policy grounds, most frequently citing the fear of widespread liability. Limitless liability concerns have so dominated the discussion that New York courts will not even consider a negligently inflicted emotional distress action brought by a bystander that does not fall within these narrow criteria—an inappropriate response that ignores a variety of other available methods to prevent unlimited liability. Rather than consider these alternatives, the court of appeals has placed the question outside the realm of traditional tort principles by finding that the putative tortfeasor owes no duty¹³ to a person in Darlene's situation. To reach this result, the court has clung to arguments that it rejected in the context of "direct" emotional distress actions in 1961, without advancing a single alternative reason for its decision.¹⁴

This Note discusses approaches to structuring the tort based upon law and economics and corrective justice principles. While both approaches suggest important considerations for the shape of any negligently inflicted bystander emotional distress action, neither provides a footing for the tort because they fail to consider the function of the tort in positing norma-

¹² Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2410-11 (1994) (adopting zone of danger test for determining scope of liability under Federal Employer's Liability Act because of concerns for "unfounded liability"); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm: A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982).

¹³ For a discussion of duty see *infra* text accompanying notes 141-144.

¹⁴ In 1961, in *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), the court overruled *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896), which held that absent a physical impact, there could be no recovery for negligently inflicted emotional distress. The arguments that the court rejected in 1961 would resurface in 1968, when the court denied liability for negligently inflicted bystander emotional distress where a mother was in the vicinity of her son's auto accident. *Tobin*, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419.

tive rule making. Furthermore, the seeming incommensurability of these approaches prevents any satisfactory resolution of this justice-liability conflict. This Note argues that the best structure for the tort is one that takes as its starting point the nature of the interest to be considered. This Note suggests a possible structure based upon the idea that because the tort protects personal interests that are in part dependent upon relational interests, the boundaries of negligently inflicted bystander emotional distress should be defined using relational interests as a touchstone.¹⁵

The Note will assert that the need to balance the competing interests of corrective justice and limitation of liability can best be achieved by applying the framework found in United States Supreme Court family law jurisprudence limning conflicting individual rights. Specifically, the Note suggests drawing upon the jurisprudence articulated in the process of defining the scope of the due process rights enjoyed by an unwed father, as articulated in the plurality opinion in *Michael H. v. Gerald D.*¹⁶ The unique confluence of family law and individual rights found in *Michael H.* and cases like it provides a framework admirably suited for resolving negligently inflicted bystander emotional distress issues, for the difficulty in balancing justice and liability concerns parallels the attempt to determine the scope of an individual right linked to a relationship. This Note will propose that a bystander who suffers significant emotional distress when an individual with whom they have the functional equivalent of a traditional family relationship is physically injured should be permitted to maintain a

¹⁵ This Note does not argue that negligently inflicted bystander emotional distress protects relational interests; that function historically is carried out by tort actions such as consortium. Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934). Rather, it argues merely that since the emotional distress suffered is a function of the relationship, the relationship should serve as the limiting device. See *infra* text accompanying notes 29-44.

¹⁶ 491 U.S. 110 (1989). This is not to suggest that the right to recovery for negligently inflicted emotional distress is or should be a fundamental right, but only that this jurisprudence provides a ready-made (if controversial) standard that can be used in the tort context for the reasons stated in the text. Justice Scalia's methodology is proposed precisely because it is the most restrictive methodology put forward: if a valid interest can be found under this approach, it is likely that it would be found under an approach using a higher level of generality. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

negligently inflicted bystander emotional distress action against the negligent actor who caused the injury.

This cause of action rests upon a recognition that the basis of the tort of negligently inflicted emotional distress to a bystander lies in the injury to each individual's affectational bond by injury to the object of that bond. The relationship with the victim is the manifestation of that bond. The policy concerns that underlie the protection accorded families underlie this tort. This policy can be furthered without incurring unlimited liability.

This Note consists of four parts. Part I provides a short conceptual background for negligently inflicted emotional distress and a brief discussion of the dominant rules governing the tort. This Part concludes that there is a lack of fit between the rules and the nature of negligently inflicted emotional distress. Part II is devoted to an analysis of *Trombetta v. Conkling* and its place in New York case law. Part III considers models suggested by Richard Posner and George Fletcher that could provide structures for the tort that differ from the jurisprudential considerations articulated in much current case law. Finally, Part IV draws on the theories advanced in Part III, lessons from other areas of the common law, and the concerns expressed by the New York Court of Appeals to suggest a model for negligently inflicted bystander emotional distress that balances the competing interests of liability and justice.

I. COMMON LAW APPROACHES TO NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS

A. Background

The tort of negligent infliction of emotional distress has bedeviled courts and commentators for over 100 years.¹⁷ The

¹⁷ See Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990) (noting that fright cases date back to the mid-nineteenth century); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1044 (1936); Harold F. McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949). For a review of the literature on negligently inflicted bystander emotional distress and an overview of the theories advocated, see Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1 (1992).

lack of agreement on the appropriate rule¹⁸ and the seeming arbitrariness of each states' rule illustrate the continuing problems besetting this area of tort law. The question of bystander recovery for negligently inflicted emotional distress highlights the struggle to reconcile compensation for losses with the fear of unlimited liability for defendants.¹⁹ On a more abstract level, the negligently inflicted bystander emotional distress debate reflects the conflict between justice and efficiency approaches to tort law. In contrast to the debate surrounding negligently inflicted bystander emotional distress, most courts have long recognized that emotional distress²⁰ is a cognizable harm.²¹ New York has recognized this interest since 1958.²² This judicial recognition demonstrates that the interest is sufficiently important to merit protection and that courts can strike a balance that includes the competing policies of protecting the interest and preventing meritless claims.

The criteria governing negligently inflicted emotional distress are analogous to those in the negligently inflicted bystander emotional distress context. First, emotional injury is a

¹⁸ As the Supreme Court recently noted in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2406 (1994), there are three major rules governing negligently inflicted emotional distress: the impact rule (discussed *infra* in text at notes 53-66), the zone of danger rule (discussed *infra* in text at notes 67-84), and the *Dillon* rule (discussed *infra* in text at notes 85-93).

¹⁹ See *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) ("The problem for the law is to limit the legal consequences of wrongs to a controllable degree.").

²⁰ Emotional distress is defined as a reaction to a traumatic stimulus. David J. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 191-96 (1976); Comment, *Negligently Inflicted Mental Distress*, 59 GEO. L.J. 1237 (1971) (hereinafter "*Negligently Inflicted Mental Distress*"). There are two types of distress: primary and secondary. Primary reactions are those that arise quickly upon the shock of the incident; they include "fear, anger, grief, shock, humiliation, or embarrassment." *Negligently Inflicted Mental Distress* at 1249 (footnotes omitted). Secondary reactions are those that manifest themselves over time, such as tension reactions that produce "nervousness, nausea, weight loss . . . genito-urinary distress, emotional fatigue, weakness, headaches, and backaches"; and "conversion reactions" where the trauma manifests itself in a physical injury. *Negligently Inflicted Mental Distress* at 1250-51 (footnotes omitted).

²¹ The protection of emotional well being can be traced back to the tort of assault. Magruder, *supra* note 17, at 1033-35.

²² *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958) (liability for mental distress imposed upon physician who treated plaintiff negligently when plaintiff developed phobia of cancer as a result of subsequent treating physician's remark that plaintiff should be checked regularly for cancer).

harm that comes about through the effects of shock.²³ As a result, the source of the injury is the same for both the physically injured party and the party who witnesses the injury.²⁴ Moreover, the scope and severity of the injury to the emotionally injured party are verifiable in the same fashion as the emotional injury to the physically injured party.²⁵ Finally, the emotional injury usually is inseparably linked with the plaintiff's relationship to the victim; as the court of appeals itself has noted, "The impact on a mother of a serious injury to her child of tender years is poignantly evident."²⁶ The shared origin, means of verification, and link between the parties all point to similar treatment for negligently inflicted emotional distress, whether experienced by the victim or the bystander.

Nevertheless, courts often distinguish between direct and bystander emotional distress, finding liability for emotional injury as a direct result of the defendant's negligence, but refusing to find liability when the bystander experiences distress. This distinction usually is based not on the differences in the harm, but purely on policy reasons:²⁷ since the injury

²³ Leibson, *supra* note 20, at 201; Simons, *supra* note 11, at 22-29; *Negligently Inflicted Mental Distress*, *supra* note 20, at 1248.

²⁴ It is important to note that the harm—not the stimuli—forms the basis for the action. See Leibson, *supra* note 20, at 196; *Negligently Inflicted Mental Distress*, *supra* note 20, at 1254-55. Some courts and commentators have conflated the two. For example, the requirement of physical presence or immediate perception is not relevant to the degree of harm suffered. The New York courts have rightly noted that the presence requirement has no rational relation to the harm. See *Tobin v. Grossman*, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969). Since the tort arises out of a personal injury, the critical question must be whether the injury occurred, rather than whether the individual received the stimuli in a specific fashion:

It does not make any difference whether or not the plaintiff was near the accident scene or whether he or she actually saw it happen. If the relationship with the victim was a sufficiently strong one, the reaction upon hearing of the loss can be expected to be the same.

Leibson, *supra* note 20, at 196 (footnotes omitted).

²⁵ Courts are experienced in the determination of the severity of the injury when the psychic injury is a derivative of the physical injury a victim suffers. See *Negligently Inflicted Mental Distress*, *supra* note 20, at 1254-60. In allowing recovery for mental distress despite the lack of physical impact, the *Battalla* court noted that, as in other contexts, "[W]e must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims." *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961) (footnote omitted).

²⁶ *Tobin*, 24 N.Y.2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

²⁷ See *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d 653, 655, 605

stems in both instances from the reaction to the shock, in theory, *any* person who suffers shock or fright at the sight of injury or death to another could be harmed.²⁸ Courts, reacting to this specter of limitless liability, have seized upon this idea as a basis for denying recovery to all plaintiffs (by finding no duty, or asserting a lack of foreseeability), thereby collapsing the distinction between those who suffer emotional distress by virtue of their relation to the victim and those who might exhibit symptoms but share no tie with the victim.

This conflation flies in the face of a distinction that most individuals make every day. Our experiences tell us that there is a distinction between the shock we experience at witnessing harm to a stranger and witnessing harm to a person with whom we share a relationship. For example, both print and broadcast press deliver a steady diet of graphic injury, death, and assorted calamities on a daily basis. Yet the average person, while she may be appalled by these sights, is not so affected that she cannot sleep or eat.²⁹ In this instance, her relationship to the people shown in these tragedies is as a viewer or reader; she has no direct link with these persons. While her emotions may be stirred, she is not normally so moved from watching television that she requires psychological treatment as a result of seeing violence on television. Were she, however, to have a relationship with a person shown in the press, we would expect her to react strongly, perhaps becoming hysterical or falling ill.³⁰ Commentators have underscored this point

N.Y.S.2d 678, 680 (1993) (court bases its decision on "firm public policy grounds"); see also Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 951-52 (1981). A decision to deny recovery may also be based on duty or foreseeability reasons. Since both concepts are judicial constructions to limit liability, reaching a decision upon a finding of no duty is an alternative method of deciding upon policy grounds. "It remains part of this Court's important common-law tradition and responsibility to define the orbits of duty." *Trombetta*, 82 N.Y.2d at 553, 626 N.E.2d at 655, 605 N.Y.S.2d at 678 (citations omitted).

²⁸ Leibson, *supra* note 20, at 195; *Negligently Inflicted Mental Distress*, *supra* note 20, at 1248-53.

²⁹ Leibson, *supra* note 20, at 194.

³⁰ See *Kelley v. Kokua Sales and Supply, Ltd.*, 532 P.2d 673 (Haw. 1975) (grandfather in California suffers heart attack and dies upon receiving telephone call that his grandchildren had been killed in car crash in Hawaii; recovery denied on grounds that the distance between the parties was too great). See also 3 JOHN BOWLBY, ATTACHMENT AND LOSS 172-78 (Clifford Yorke ed., 1980).

by finding that the determinative factor in the degree of emotional injury suffered when a loved one is injured or killed is the quality of the relationship,³¹ a fact recognized by courts.³²

Relationships between individuals, both in family units and as individuals, are fundamental to human society.³³ The relationship is a manifestation of the "affectational bond" between individuals.³⁴ Attachment theory suggests that the affectational bond between humans is instinctive behavior that originally arose from the need to seek protection from predators. Its basis in a desire for safety indicates its persistence over time; while it is most clearly demonstrated in the effects of mother-child separation, the need persists through life.³⁵ In later life, the need for safety takes the form of attachment to an "attachment figure": a person who "provid[es] his or her companion with a secure base from which to operate."³⁶ Attachment is expressed by both the person who seeks the bond and the caretaker, and is personal as between the individuals; there is no necessary relationship between the need for the relationship and its formal status.³⁷

The severity of the injury to the relationship will determine the severity of the injury to the bystander.³⁸ Breaking

³¹ Leibson, *supra* note 20, at 196.

³² See *supra* text accompanying note 26; cf. *infra* note 47.

³³ See THEODORE LIDZ, *THE PERSON: HIS DEVELOPMENT THROUGHOUT THE LIFE CYCLE* (3d ed. 1968).

³⁴ BOWLBY, *supra* note 30; JOHN BOWLBY, *THE MAKING AND BREAKING OF AFFECTATIONAL BONDS* (1989).

³⁵ BOWLBY, *supra* note 34, at 87.

³⁶ BOWLBY, *supra* note 34, at 103.

³⁷ BOWLBY, *supra* note 34, at 133. Attachment therefore is distinct from the concept of consortium, for unlike a derivative consortium action where the loss is deemed to flow from the status of the relation, the disorganizing effects on the person who suffers the loss of the attachment figure are the product of that individual's attachment. See BOWLBY, *supra* note 34, at 128-33.

³⁸ Leibson, *supra* note 20, at 197 ("[M]edical authorities are in agreement that a bystander who has no relationship with the victim cannot be expected to have any systematic emotional reaction or suffer any psychic damage as a result of witnessing the victim's injury."). This assumes that the affectational bond is manifested by the relationship. Despite the seeming obviousness of this statement, it is important to make clear the relationship between the damage to the bond and the consequent manifestation of that injury. For example, the loss of a partner may produce grief, anxiety and anger. These emotions are "usually a reflection of the state of a person's affectational bonds . . ." BOWLBY, *supra* note 30, at 40. This Note assumes that the defendant negligently caused a physical injury to a person

the affectational bond causes the bystander to suffer emotional harm; absent the bond between the bystander and the victim, the bystander suffers no harm other than a transient fear or revulsion, which, while uncomfortable, is not actionable.³⁹ In contrast, the harm a person suffers as the result of shock induced through the negligent injury to a person with whom the bystander has a relationship is a quantifiable loss that can be compensated within the traditional tort structure.

Though usually overlooked, the emphasis on the relationship is critical. Although negligently inflicted bystander emotional distress should not be confused with consortium, since the former is injury suffered directly while the latter is a claim based upon a loss of the elements of a relationship,⁴⁰ the two share a determination that emotional stability should be protected and a need to quantify intangible values. Like actions for consortium, which are characterized as derivative,⁴¹ negligently inflicted bystander emotional distress actions, while not derivative, can be characterized as actions based upon the infringement of an intangible but valid interest.⁴² Likewise,

(the victim) who has a relationship with the plaintiff, who has suffered severe emotional distress as a result of this incident.

³⁹ Implicit in any claim for emotional distress is the requirement that the distress be severe enough to warrant bringing an action at law. See Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1, 40 (1979) (arguing that while liability should be unrestricted, damages should be limited to economic loss); *Negligently Inflicted Mental Distress*, *supra* note 20, at 1255; see also Leibson, *supra* note 20, at 194; Magruder, *supra* note 17, at 1066; Simons, *supra* note 11, at 22-29.

In an article on intentional infliction of emotional distress, Daniel Givelber has identified several of the reasons for requiring the distress to be serious: the prevalence of incivility makes it impossible to prevent it or provide a remedy; the requirement of seriousness serves as an indicator of reliability; the right to liberty includes the right to behave in a fashion that may cause emotional distress to others; and that certain societal situations such as cross examination require a certain amount of incivility. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982). Several of these concerns also inform the negligent infliction of emotional distress, notably the concern for verification and the inability to adjudicate all the misfortunes of daily life.

⁴⁰ *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968) ("The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more.") (citation omitted).

⁴¹ *Id.*

⁴² In discussing the intangible nature of consortium damages, the *Millington*

the cases that allow for recovery based upon mishandling of corpses or telegrams indicating death also indicate that the existence of the relationship between the plaintiff and the victim is decisive in ascertaining liability.⁴³ In all of these instances, it is the bond—as expressed by the relationship between the parties—that allows for recovery. The principle is that a relationship that manifests the functions of traditional relationships serves as a sure guide. The tort of negligently inflicted bystander emotional distress recognizes that the injury is to the affectational bond, but liability is determined through an examination of the relationship between the plaintiff and the victim, making the relationship crucial to the tort. Thus, while negligently inflicted bystander emotional distress protects an individual interest, this interest⁴⁴ exists only as a function of the plaintiff's relationship with the victim.

Negligently inflicted bystander emotional distress protects an interest important to society as well as to individuals. The United States Supreme Court has long recognized that families are important because they promote values that are fundamental to the maintenance of a civil society.⁴⁵ Commentators agree: "It is hard to conceive of a good and successful society without reasonably strong families—multigenerational, domestic groups of kinfolk that effectively carry out their socially assigned tasks."⁴⁶ Similarly, the values that characterize any

court stated:

To describe the loss as 'indirect' is only to evade the issue. The loss of companionship, emotional support, love, felicity and sexual relations are real injuries. The trauma of having to care for a permanent invalid is known to have caused mental illness. . . . To describe these damages as merely parasitic is inaccurate and cruel.

Id. at 503, 239 N.E.2d at 899, 293 N.Y.S.2d at 308.

⁴³ See *infra* cases cited at notes 282-85; see also Magruder, *supra* note 17, at 1066-67 (citing cases); McNiece, *supra* note 17, at 33-37 (citing cases).

⁴⁴ Liability interest is here used in the sense of the phrase developed in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), reprinted in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 31 (Bruce A. Acherman ed., 1975) (a liability rule protects an entitlement by requiring that a party seeking it must pay an objectively determined value for it).

⁴⁵ See *infra* note 47.

⁴⁶ David Popenoe, *The Family Condition of America: Cultural Change and Public Policy*, in *VALUES AND PUBLIC POLICY* 81 (Henry J. Arron et al. eds., 1994); cf. Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 U. MICH. J. L. REF. 423 (1992) (arguing for

stable, long-term relationship are those which aid in the development of a civil society, for, after all, it is the function of such relationships (usually socialization) and not their formal status that provides the reason for protection.⁴⁷ In an age where the traditional family structures provide less and less of a source for the inculcation of traditional values, it is imperative that the legal system provide recognition to nontraditional relationships insofar as they perform the same function that the family traditionally performed.⁴⁸ Negligently inflicted bystander emotional distress, because it promotes the protection of these values, serves both public and private interests.

B. A Survey of the Common Law Rules

The common law has long recognized that mental distress is a compensable injury.⁴⁹ In the last fifty years, courts have established that the intentional infliction of emotional distress is a valid cause of action.⁵⁰ When the elements of this tort are fulfilled, courts do not hesitate to find an actor liable to third

legal recognition of caretakers and abandonment of traditional legal posture disfavoring altruism).

⁴⁷ '[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.'

Lehr v. Robertson, 463 U.S. 248, 261 (1983) (citations omitted) (footnote omitted). Christopher Lasch calls the family "the chief agency of socialization." CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* 3 (1977).

⁴⁸ Over 15 percent of Americans live in "non family households" (either singly or with persons not related by marriage, birth or adoption). BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1990 CP-2-1, *Fertility and Household and Family Composition: 1990* 16 (1993).

⁴⁹ The tort of assault is in fact an action for the violation of a protected mental interest. See Magruder, *supra* note 17, at 1033-34 (noting that as long ago as 1348, courts recognized the validity of a claim based upon mental, rather than physical anguish). Generally, the action was characterized as parasitic when it was not related to an assault action. See Magruder, *supra* note 17, at 1048.

⁵⁰ *State Rubbish Collectors Assoc. v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (threats made by defendant manifested intent to cause plaintiff emotional distress); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958) ("Freedom from mental disturbance is now a protected interest in this State."); Magruder, *supra* note 17, at 1044; accord, RESTATEMENT (SECOND) OF TORTS § 46 (1965).

parties.⁵¹ In contrast, courts have struggled to fashion a satisfactory rule to govern negligently inflicted emotional distress.⁵²

1. The Need for Verification

The New York Court of Appeals was the first American court to face directly the question of recovery for physical distress occasioned by shock.⁵³ In *Mitchell v. Rochester Ry. Co.*,⁵⁴ the plaintiff brought suit after she was nearly run down by the defendant's team of horses, which were finally stopped inches away from her. She subsequently suffered a miscarriage, and brought an action alleging that the shock of this accident had induced her miscarriage.⁵⁵ The court denied her claim, holding that "no recovery can be had for fright cases."⁵⁶ Additionally, the court denied recovery on the grounds that the incident was not the proximate cause of the plaintiff's condition;⁵⁷ the problems inherent in proving this type of case were insurmountable,⁵⁸ and allowing a claim of this type would result in a "flood of litigation."⁵⁹ The court concluded that giv-

⁵¹ See RESTATEMENT (SECOND) OF TORTS § 46 (1965), and cases cited therein.

⁵² Miller, *supra* note 39, at 2.

⁵³ Chamallas & Kerber, *supra* note 17, at 827.

⁵⁴ 151 N.Y. 107, 45 N.E. 354 (1896), *overruled by* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 739, 219 N.Y.S.2d 34 (1961).

⁵⁵ *Id.*

⁵⁶ *Id.* at 109, 45 N.E. at 354. As commentators have observed, the plaintiff was not seeking recovery for her fright, but rather for the physical consequences (miscarriage) of that shock. See, e.g., McNiece, *supra* note 17, at 26 n.86.

⁵⁷ *Mitchell*, 151 N.Y. at 110, 45 N.E. at 355. Chamallas and Kerber argue that the court seemed to base its holding most prominently on *V. v. Coultas*, 13 App. Cas. 222 (P.C. 1888), another near-miss case. Chamallas & Kerber, *supra* note 17, at 826. In *Coultas*, the plaintiff alleged that she suffered a miscarriage as the result of fright she experienced when her carriage narrowly missed being struck by a train. Chamallas & Kerber, *supra* note 17, at 826. The court denied liability in that case, and the authors argue that the denial was a gender-related denial rather than a proximate cause issue; in short, that the plaintiff was (literally) not a reasonable man, and so her injuries were caused not by the fright, but by her own temperament. The English courts later disapproved *Coultas*. Chamallas & Kerber, *supra* note 17, at 826-27.

⁵⁸ *Mitchell*, 151 N.Y. at 110, 45 N.E. at 355. But see *Battalla*, 10 N.Y.2d at 242, 176 N.E.2d at 731, 219 N.Y.S.2d at 37, *overruling Mitchell* ("[T]he question of proof in individual situations should not be the arbitrary basis upon which to bar all actions . . .").

⁵⁹ *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 110, 45 N.E. 354, 354 (1896).

en these considerations, allowing recovery would be "contrary to principles of public policy."⁶⁰

This rule—no recovery for emotional distress absent a showing of physical impact—was followed in a Massachusetts case the following year. In *Spade v. Lynn*,⁶¹ the court denied recovery to a woman who alleged physical illness as the result of a motorman's negligence in removing two obstreperous passengers next to her.⁶² This rule became the settled law of most jurisdictions,⁶³ even as the English courts that originally had promulgated the doctrine abandoned it.⁶⁴ Once courts accepted that there was no necessary link between the impact requirement and damages for fright, they eliminated the impact requirement as underinclusive.⁶⁵ The issue of the genuineness of injury, however, has remained a factor in bystander cases to the present day.⁶⁶

Other courts developed a test that established the accident area as the limiting device. Known as the zone of danger, this test requires a plaintiff to be within the area of the accident in order to recover. "A person is within an accident's zone of danger . . . when he is sufficiently close to that accident such that he is subjected to a high risk of physical impact emanating from the accident itself."⁶⁷ If the plaintiff is not within this zone, then recovery is prohibited, regardless of the actual injuries suffered.⁶⁸ In its pure form, the rule does not require any relationship between the victim and the plaintiff.⁶⁹ Support-

⁶⁰ *Id.*

⁶¹ 47 N.E. 88 (Mass. 1897).

⁶² The facts here are taken from the account in Chamallas & Kerber, *supra* note 17, at 829.

⁶³ Chamallas & Kerber, *supra* note 17, at 829.

⁶⁴ Chamallas & Kerber, *supra* note 17, at 829. See also NICHOLAS J. MULLANY & PETER R. HANDFORD, TORT LIABILITY FOR PSYCHIATRIC DAMAGE 10-11 (1993).

⁶⁵ Pearson, *supra* note 12, at 488-89.

⁶⁶ *Trombetta v. Conkling*, 82 N.Y.2d 549, 554, 626 N.E.2d 653, 655, 605 N.Y.S.2d 678, 680 (1993) (citing "potentiality for inappropriate claims" as a reason for denial of recovery); Pearson, *supra* note 12, at 508.

⁶⁷ *Hayes v. Illinois Power Co.*, 587 N.E.2d 559, 562 (Ill. 1992) (citations omitted).

⁶⁸ *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968); Pearson, *supra* note 12, at 490.

⁶⁹ *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992) (adopting RESTATEMENT (SECOND) OF TORTS § 313 and holding that woman who witnessed water accident from boat was not in zone of danger—no recovery). There are two major variations on the zone of danger rule, generating confusion. In its pure

ers of the rule cite its ease of application and its prophylactic effect against any possible flood of litigation.⁷⁰ The first American application of this rule came in *Waube v. Warrington*,⁷¹ where the court denied recovery to a spouse because his wife—who while suffering from shock upon witnessing the death of her child, had refused to eat and had subsequently died—had viewed the accident from within her home.⁷²

As with any bright-line rule, the application of the zone of danger occasionally has been criticized as harsh because it bars claims on the fortuity of the plaintiff's location, which has no relation to the injury suffered. *Resavage v. Davies*⁷³ is illustrative. While Ms. Resavage's daughters were waiting for the school bus, a truck mounted the curb where they were standing and struck them both, killing them. Ms. Resavage, who had seen this carnage from the relative safety of her porch approximately ninety feet from the curb, ran out to the street and found her children lying in a pool of blood. The Maryland court denied her negligently inflicted emotional distress claim because she was not within the zone of danger; the truck did not come near her, nor did she fear for her own safety.⁷⁴

incarnation, recovery is granted when the plaintiff is in the zone of danger and fears for her own safety. The premise offered for this rule is that a near miss is as good as a direct hit. Pearson, *supra* note 12, at 490. The second or alternate rule is the version found in § 436 of the RESTATEMENT (SECOND) OF TORTS, as adopted by the court of appeals: a plaintiff may recover for either her own fright or their fright upon their perception of an injury to a close relative.

⁷⁰ *Bovsun v. Sanperi*, 61 N.Y.2d 219, 229, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984); RESTATEMENT (SECOND) OF TORTS § 313 cmt. d (1963); see also *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994) (discussing rules and choosing to adopt zone of danger test for negligently inflicted emotional distress claims brought under Federal Employers' Liability Act); Pearson, *supra* note 12, at 490; Paul V. Callandrella, Note, *Safe Haven for a Troubled Tort: A Return to the Zone of Danger for the Negligent Infliction of Emotional Distress*, 26 SUFFOLK U. L. REV. 79 (1992).

⁷¹ 258 N.W. 497 (Wis. 1935).

⁷² *Id.* Commentators have traced the origin of this rule to dictum in *Dulieu v. White & Sons*, 2 K.B. 669 (1901). See Chamallas & Kerber, *supra* note 17, at 830; McNiece, *supra* note 17, at 24 n.78. In that case, the court allowed recovery to a woman who alleged that she had miscarried due to the fright she suffered when the defendant negligently drove his horse into the pub where she was working. Chamallas & Kerber, *supra* note 17, at 830. For a discussion of the English cases, see generally MULLANY & HANDFORD, *supra* note 64.

⁷³ 86 A.2d 879 (Md. 1952).

⁷⁴ *Id.*

Although cases like *Resavage* have aroused the ire of both the courts and commentators,⁷⁵ others have argued that the zone of danger rule is no more arbitrary than any other rule crafted to limit liability.⁷⁶ Moreover, the zone of danger does provide an effective and easy to administer cap upon the number of potential plaintiffs, since only those within the zone may maintain an action.⁷⁷ Privileging physical presence over emotional relationship, some courts hold that unrelated parties may recover so long as they meet the proximity requirement.⁷⁸

Using physical presence as a proxy for validating an action for emotional distress results is improper, however, because the zone rationale assumes that the only valid cause of action can result from fear for oneself.⁷⁹ Applying this rule in the negligently inflicted bystander emotional distress context—where the injury is conditioned upon the presence of a third party (the victim)—is awkward at best. Subsequent reworkings of the zone of danger rule have removed its rationale but kept its form. In its pure form, the rule requires that the plaintiff must have directly experienced the possibility of harm.⁸⁰ The alternative view, permitting recovery for fear of harm to another but requiring presence in the zone, destroys the original rationale of the rule and substitutes a forced coupling of unrelated requirements. A limit based upon physical presence assumes that either presence or direct perception are satisfactory proxies for determining liability. Yet because neither is related to the harm in a negligently inflicted bystander emotional distress action, using these criteria to determine the validity of the injury is akin to asking “whether a particular

⁷⁵ See, e.g., *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Simons*, *supra* note 11, at 9; see generally *Negligently Inflicted Mental Distress*, *supra* note 20, at 1245-48.

⁷⁶ See, e.g., *Pearson*, *supra* note 12.

⁷⁷ See *Bovsun v. Sanperi*, 61 N.Y.2d 219, 230, 461 N.E.2d 843, 848, 473 N.Y.S.2d 357, 362 (1984).

⁷⁸ See *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992) (holding that governing concern for recovery is whether plaintiff was within zone of danger, not whether they were related to the victim).

⁷⁹ See *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968); *Pearson*, *supra* note 12, at 490.

⁸⁰ *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935). In effect, then, this version of the rule restricts the action to the directly injured. See *Dillon*, 441 P.2d at 915 (criticizing this requirement and rejecting zone of danger rule).

line is longer than a particular rock is heavy."⁸¹ If the action is for emotional distress, the limit should relate to the action. Otherwise, application of the zone of danger rule leads to this result: the stranger in the zone of danger who witnesses an accident can recover, but the parent of a child in the same accident will not if the parent is not in the zone of danger.⁸² It is this result that has been criticized as harsh and irrational,⁸³ and which led the California Supreme Court to attempt another solution.⁸⁴

2. *Dillon v. Legg* and the Problem with Foreseeability

In 1968, the California Supreme Court decided *Dillon v. Legg*,⁸⁵ striking down the zone of danger rule.⁸⁵ The court rejected the requirement of presence within the zone, and, couching its language in foreseeability terms, suggested several factors for consideration:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the

⁸¹ *Bendix Autolite Corp. v. Midwest Enter., Inc.*, 468 U.S. 888, 897 (1988) (Scalia, J., concurring), *quoted in* Tribe & Dorf, *supra* note 16, at 1090.

⁸² *Hansen*, 830 P.2d 236.

⁸³ See *infra* text accompanying note 112. Pearson maintains that the zone of danger rule is not arbitrary when the gravamen of the tort is fear for oneself. He does concede that the application of this rule to a tort whose gravamen was "foreseeable emotional harm" would generate arbitrary results. Pearson, *supra* note 12, at 490.

⁸⁴ This requirement that the plaintiff be aware of the possibility for harm to the self, as applied to bystander actions generates the perverse result that plaintiffs are in effect penalized for not being afraid for themselves. See *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968). Since fright has no demonstrable value either socially or from a utilitarian perspective, it is difficult to justify a policy that in effect places a preference upon fear for one's own safety rather than fear for others. For a discussion as to the value of placing any preference upon altruism, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 119 (1987), and Horsburgh, *supra* note 46.

⁸⁵ 441 P.2d 912 (Cal. 1968), *overruling* *Amaya v. Home Ice Co.*, 379 P.2d 513 (Cal. 1962).

⁸⁶ In *Dillon*, a mother and daughter watched as a truck hit another family member. The court struck down the zone of danger rule, citing the arbitrariness of a rule that allowed the sister within the zone of danger to recover, but prohibited the injured child's mother from recovering because she was outside the zone. *Dillon*, 441 P.2d at 914.

accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁸⁷

Because the opinion attempted to move beyond the zone of danger rule and craft a standard more in keeping with the "general rules of tort law"⁸⁸ it did not set a specific standard but rather suggested these principles as a means for working out a series of rules. This approach soon ran into difficulty. First, lower courts applied the *Dillon* factors in a mechanical fashion, generating results that were at least as arbitrary as those obtained under a zone of danger rule.⁸⁹ Second, because the court couched the *Dillon* rules in the language of foreseeability,⁹⁰ and defined duty essentially as a function of foreseeability, the elusive concept of foreseeability came to dominate the decisions.⁹¹ Ultimately, the court called a halt, first refusing to extend the *Dillon* rule to unmarried cohabitants,⁹² and then freezing the rule.⁹³ In freezing the rule, the court did not attempt to fashion a new analysis but merely capped the *Dillon* limits. In doing so, the court retreated to a position

⁸⁷ *Id.* at 920. As the Supreme Court noted in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2407 (1994), 23 jurisdictions have adopted the *Dillon* rules.

⁸⁸ *Dillon*, 441 P.2d at 924.

⁸⁹ *Thing v. La Chusa*, 771 P.2d 814, 821-25 (Cal. 1989) (discussing the history of post *Dillon* negligently inflicted emotional distress claims and finding the results "murky"); Pearson, *supra* note 12, at 490-501.

⁹⁰ *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968) ("Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case.").

⁹¹ *Thing*, 771 P.2d at 826-27. Foreseeability and duty are related but not identical concepts. Both function as devices to limit the scope of liability. Foreseeability—the requirement that the injury to the plaintiff be foreseen in some fashion—will limit liability where duty might otherwise impose it. See Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 788 (1951).

⁹² *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988).

⁹³ *Thing*, 771 P.2d at 821-25. The court tightened the *Dillon* guidelines by requiring that recovery could be had

if but only if [plaintiff] (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress . . . which is not an abnormal response to the circumstances.

Id. at 829-30 (footnotes omitted). In defining "closely related" the court stated that "absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." *Id.* at 829 n.10.

similar to the zone of danger approach, increasing the discontinuity between the rule and its underlying concerns. The discontinuity illuminates the lack of a coherent foundation for the tort, without which it is exceedingly difficult to articulate a coherent rationale for limiting liability. To impose an arbitrary cap without considering the results is not defensible from either an economic or social perspective.

In New York, the court of appeals has cited the California experience repeatedly as a basis for its refusal to expand the scope of the tort,⁹⁴ consistently characterizing its refusal as stemming in part from *Dillon's* reliance on foreseeability,⁹⁵ noting, as do the California courts, that pure foreseeability proves too much.⁹⁶ Yet there is a fundamental difference in the method of analysis between the New York courts and the California courts. Under the *Dillon* approach in California, duty is established as a function of foreseeability; foreseeability creates the class of potential plaintiffs. In New York duty precedes foreseeability.⁹⁷ Thus foreseeability operates as a limiting device in New York, and not as a device to further liability,

⁹⁴ See *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d 653, 655, 605 N.Y.S.2d 678, 680 (1993) (citing cases).

⁹⁵ See *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

⁹⁶ *Id.*; *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989).

⁹⁷ "Foreseeability should not be confused with duty." *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976) (parking garage not liable to pedestrian injured by motorist exiting garage); see also *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 482 N.E.2d 34, 36, 492 N.Y.S.2d 555, 557 (1985) (holding that electric utility had no duty to tenant of apartment building injured in fall during utility blackout and that "[d]uty in negligence cases is defined neither by foreseeability of injury . . . nor by privity of contract") (citation omitted).

Judge Cardozo established the temporal relationship between duty and foreseeability: "[t]he question of liability is always anterior to the question of the measure of the consequences that go with liability." *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 346, 162 N.E. 99, 101 (1928).

Generally, duty is considered an analytically distinct concept from foreseeability, which, like proximate cause, is a question of fact. Because foreseeability and duty are both limitations on liability, courts have occasionally conflated the two, by holding that there is no duty because a harm was not foreseeable. In reality, these concepts exist independently of each other; it is possible to have foreseeability without duty. See, e.g., *Strauss v. Belle Realty*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985); H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 263-90 (2d ed. 1985); Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

i.e., the foreseeability *per se* of a plaintiff does not impose a duty as to that plaintiff.⁹⁸ This distinction is underscored by the fact that while duty is a question of law, foreseeability is a question of fact.⁹⁹ Since the New York courts do not accept the proposition that foreseeability is the sole criteria of duty,¹⁰⁰ the argument that in New York, foreseeability would

⁹⁸ The court had previously stated that foreseeability alone would not suffice to establish duty. *Pulka*, 40 N.Y.2d at 786, 358 N.E.2d at 1023, 390 N.Y.S.2d at 397. The *Trombetta* court also stated that duty is the prerequisite for liability, *Trombetta*, 82 N.Y.2d at 552, 626 N.E.2d at 654, 605 N.Y.S.2d at 679, citing *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 448 N.E.2d 1332, 462 N.Y.S.2d 421 (1983) (recovery allowed to dentist for pecuniary loss for loss of practice but not emotional distress damages for trauma as a result of using mislabeled equipment and administering fatal gas to patient); *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980) (holding that a mother could not recover for emotional distress suffered as a result of birth defects that daughter suffered after mother had taken drug during pregnancy); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (in wrongful birth case no recovery for emotional damages could be had absent a duty to plaintiff parents); *Howard v. Lecher*, 42 N.Y.2d 109, 397 N.Y.S.2d 363, 366 N.E.2d 64 (1977) (no recovery for emotional distress where doctor failed to inform prospective parents of the likelihood of their child being born with fatal genetic disease from which child subsequently died); cf. *Schwartz*, 46 N.Y.2d at 410, 386 N.E.2d at 811, 413 N.Y.S.2d at 899: "As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party." (citations omitted).

⁹⁹ *Palka v. Servicemaster Management Servs. Corp.*, 83 N.Y.2d 579, 585, 634 N.E.2d 189, 192, 611 N.Y.S.2d 817, 820 (1994) (court determines that hospital maintenance contractor has a duty to employee of hospital injured by maintenance contractor's negligent repair of fan); *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d, 653 655, 605 N.Y.S.2d 678, 680 (1993) ("It remains part of this Court's important common law tradition and responsibility to define the orbits of duty."). Although the opinion suggests that the court is merely fulfilling a passive role by stating what the law is, the court is in fact shaping the law, and so is following in the quasi-realist footsteps of Judge Cardozo, who wrote that when precedent and statute are unavailing, the judge "must then fashion law." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921).

¹⁰⁰ The court has previously stated that foreseeability alone will not suffice to establish duty. *Pulka*, 40 N.Y.2d at 786, 358 N.E.2d at 1023, 390 N.Y.S.2d at 397. As a limiting doctrine, foreseeability is not the sole criteria for duty. HART & HONORE, *supra* note 97, at 263. Hart and Honore suggest that the confusion about foreseeability may be due to inconsistent, unidentified switching between "practical" and "theoretical" foreseeability, the former being the amount of ex ante foresight exercised in a specific context, and the latter being the ex post determination of the scope of liability. *Id.* at 263-64. The source of some of the confusion on the relationship between foreseeability and duty may also lie in Judge Cardozo's *Palsgraf* opinion linking duty and foreseeability. Leon Green has suggested "Cardozo's own decisions have done much to indicate that other factors have much greater weight in setting bounds to the scope of duty." Green, *supra* note 97, at 1422.

lead to unlimited liability is specious at best. Furthermore, the court's rejection of foreseeability-based liability only answers half the inquiry; rejecting foreseeability-based liability does not justify failing to consider whether a negligently inflicted bystander emotional distress duty can be coherently defined. The difficulty with *Dillon* indicates only that. The court erred by using *Dillon's* failings to vault to the conclusion that *all* tests for limiting negligently inflicted bystander emotional distress other than a bright line rule will result in chaos. Unfortunately, this broad brush approach has characterized the court of appeals's approach to the tort in New York.

3. A Brief History of Negligently Inflicted Emotional Distress in New York

The decisions of the court of appeals on the subject of negligently inflicted bystander emotional distress are remarkably similar to its earlier decisions on negligently inflicted emotional distress. In its denial of liability to Darlene Trombetta in 1993, the court of appeals resorted to arguments it had advanced in 1896 to deny recovery to Ms. Mitchell.¹⁰¹ Indeed, until 1961, no recovery for fright could be had in New York absent a showing of physical impact.¹⁰² Courts employed this limitation in the (mistaken) belief that it would limit liability and guard against fraudulent claims.¹⁰³ This artificial restriction often served only to deny compensation to a deserving plaintiff while encouraging the manufacture of impact claims.¹⁰⁴

One might argue, especially in the negligently inflicted bystander emotional distress context, that making "practical" foreseeability the sole criteria of duty would indeed prove too much, and so fail to provide a meaningful limit on the scope of liability. Linking foreseeability and duty in this fashion would have the perverse result of inflating and contracting tort liability, as all foreseeable incidents would dictate liability, but liability for all incidents not foreseeable (in the everyday sense of the word) would be barred. See HART & HONORE, *supra* note 97, at 262-66.

¹⁰¹ Compare the arguments to deny liability advanced in *Trombetta* (as discussed *infra* in text accompanying notes 132-135) with those advanced to deny liability in *Mitchell* (as discussed *supra* in text accompanying notes 54-60).

¹⁰² The requirement of physical impact for maintenance of a claim of emotional distress was overruled in *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 241, 176 N.E.2d at 731, 219 N.Y.S.2d at 37 (finding that the im-

All this changed in 1961 when a state employee neglected to fasten the safety belt on a ski lift that held nine-year-old Carmen Battalla. The child was not physically injured, but the employee's failure to fasten her in caused her to suffer acute emotional distress.¹⁰⁵ The case ultimately went to the court of appeals, where, in a decision remarkable for its sweeping tone, the court overruled *Mitchell* and permitted the plaintiff to maintain an action for negligently inflicted emotional distress absent a showing of physical impact.¹⁰⁶ The court employs striking language in *Battalla*: "It is fundamental to our common law system that one may seek redress for every substantial wrong. . . . [E]ven if a flood of litigation were realized by the abolition of the [impact requirement], it is the duty of the courts to willingly accept the opportunity to settle these disputes."¹⁰⁷ Using this language, the court brushed aside the public policy arguments that previously had been firmly emplaced as the underpinning for the impact rule.¹⁰⁸ In 1961, it appeared to be a matter of time before the court also lifted the ban on bystander negligently inflicted emotional distress claims.

The court confounded these expectations in *Tobin v. Grossman*.¹⁰⁹ In *Tobin*, the court considered the claim of a mother who heard but did not see an auto accident that left her two-year-old child seriously injured. First, the court distinguished Philomena Tobin's case from seemingly similar cases that allowed for the expansion of tort liability, finding that these previous decisions represented only an extension or a modification of an existing rule, while this case presented the question of whether a new tort duty should be created.¹¹⁰ Af-

pact rule "penalized the honest claimant").

¹⁰⁵ These facts are taken from *Battalla v. State*, 17 Misc. 2d 548, 184 N.Y.S.2d 1016 (Ct. Cl. 1959), *rev'd*, 11 A.D.2d 613, 200 N.Y.S.2d 852 (3d Dep't 1960), *rev'd*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

¹⁰⁶ *Battalla*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34.

¹⁰⁷ *Id.* at 239, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.

¹⁰⁸ *Id.* at 241-42, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38 (Van Voorhis, J., dissenting).

¹⁰⁹ 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

¹¹⁰ *Id.* at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 557. The court declared that in most other instances the cause of action had been recognized, but had been limited in its application by a variety of legal and technological obstacles. The court did admit that the products liability field had witnessed the creation of implied new causes of action through the broadening of the duty concept. *Id.* at

ter considering a variety of policy concerns, the court denied recovery, asserting that it could find "no rational practical boundary for liability."¹¹¹

The arguments advanced in *Tobin* are largely similar to those advanced in *Battalla*, but the result is contrary. As Judge Keating noted in dissent:

The majority opinion effectively demolishes every legalism and every policy argument which would deny recovery to a mother who sustains mental and physical injuries caused by fear or shock, upon learning that her child has been killed or injured in an accident. It has been shown that every element necessary to build a case for tortious liability in negligence is here present. There is an important interest worthy of protection, there is proximate cause, there is injury, and there is foreseeability. Yet, having shown all this, inexplicably, recovery is denied.¹¹²

The *Tobin* majority disinters arguments made in *Mitchell* and rejected in *Battalla*: fear of crushing liability and the difficulty of limiting the scope of the tort.¹¹³ The salient distinction, therefore, is fact based: here, the fact of a third party allows the court, without explanation, to recycle previously rejected arguments. Rather than consider whether it should validate an interest, the court merely restated arguments that it had rejected seven years earlier in *Battalla*. Because the court distinguished the negligently inflicted bystander emotional distress claim from other areas of expanded liability by developing a distinction between a "new" duty and an "expanded" duty and

614, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

¹¹¹ *Id.* at 612, 249 N.E.2d at 420, 301 N.Y.S.2d at 556. The court identified seven areas of concern: foreseeability of the injury, proliferation of claims, fraudulent claims, inconsistency of the zone of danger rule, unlimited liability, unduly burdensome liability and the difficulty of circumscribing the area of liability. *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

¹¹² *Tobin*, 24 N.Y.2d at 619, 249 N.E.2d at 424-25, 301 N.Y.S.2d at 562 (Keating, J., dissenting).

¹¹³ *Id.* at 618, 249 N.E.2d at 423, 301 N.Y.S.2d at 560. The court also notes that in contrast to other areas of tort law, "[T]here are no new technological, economic, or social developments which have changed social and economic relationships and therefore no impetus for a corresponding legal recognition of such changes[. Hence a radical change in policy is required before one may recognize a cause of action in this case." *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. This nod to realism gives the court a convenient method for finding that circumstances have changed so as to require a change in the law. For example, a finding that a large percentage of the population does not live in a traditional family unit might give rise to a rationale for changing the limit of the *Trombetta* holding.

placing negligently inflicted bystander emotional distress in the former category, it avoided having to provide a reason for its differentiation of this interest from other interests found worthy of protection. As a result, the court reverted to its pre-*Battalla* stance of precluding liability on the basis of a mere assertion rather than any principled consideration of the interests at stake.

Tobin posited the rule in New York, and it remained unchanged until 1984, when the court sidestepped the *Tobin* rationale in *Bovsun v. Sanperi*.¹¹⁴ In 1984, the court declared that an "immediate family member"¹¹⁵ who was within the zone of danger could recover for the emotional distress suffered as the result of perceiving harm to another.¹¹⁶ In *Bovsun* and a companion case, *Kugel v. Mid Westchester Industrial Park*,¹¹⁷ plaintiffs brought actions for emotional distress stemming from auto accidents. In *Bovsun*, the father had alighted from the family car by the side of a road and was crushed by a car that pinned him between the two vehicles. In *Kugel*, the family auto was struck from behind, injuring the parents and their two children; the younger child died from internal injuries she suffered when she was thrown from her mother's lap.¹¹⁸

The court allowed these claims to go forward, distinguishing *Tobin* on the ground that in these cases the plaintiffs were within the zone of danger.¹¹⁹ The court stated that the zone

¹¹⁴ 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

¹¹⁵ The court refused to define this term. *Id.* at 233 n.13, 461 N.E.2d at 850 n.13, 473 N.Y.S.2d at 364 n.13. The question remained unresolved until *Trombetta* supplied the answer.

¹¹⁶ *Bovsun*, 61 N.Y.2d at 233 n.13, 461 N.E.2d at 850 n.13, 473 N.Y.S.2d at 364 n.13.

¹¹⁷ 127 A.D.2d 632, 511 N.Y.S.2d 659 (2d Dep't 1987).

¹¹⁸ *Bovsun*, 61 N.Y.2d at 224-26, 461 N.E.2d at 844-45, 473 N.Y.S.2d at 358-59. In the course of a long and thorough dissent, Judge Kaye observed in a footnote that the majority's test required the "contemporaneous observation" of "serious physical injury" and that a correct application of this standard would require that the Kugels should not recover since the injuries Stephanie Kugel suffered that caused her death were largely internal. *Id.* at 241 n.2, 461 N.E.2d at 855 n.2, 473 N.Y.S.2d at 369 n.2. Under this interpretation, a parent who witnesses the shooting death of a child might not recover for emotional distress, but might recover if the child was hacked to death with an axe. The consideration of a need for a showing of a threshold level of gore illustrates the problems inherent in imposing an artificial constraint on negligently inflicted emotional distress rather than a logically coherent set of rules and principles.

¹¹⁹ *Bovsun v. Sanperi*, 61 N.Y.2d 219, 228, 461 N.E.2d 843, 847, 473 N.Y.S.2d

of danger rule was the majority rule and that it comported with traditional negligence concepts, since the defendant breached a duty to the plaintiff who did or could have feared for her own safety.¹²⁰ Adopting the approach contained in the Restatement (Second) of Torts, the court concluded that the adoption of this rule did not conflict with the *Tobin* rule because it provided a rule that would "serve the purpose of holding strict rein on liability" using a "framework of traditional and accepted negligence principles."¹²¹

The invocation of this language failed to mask a significant shift that the court made. First, as the majority itself admitted, the zone test had been rejected in *Tobin* as hopelessly arbitrary.¹²² Second, as Judge Kaye made clear in a long dissent, the rationale that applied to *Tobin* applied equally well in this case.¹²³ The *Bovsun* test also eliminated one of the fundamental principles of the zone test: the requirement that plaintiffs actually fear for their own safety.¹²⁴ Because the court previously had barred recovery in this situation, the court's requirements—serious injury, close family relationship,

357, 361 (1984).

¹²⁰ *Id.* at 229, 461 N.E.2d at 847, 473 N.Y.S.2d at 361.

¹²¹ *Id.* at 230, 461 N.E.2d at 848, 473 N.Y.S.2d at 362. The court quoted from the RESTATEMENT (SECOND) OF TORTS, § 436(3) cmt. f, to the effect that where a person suffers emotional distress from the perception of injury to a family member and both persons are within the zone of danger, the emotionally injured party may maintain a claim for emotional distress even though the distress arises from the perception of injury to another rather than to the self. *Id.* at 230 n.8, 461 N.E.2d at 848 n.8, 473 N.Y.S.2d at 362 n.8. The *Restatement's* willingness to countenance the prospect of a person recovering while in the zone of danger but not actually afraid for their own safety is an implicit recognition of the arbitrariness of the rule since the premise of the zone of danger is a breach of duty to the emotionally injured party. See *supra* note 69.

¹²² *Bovsun*, 61 N.Y.2d at 228, 461 N.E.2d at 847, 473 N.Y.S.2d at 361. According to the court,

We recognize that our decision in these two appeals may be perceived as overruling, or at least as rejecting in a significant respect, the rationale on which our decision in *Tobin* was predicated, notwithstanding that the precise issue presented in the appeals now before us was not presented in *Tobin*.

Id. at 232, 461 N.E.2d at 849, 473 N.Y.S.2d at 363.

¹²³ *Bovsun v. Sanperi*, 61 N.Y.2d 219, 235, 461 N.E.2d 843, 851, 473 N.Y.S.2d 357, 365 (1984) (Kaye, J., dissenting).

¹²⁴ As Judge Kaye observed, since in both cases the plaintiffs' vehicles were struck from behind, the plaintiffs in both cases were unaware of any danger prior to the accident, and in *Bovsun* did not see the accident at all. *Id.* at 241, 461 N.E.2d at 854-55, 473 N.Y.S.2d at 368-69 (Kaye, J., dissenting).

and presence in the zone of danger—can be seen not as a total bar, but as prerequisites for recovery. Thus, albeit in a limited fashion the court did recognize that damage to the affectational bond should be compensated. Still, in characterizing the *Bousun* result as an exception, the court again missed an opportunity to tie together policy and rules.

II. *TROMBETTA V. CONKLING*

A. *The Case*

Subsequent to the accident that resulted in the death of Phyllis Fisher, Darlene Trombetta commenced an action in state supreme court seeking damages for emotional distress. The defendants moved to dismiss on the ground that Darlene Trombetta was not a member of Fisher's immediate family. Rejecting the dismissal motion, Judge Anthony Shaheen held that Trombetta's action could go forward because of the nature of her relationship to Fisher. In its attempt to define "immediate family member," the court turned to the policy that restricted the potential claimants to the class of immediate family members. The court determined that the governing restriction was the requirement of a close relationship between the bystander and the victim. Drawing on cases from other states, the court held that "'close relationship' criteria should encompass relationships other than those based on marriage or consanguinity."¹²⁵ Applying this standard, the court found that because the nature of the relationship between the plaintiff and the victim was "more in the nature of a mother/child relationship rather than an aunt/niece relationship, the plaintiff should be considered 'immediate family' to her aunt, and there-

¹²⁵ *Trombetta v. Conkling*, 154 Misc. 2d 844, 846, 586 N.Y.S.2d 461, 462 (Sup. Ct. Oneida County 1992), *rev'd*, 187 A.D.2d 213, 593 N.Y.S.2d 670 (4th Dep't), *aff'd*, 82 N.Y.2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678 (1993). In his opinion, Judge Shaheen cited *Leong v. Takasaki*, 520 P.2d 758 (Haw. 1974) (child who saw step-grandmother killed in auto accident could recover negligently inflicted bystander emotional distress damages because of the special nature of the relationship between the parties), *James v. Lieb*, 375 N.W.2d 109 (Neb. 1985) (parties other than immediate family members could recover provided they could show a significant attachment), and *MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS* (1982), for the proposition that for purposes of this negligently inflicted bystander emotional distress action, Trombetta should be considered immediate family.

fore permitted to maintain an action for emotional damages. . . .¹²⁶

The appellate division reversed.¹²⁷ Writing for a unanimous panel, Judge John Doerr held that Trombetta was not a member of Fisher's immediate family and so did not fit within the *Bovsun* exception. The court reasoned that allowing this extension of liability would result in an unacceptable extension of liability. Citing *Elden v. Sheldon*,¹²⁸ the court stated that a bright line in this area of the law was essential, and held that even if the plaintiff had had a relationship that was the "functional and emotional equivalent of a nuclear family," liability concerns precluded recovery.¹²⁹

The court of appeals unanimously affirmed.¹³⁰ Judge Bellacosa stated that the right to recover for negligently inflicted bystander emotional distress did not extend farther than the immediate family members who had recovered in *Bovsun*. The court noted that New York had not followed other states in allowing damages for negligently inflicted bystander emotional distress, and suggested that the narrow exception made in *Bovsun* was the product of the recognition that the plaintiffs had been put in harm's way rather than a right based upon the emotional trauma that they suffered.¹³¹ Ignoring the lower court's relational argument, the court characterized the decision as a balancing test between duty and liability. The court did not explicitly characterize the policy interests at stake, but stated several fears regarding an expansion of negligently inflicted bystander emotional distress liability: the difficulty of containing liability, a morass of case-by-case adjudication, and the potential for false and inflated claims.¹³² Contrasting

¹²⁶ *Trombetta*, 154 Misc. 2d at 847, 586 N.Y.S.2d at 462.

¹²⁷ *Trombetta v. Conkling*, 187 A.D.2d 213, 216, 593 N.Y.S.2d 670, 672 (4th Dep't 1993).

¹²⁸ 758 P.2d 582 (Cal. 1988) (unmarried cohabitant of victim denied recovery for emotional distress because relationship did not fall within established guidelines).

¹²⁹ *Trombetta*, 187 A.D.2d at 216, 593 N.Y.S.2d at 671 (citing *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988)).

¹³⁰ *Trombetta v. Conkling*, 82 N.Y.2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678 (1993).

¹³¹ *Id.* at 552, 626 N.E.2d at 654-55, 605 N.Y.S.2d at 680.

¹³² *Id.* at 553-54, 626 N.E.2d at 655-56, 605 N.Y.S.2d at 680. In support of these policy concerns, the court cited to *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402-03, 482 N.E.2d 34, 36, 492 N.Y.S.2d 555, 557 (1985) (landlord does not owe duty to tenant from harm suffered as a result of blackout in New York City),

these concerns with the "personal tragic loss" that Darlene suffered, the court held that the concerns it had identified outweighed the plaintiff's interest.¹³³ The court stated that the best method for addressing the identified concerns was to limit the class of potential plaintiffs to a "strictly and objectively defined class of bystanders."¹³⁴ In addition to controlling liability, defining the class in this fashion would avoid both the problem of case-by-case determination and problems of proof. The court confined the class of potential plaintiffs to those who were members of the victim's immediate family, thus rejecting Darlene's claim.¹³⁵

B. *Analysis*

The *Trombetta* decision is a firm rejection of negligently inflicted bystander emotional distress in New York. In summarily denying Darlene Trombetta's claim, the court squandered the opportunity to consider the interests involved in negligently inflicted bystander emotional distress and to provide principled protection for interests it has deemed important in other contexts.

The narrow issue before the court was the definition of the term "immediate family member." The court restricted the term to immediately related persons. By refusing to enlarge the *Bousun* decision beyond its facts, the court signaled that it would continue to reject any attempt to expand a defendant's potential liability to a third party. Additionally, the court reasoned that liability was dependent upon the plaintiff's status rather than the nature of his or her relationship to the victim. In making the resolution of liability turn upon status, the court repeated its signal that the prevention of unlimited liability was its paramount concern.

In reaffirming this concern, the court hearkened back to *Tobin v. Grossman*, which first rejected bystander claims.

and *De Angelis v. Lutheran Medical Ctr.*, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983) (refusing to allow child to recover for loss of consortium from parent's injuries).

¹³³ *Trombetta*, 82 N.Y.2d at 553, 626 N.E.2d at 655, 605 N.Y.S.2d at 680.

¹³⁴ *Id.*

¹³⁵ *Trombetta v. Conkling*, 82 N.Y.2d 549, 554, 626 N.E.2d 653, 656, 605 N.Y.S.2d 678, 681.

Quoting *Tobin*, the *Trombetta* court stressed the difficulty of attaining "essential justice" in bystander emotional distress cases.¹³⁶ Likewise, the concerns articulated in *Tobin* are renewed in *Trombetta*: fear of unlimited liability, fear of case-by-case adjudication, and fear of false claims. The weight the court gives to these arguments is made manifest by the opinion's failure to discuss the trial court's functional-family argument. By failing to discuss this argument and instead simply relying on rehashed *Tobin* arguments the court signaled that these rationales would trump all others.

The court's focus on policy concerns is crucial, because policy concerns provide the rationale for denying the extension of liability. The court characterizes its decision as the product of a balancing test,¹³⁷ but it does not clearly delineate the competing interests. Instead, it chooses to characterize the interests as public policy on the one hand and an amorphous injury on the other.¹³⁸ This failure to articulate the interests at issue is problematic; it allows the court to freely characterize the issues in a manner that enables the court to avoid the contradictions inherent in its reasoning. The court's interest identification begins with the assertion made in *Tobin* that it is not possible to establish a rational limit for negligently inflicted bystander emotional distress liability.¹³⁹ In contrast, the court does not clearly define Darlene Trombetta's interest. Although the court accepts the possibility that Darlene suffered a severe loss, and that she had enjoyed a relationship with her aunt that was the functional equivalent of a mother-daughter relationship, the court refused to consider whether this injury should be viewed as the result of an invasion of a protected interest. The resulting balancing consisted of an

¹³⁶ The court stated:

We have said it before and it has special application here: "Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal perforce limited by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end."

Id. at 554, 626 N.E.2d at 656, 605 N.Y.S.2d at 681 (quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969)).

¹³⁷ *Trombetta*, 82 N.Y.2d at 553-4, 626 N.E.2d 655, 605 N.Y.S.2d 680-81.

¹³⁸ *Id.* at 552, 626 N.E.2d at 654, 605 N.Y.S.2d at 679-80.

¹³⁹ *Id.* at 552, 626 N.E.2d at 654, 605 N.Y.S.2d at 680.

historic concern for the limitation of liability contrasted with a previously unrecognized and amorphous interest. From this point, the decision to deny liability was reached without difficulty, as the court finds that policy concerns dictate that there is no duty to the plaintiff.¹⁴⁰

In using duty to limit the scope of liability the court is employing a traditional method for circumscribing liability.¹⁴¹ While duty operates in part as a limiting device, the determination of the existence of duty in law cannot be simply the result of a "yes" or "no" answer to the question "will liability ensue"? Making duty turn only on this issue effectively collapses duty into foreseeability because once the assumption is made that the class of potential plaintiffs is not susceptible of definition, merely finding that the injury is foreseeable will always result in a finding of no duty.¹⁴² Duty is more than a tool to prevent crushing liability; it enables courts to establish the relationships between parties and the scope of the protection afforded recognized interests.¹⁴³ The court itself has not-

¹⁴⁰ The court identifies two reasons for finding no duty: "sound policy and strong precedents." *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d 653, 654, 605 N.Y.S.2d 678, 680. Preventing the imposition of crushing liability is the sound policy, while the strong precedents are those that hold that public policy dictates that liability should not be allowed to crush defendants. See *infra* text accompanying notes 148-51. Thus, pursuant to this rather circular logic, since the imposition of liability would result in a crushing burden upon the defendants, there can be no duty to the plaintiff.

¹⁴¹ See *supra* note 97.

¹⁴² Because it resolved the issue by finding no duty, the *Trombetta* court did not consider foreseeability separately. *Trombetta*, 82 N.Y. at 553, 626 N.E.2d at 655, 605 N.Y.S.2d at 680.

¹⁴³ Judge Cardozo defined duty in this fashion: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v. Long Island R.R. Co.* 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). In dissent, Judge Andrews argued that this conception of duty was too narrow: "Due care is a duty imposed upon each one of us to protect society from unnecessary danger, not to protect A, B, or C alone." *Id.* at 349, 162 N.E. at 102 (Andrews, J., dissenting). In New York, "[D]uty is essentially a legal term by which [courts] express [their] conclusion that there can be liability." See, e.g., *De Angelis v. Lutheran Medical Ctr.*, 58 N.Y.2d 1053, 1055, 449 N.E.2d 406, 407, 462 N.Y.S.2d 626, 627 (1983). Duty thus is characterized as a balancing process which must take into account the competing interests in affording a remedy and preventing unlimited liability. *Id.* See also *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) ("[I]t should be recognized that 'duty' is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.") (citations omitted).

ed that the determination of duty is a complex issue:

Common-law experience teaches that duty is not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, [and] weighty competing socioeconomic policies These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis.¹⁴⁴

Despite this recognition of the complexity of the duty analysis, the court fails to articulate any rationale for its conclusion other than to state that the imposition of liability would result in a crushing burden, which as previously noted, is an argument that rests upon an outcome-determinative use of foreseeability predicated upon an assertion of the impossibility of containing the class of potential plaintiffs. Because the finding of no duty rests upon this assertion, it is important to trace its origin.

In its opinion, the court cites two precedents for its conclusion that there is no duty. One of them, *De Angelis v. Lutheran Medical Center*,¹⁴⁵ a memorandum opinion, denies a claim for loss of parental consortium, which is not recognized in New York.¹⁴⁶ The court apparently cited *De Angelis* for the proposition that mere sympathy is not sufficient to establish liability: "It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and concomitantly, liabilities, regardless of the economic and social burden."¹⁴⁷ This assertion restates the *Tobin* argument: the court will not consider a new, different duty, but the court will grant recognition to a duty that can be characterized as an extension of a prior one.

It is the other case, *Strauss v. Belle Realty*,¹⁴⁸ which illuminates the true source of the court's assertion that there is no duty. In *Strauss*, a tenant sued New York City's electric utility

¹⁴⁴ *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 585, 634 N.E.2d 189, 192, 611 N.Y.S.2d 817, 820 (1994) (hospital maintenance contractor held to have a duty to employee of hospital injured by maintenance contractor's negligent repair of fan) (citations omitted).

¹⁴⁵ 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983).

¹⁴⁶ *Id.* See also *Borer v. American Airlines*, 563 P.2d 858 (Cal. 1976) (denying consortium remedy for children of injured parents).

¹⁴⁷ *De Angelis*, 58 N.Y.2d at 1055, 449 N.E.2d at 407-08, 462 N.Y.S.2d at 627-28.

¹⁴⁸ 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985).

for injuries he suffered in the stairwell of his apartment building during the 1977 New York City blackout. The court found that the utility did not owe a duty to the tenant. Although the utility had been grossly negligent, the tenant was not a member of a narrowly defined class; the utility provided electricity to the tenant's landlord in a fashion identical to all its other customers.¹⁴⁹ Policy concerns dictated that liability be curtailed even in the face of negligence. Judge Meyer, dissenting in *Strauss*, noted that in reaching its conclusion, the majority had failed to consider any factor other than that the tenant did not belong to a discrete class.¹⁵⁰ Thus the root assumption at work is that no duty will be found, regardless of other factors, so long as the plaintiff is viewed as a member of a general, rather than a specific class.¹⁵¹

In *Trombetta* the court has again made a similar one-sided calculation. Moreover, it has not even considered this side of the equation properly. Ultimately, the court's policy determination consists of two assumptions: all policy concerns are to be

¹⁴⁹ *Id.* at 403, 482 N.E.2d at 37, 492 N.Y.S.2d at 558. The court reached the conclusion that the obligation to the tenant in this case was identical to all others similarly situated from the premise that the obligation to the tenant's landlord was statutorily based, and so must be identical with all others similarly situated, i.e., all of the utility's customers. *Id.*

¹⁵⁰ Judge Meyer stated:

My disagreement with the majority results not from its consideration of public policy as a factor in determining the scope of [the utility's] duty, but from the fact that in reaching its public policy conclusion it has considered only one side of the equation and based its conclusion on nothing more than an assumption.

Id. at 405-06, 482 N.E.2d at 38, 492 N.Y.S.2d at 559 (Meyer, J., dissenting).

¹⁵¹ This principle was established in *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). In *Ultramares*, an accounting firm prepared a certified balance sheet for its client Smith. On the basis of this statement, the plaintiff loaned money to Smith. As it turned out, the books the accountants used to prepare the balance sheet were fraudulent, and Smith soon went bankrupt. The plaintiff lender sued the accountants in both fraud and negligence. In an opinion by Judge Cardozo, the court allowed the fraud charge to go to the jury, but dismissed the negligence count. The chief rationale for dismissal was the fear of unlimited liability, because the inability to contain the class of potential plaintiffs would expose the defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Imposing liability in this situation would "enkindle doubt about whether a flaw may not exist in the implication of a duty that exposes to these consequences." *Id.* at 179-80, 174 N.E. at 444. G. Edward White argues that *Ultramares* is another attempt by Cardozo to establish a limit to principles he had enunciated in earlier tort cases. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 129-36 (1980).

subordinated to the specter of limitless liability when the plaintiff cannot be characterized as a member of a "discrete readily determinable class,"¹⁵² and Darlene Trombetta cannot be a member of such a class. The court provides no justification for the application of these assumptions. Even if the first assumption is warranted in this context, the court fails to provide a reason for the second assumption. Moreover, it does not consider any of the other factors that form part of the determination of duty. The resulting determination that policy concerns dictate a finding of no duty is unjustified, not because the result is necessarily wrong, but because the court simply assumes, without consideration, that since no viable method for limiting the scope of duty exists, any imposition of liability would be so crushing as to outweigh any interest the plaintiff might have.¹⁵³

In addition to failing to follow its own duty calculus the court makes its policy determinations in a fashion that circumvents consideration of the harm that Darlene suffered. If the court had considered this injury, it would have been forced to square the finding of no duty with its prior holdings that found emotional stability to be a protected interest.¹⁵⁴ Additionally, it would have had to explain why the determination of recovery turns not on the (admitted) validity of the injury, but on the formal relational status of the person injured, a criteria not necessarily related to the harm.

The court's rationale for the placement of the line delineating recovery is suspect for other reasons as well. Taking at face value the court's argument that the need to prevent unlimited liability presents a paramount concern within the duty matrix, the court has achieved this goal by allowing only those specifically defined family members within the zone of danger to

¹⁵² *Trombetta v. Conkling*, 82 N.Y.2d 549, 554, 626 N.E.2d 653, 655, 605 N.Y.S.2d 678, 680 (1993).

¹⁵³ For example, the court could have considered the feasibility of an alternative method for limiting damages, such as limiting them to pecuniary losses, as it had in *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 448 N.E.2d 1332, 462 N.Y.S.2d 421 (1983).

The denial of liability may also be seen as placing the action under the no duty rule. Under this rule courts refuse to find liability on the grounds that the action lies outside the scope of negligence law. Rabin, *supra* note 27, at 951-52.

¹⁵⁴ See *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

recover. In doing so, the court reuses two old assumptions as proxies: that physical presence and a formal relational status are the correct (indeed, the only) criteria for determining liability. Requiring that the plaintiff be both in the zone of danger and a member of the immediate family produces only a smaller class, not a more discrete one.¹⁵⁵ Mere reduction of the class size should not be a surrogate for determining the appropriate limits of liability. The mechanical tests the court creates do not test the validity of the harm suffered, as when a separated spouse or a child who has not spoken to his or her parent in twenty years can maintain an action but a person who presently functions as an intimate caretaker cannot.

In addition to its one-sided duty calculus, the court advances other arguments that contradict its other opinions without distinguishing them. For example, the court asserts that the potential for fraudulent claims is another factor in its decision to preclude liability. Yet, as in *Tobin*, the court fails to provide any explanation for its finding that this type of claim is more easily fabricated than a direct negligently inflicted emotional distress action would be.¹⁵⁶ In *Battalla*, the rationale for discriminating between claims based upon the difficulty of proof was derided.¹⁵⁷ Even if medicine had failed to make any advances in its ability to offer proof (or refutation) of emotional injury since *Battalla*, the court has consistently failed to advance any coherent rationale for its assertion that the proof it will accept in a negligently inflicted emotional distress action is not valid to show the identical injury in a bystander emotional distress action.

The assumption the court makes—that it is impossible to define a class in a fashion other than formally—is unfounded at best. By falling back on a strict status test, the court ignores other New York decisions that have determined the scope of family membership in other contexts. For example, in a series of zoning cases, the court of appeals has held repeatedly that a

¹⁵⁵ Discrete is defined as "[s]eparate, detached from others; individually distinct" 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 688 (1993).

¹⁵⁶ In 1969, Judge Keating noted in his dissent to *Tobin* that the court presented a case for liability and then refused to allow it. See *supra* text accompanying note 112.

¹⁵⁷ *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 731, 731-32, 219 N.Y.S.2d 34, 34 (1961).

family should be defined in a functional rather than biological sense.¹⁵⁸ In these cases, the court has stressed that the test for ascertaining if a family exists should be based on an assessment of whether the unit functions as a family, rather than the legal status of its members. The underlying principle in these cases has been the protection of the values that the family unit supports.¹⁵⁹ The *Trombetta* opinion implicitly rejects this approach, holding that liability should not be extended even to those persons who can "demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond."¹⁶⁰ The court offers no rationale for this decision other than public policy,¹⁶¹ thus rejecting without consideration a method of analysis it uses in a variety of situations to determine the legal standing of nontraditional groups.¹⁶² Because the court does

¹⁵⁸ See *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985) (court employed "functional family" test to find that zoning ordinance defining a family as either any number of related persons or two unrelated persons over the age of 62 not rationally related to stated goals of zoning); *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978) (group home for children where the children were not permanent residents and there were alternative parental figures for weekdays and weekends held to be a single family home for purposes of zoning ordinance); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 304, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 453 (1974) (a group home for children that "bears the generic character of a family unit as a relatively permanent household" can be considered a single family for zoning purposes); cf. *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (in construing rent-regulation statute, court held "family" means any association characterized by permanence).

¹⁵⁹ In *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 273, 380 N.E.2d 207, 210, 408 N.Y.S.2d 377, 380-81 (1978), the court stated that the group home's promotion of stable family life would actually advance the goals that the zoning sought to achieve—the promotion of family values.

¹⁶⁰ *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d 653, 655, 605 N.Y.S.2d 678, 680 (1993).

¹⁶¹ *Id.*

¹⁶² While the court's opinions which employ a functional-family analysis have largely been in the area of zoning control, the analysis itself is not dependent upon this restriction. It consists of three elements: permanence, appearance and fulfillment of traditional roles (e.g., parenting). See *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (permanence and appearance); *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978) (fulfillment of traditional roles); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (permanence and appearance). If, as argued earlier, negligently inflicted bystander emotional distress is a tort that derives its legitimacy from the exis-

not distinguish the concerns that animate finding functional families in some contexts but not others, the assertion that policy concerns dictate the result is unsupported.¹⁶³ The court's perfunctory recitation of "policy concerns" serves only to underscore the lack of analysis, which flows from the belief that any expansion of liability would result in a tidal wave of lawsuits, a warning that has previously failed to come true.¹⁶⁴ As a result, the court decided a case largely on arguments advanced in *Mitchell* in 1896, rejected in *Battalla* in 1961, and not significantly examined since then.

The court's determination that the potential burden on a potential tortfeasor is unlimited might seem to be the product of an economic analysis of the problem, but at bottom the rhetoric of liability serves merely to reach a foreordained result. The court finds initially that while the injury is real enough, the class of potential claimants is too large.¹⁶⁵ No factual basis for this finding exists, but this assertion terminates any discussion about reallocating the loss, for, given this assertion, the denial of liability will always be efficient.

This argument has two results. First, the court's action

tence of a relationship between persons, then it is appropriate to use this analysis to determine the scope of liability since it is an accepted method to calibrate relationships.

¹⁶³ New York has been inconsistent in its application of the family function concept. See *infra* text accompanying notes 248-259.

¹⁶⁴ Although Judge Kaye had warned of an onslaught of litigation after *Bovsun v. Sanperi*, 61 N.Y.2d 219, 235, 461 N.E.2d 843, 851, 473 N.Y.S.2d 357, 365 (1984) (Kaye, J., dissenting), a Westlaw search indicates that the number of reported cases that attempted to fit under the *Bovsun* rule was rather small. The majority of these cases denied recovery, usually on the ground that the proffered cause of action did not fit within the *Bovsun* rule.

In addition to the older exceptions that impose liability, see *infra* note 282, there is another exception, as established in *Johnson v. New York*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). In that case, the court held that a woman had a cognizable claim for emotional distress where the hospital in which her mother was a patient falsely informed her in a telegram that her mother had died. The court distinguished *Tobin* on the ground that this case followed in the line of cases that allowed liability for the negligent mistransmission of a death notice. *Id.* Additionally, the court found that the daughter here was "directly" injured as a result of the hospital's act. *Id.* As such, she was directly involved, and so the court held *Tobin* not applicable. *Id.* But see *Simons*, *supra* note 11, at 37-38 (noting that under the *Johnson* standard there is no geographical limit to the duty).

¹⁶⁵ *Trombetta v. Conkling*, 82 N.Y.2d 549, 553, 626 N.E.2d 653, 655, 605 N.Y.S.2d 678, 680 (1993).

prevents any consideration of potential incentives to mitigate damages or deterrents to the behavior that causes this type of injury. Second, by refusing to consider shifting the cost of the accident onto the putative tortfeasor, the court has implicitly determined that these costs are noncompensable, or that the victim is in a better position to avoid (pay) them. The argument that the costs are noncompensable may be rejected on the ground that identical damages are compensated in other contexts.¹⁶⁶ As to the cost avoidance argument, even if we assume that liability would be greatly expanded, the court's determination requires assuming that the victim is the "best" cost avoider,¹⁶⁷ or that "the victims are responsible for these accident costs."¹⁶⁸ The court does not, however, make any of these arguments; indeed, it does not mention them. Again, the rhetoric of "policy" serves merely to cloak a decision based upon unfounded assumptions in an aura of authority.

The court also fails to explain why traditional tort principles cannot contain the tort. Since the elements of negligence—damages, proximate cause, cause in fact, foreseeability, and a violation of the standard of due care—all operate to provide limits on the scope of liability, the indiscriminate and exclusive use of liability concerns as a bar to otherwise valid claims would seem to suggest the need for a compelling justification for them. The court's simple, unexamined assertion does not provide a sufficient justification.¹⁶⁹ Absent a strong showing of need, the court should not depart from accepted negligence principles. So long as the court continues to govern the tort with an externally imposed limit rather than one that is derived from a consideration of the interests at stake on both sides, then this rule will continue to produce arbitrary results that do not advance legitimate state and private interests.

The age of these arguments need not invalidate them;

¹⁶⁶ See, e.g., *Battalla v. New York*, 24 N.Y.2d 980, 250 N.E.2d 224, 302 N.Y.S.2d 813 (1969).

¹⁶⁷ GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 175 (1970). Calabresi defines specific deterrence, a collective decision based on both market and nonmarket factors as to the "tolerable level of accident costs," as the process of seeking the "best cost avoider." *Id.* at 174-75.

¹⁶⁸ *Id.* at 233.

¹⁶⁹ The problem of a perception that has firmly taken root but lacks a foundation in fact is a recurrent phenomenon. See, e.g., *PLATO, THE REPUBLIC* 193-97 (514a-518d) (Allan Bloom trans., 1968).

many tort principles, such as absolute liability for trespass, have remained intact over the years. Likewise, the application of principles first derived in another context are not automatically suspect. Yet when the assumptions underlying the rule are no longer accepted, and the application of a rule in a different context leads to results that are uniformly recognized as arbitrary, then the utility of the continued application of the rule must be questioned.

The court has placed negligently inflicted bystander emotional distress claims beyond the negligence system in New York. In doing so, it has impliedly denied that the goals of the negligence system—whether based on considerations of fairness or utility or social policy—can have any impact on the infliction of negligently inflicted bystander emotional distress and subsequent harm. In refusing to apply negligence concepts to this problem, the court has rejected the opportunity to strike a balance between legitimate concerns, and has opted instead to turn its back on the problem.

III. TOWARD A MODEL FOR NEGLIGENTLY INFLICTED BYSTANDER EMOTIONAL DISTRESS

A. *Characterizing the Interest*

Liability for negligently inflicted bystander emotional distress has been determined by the need to limit the scope of liability rather than as a consideration of the interests involved. Initial assumptions about liability may well determine the rule applied. The zone of danger approach does not limit recovery in any fashion except by pure physical proximity, providing a rough cut-off point. Since the zone rule does not link the purpose of the tort with the limit placed upon it, the potential claimant pool is always vast.

In contrast, grounding the tort in relational interests provides a coherent limitation device. The existence of a relationship demonstrating the affectational bond becomes the threshold requirement: absent a showing of a relationship with the injured party, a plaintiff cannot maintain an action since there is no showing of a cognizable harm.¹⁷⁰

¹⁷⁰ The requirement of a threshold showing of a significant relationship per-

Regardless of the characterization of the interest, any system which hopes to respond to the competing concerns that exist in the negligently inflicted bystander emotional distress context should consider two prominent goals of the tort system: utility and fairness.¹⁷¹ Since these concerns dominate the discussion of the negligently inflicted bystander emotional distress debate, it is worthwhile to briefly examine two theories that attempt to explain the tort system in these terms.

B. *Models*

This Note will briefly examine aspects of two theories of tort law: the wealth maximization approach as developed by Richard Posner, and the concept of reciprocity and risk, as developed by George Fletcher, to ascertain if either of these principles can provide a useful framework for analysis of negligently inflicted bystander emotional distress actions.¹⁷² This Note concludes that while both frameworks provide important insights, neither, standing alone, is sufficiently all-encompassing to provide a normative rule.

1. Law & Economics

The law and economics school argues that tort law can be explained by economic principles. In brief, the writers of this school (most notably Richard Posner) claim that the common law can best be understood as an effort to pursue economic efficiency: "[T]he common law theory of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote effective resource allocation."¹⁷³ Although the law and economics

forms two functions: first, it creates a cognizable class of plaintiffs who must prove a relationship; second, it eliminates the need for foreseeability as a guard against unlimited liability, since the question is no longer whether it was foreseeable that the plaintiff would suffer emotional injury, but (1) did the plaintiff have a relationship with the victim, and (2) was that relationship violated to a significant degree (indicating damage to the affectational bond)?

¹⁷¹ See JULES L. COLEMAN, *RISKS AND WRONGS* 200-11 (1992). Although these goals can be cast in opposition to each other, they share many aspects. *Id.* at 211.

¹⁷² This Note is not an attempt to add to the vast body of commentary on these theories. Rather, it is merely an effort to apply them to obtain guidance for a normative approach to negligently inflicted bystander emotional distress.

¹⁷³ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF*

movement has come under wide-ranging criticism for its emphasis on utilitarian concerns, its adoption of a variety of economic tools to consider legal decisionmaking lends itself to a consideration of negligently inflicted bystander emotional distress.¹⁷⁴

Before considering negligently inflicted bystander emotional distress claims under this model, several of its assumptions should be noted. The overarching principle of the economic theory of tort law is that its end is to promote efficiency.¹⁷⁵ This argument suggests that legal rules (such as setting a standard of care) can promote efficient behavior.¹⁷⁶ Efficiency under this conception is Kaldor-Hicks efficiency; any shift where the "winners could compensate the losers" is beneficial.¹⁷⁷ Since the goal is social wealth, this standard is utilitarian in that it seeks the greatest good for the greatest number.¹⁷⁸

Several considerations follow from the initial premise.¹⁷⁹ First, since the goal is maximization of utility, the system's goal is to minimize the costs of accidents and subsequent losses, i.e., to optimize the level of accidents, not to minimize the number of accidents.¹⁸⁰ Second, fault as a moral element is not a concern of the law. Insofar as fault exists as a concern, it may be thought of as a societal condemnation of any behavior that fails to meet a generalized standard of care.¹⁸¹ Third,

TORT LAW 1 (1986).

¹⁷⁴ There is a vast body of literature discussing the law and economics movement and its application. For an introduction to the scope of the law and economics movement, see Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) (hereinafter "Symposium").

¹⁷⁵ See LANDES & POSNER, *supra* note 173.

¹⁷⁶ Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 354 (1984).

¹⁷⁷ LANDES & POSNER, *supra* note 173, at 16.

¹⁷⁸ LANDES & POSNER, *supra* note 173, at 18.

¹⁷⁹ These considerations or corollaries of the initial premise should not be confused with the assumptions made in positing the economic theory. See LANDES & POSNER, *supra* note 173, at 12.

¹⁸⁰ LANDES & POSNER, *supra* note 173, at 18; STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 7 (1987).

¹⁸¹ LANDES & POSNER, *supra* note 173, at 14. Tort law imposes liability when an actor fails to act in a fashion that comports with due care. See RESTATEMENT (SECOND) OF TORTS § 282 (1965). Care is thus the measure to determine the efficiency of the actor's conduct. Shavell states, "[D]ue care is in fact found by a process that operates as if it were designed to identify behavior that minimizes

tort law is not an ex ante allocation device and so is not a redistribution mechanism.¹⁸² Fourth, tort law has a deterrent effect even when analyzed from the perspective of utility rather than in a normative fashion.¹⁸³

In *The Economic Structure of Tort Law*, Landes and Posner find that negligently inflicted bystander emotional distress claims should not be allowed.¹⁸⁴ They cite three reasons: there will be no allocative effect if liability is imposed; the administrative costs are high; and since the amount of harm that the negligently inflicted bystander emotional distress plaintiff suffers is small compared to that of the victim, no effective change in the level of care results.¹⁸⁵ In short, whenever administrative costs are high, a negligently inflicted bystander emotional distress claim that fails to affect the level of care is irrelevant to a determination of efficient conduct.

This result is suspect because of the assumptions made. The authors start with the supposition that the probability of purely psychic injury to an eyewitness is small.¹⁸⁶ Consequently, this injury will have little effect upon the standard of care, since the bulk of the injuries that fashion the standard of care are physical injuries. Furthermore, if the probability of this type of injury is low, then courts cannot ascertain an effective marginal care rate and potential injurers will fail to take even costless precautions.¹⁸⁷ But, these assumptions are questionable. First, the authors' assumption that it is unlikely

total accident costs." SHAVELL, *supra* note 180, at 19. The standard of care may be set according to either a negligence standard or a strict liability standard. Strict liability regulates the level of activity rather than the level of care; since the conduct is of a type that is not favored or has high costs associated with it, imposing strict liability upon a specific class of activities may reduce that activity. LANDES & POSNER, *supra* note 173, at 66.

¹⁸² LANDES & POSNER *supra* note 173, at 15.

¹⁸³ LANDES & POSNER, *supra* note 173, at 10-12 (citing a number of studies that indicate that tort law deters behavior); SHAVELL, *supra* note 180, at 13.

¹⁸⁴ LANDES & POSNER, *supra* note 173, at 244-45. It should also be noted that in an earlier article the authors suggest claims for negligently inflicted emotional distress should be honored. See William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 895, 917-18 (1981) (suggesting that non-bystander emotional distress actions enable recovery of the "real social cost" of emotional distress, thus "probably . . . making tort law more, rather than less, efficient").

¹⁸⁵ LANDES & POSNER, *supra* note 173, at 244.

¹⁸⁶ LANDES & POSNER, *supra* note 173, at 244.

¹⁸⁷ LANDES & POSNER, *supra* note 173, at 244.

that a witness to an accident would suffer psychic injury lacks support. In making this assertion, the authors have failed to distinguish the pure or totally unrelated bystander from the bystander who possesses a significant relationship with the victim. While it is true that the unrelated bystander is not expected to suffer a significant psychic harm, this assertion does not hold for the related bystander.¹⁸⁸ Indeed, liability has been denied for precisely this reason: for the related bystander, the probability of injury is relatively high.¹⁸⁹ If we suppose that the authors had considered bystanders as members of disparate classes (related and unrelated), then their assumption regarding the low total incidence of psychic injury is based upon an assumption that for any given accident, the number of unrelated bystanders is greater than the number of related bystanders. This assumption lacks merit.¹⁹⁰ Even if this assumption were true, it does not follow that it is impossible to separate the related from the unrelated bystander.¹⁹¹ Since, as the authors note, the calculation of care is made on the margins (i.e., the determination of liability is made by comparing the marginal cost of care against the marginal reduction of damages),¹⁹² any readjustment of the calculation to consider the increased likelihood of harm may have an effect on the calculus of care.¹⁹³

¹⁸⁸ See *supra* notes 37-38.

¹⁸⁹ In denying liability, the *Tobin* court stated: "Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma [T]he logical difficulty of excluding . . . even the conscientious and sensitive caretaker, from a right to recover . . . raises subtle and elusive hazards" *Tobin v. Grossman*, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 560 (1969).

¹⁹⁰ For example, the *Tobin*, *Bovsun*, and *Trombetta* actions were not brought by unrelated bystanders.

¹⁹¹ See *supra* text accompanying notes 148-55.

¹⁹² LANDES & POSNER *supra* note 173, at 60-61, 87.

¹⁹³ The authors posit that an economically efficient determination of care must both lower the possibility of negligent behavior and the probability of the act (accident). If there is no difference in the probability of the accident when a rule is violated, then there is no violation. LANDES & POSNER, *supra* note 173, at 232-33. The authors consider that liability would normally exist in the negligently inflicted bystander emotional distress situation, except that the probability of the injury itself—not the accident—is low. LANDES & POSNER, *supra* note 173, at 243. Arguably, therefore the authors may be implicitly bound to the conclusion that if the probability of the injury is higher, then the standard of care would be influenced. LANDES & POSNER, *supra* note 173, at 243.

The authors cite to *Palsgraf v. Long Island R.R. Co.*¹⁹⁴ as an example of a denial of liability where the potential for the particular harm that ensued was so low as to fail to influence the standard of care.¹⁹⁵ *Palsgraf*, however, is understood to stand for the proposition that the scope of a party's duty cannot be infinite, not that the imposition of liability would not increase the standard of care.¹⁹⁶ More importantly, the authors' analogy between *Palsgraf* and the psychic trauma situations rests upon their assumption that psychic trauma is rare.¹⁹⁷ Equating the sequence of events in *Palsgraf* with the events in *Trombetta* illustrates the difficulty with this analogy.¹⁹⁸

The authors' other rationale for the denial of liability—that the administrative costs are too high—has been rejected by courts.¹⁹⁹ The authors undercut their own argument by noting the trend toward the recognition of liability in the negligently inflicted bystander emotional distress context.²⁰⁰ They suggest that the basis for the expansion of liability is decreasing administrative costs, a function of the increased ability to accurately determine psychic harm.²⁰¹ If the probability of psychic harm has not increased overall, the argument that reduced administrative costs alone now enable these actions to be efficient at common law strongly suggests that neither of the traditional assertions—unmanageable size or infrequency of the injury—are valid rationales for the bar.

Application of the negligence formula articulated in *The*

¹⁹⁴ 248 N.Y. 339, 162 N.E. 99 (1928).

¹⁹⁵ LANDES & POSNER, *supra* note 173, at 246.

¹⁹⁶ See, e.g., WHITE, *supra* note 151, at 96-101 (discussing *Palsgraf* and suggesting that Cardozo's majority decision was a limit on negligence by making it relational rather than universal).

¹⁹⁷ LANDES & POSNER, *supra* note 173, at 246.

¹⁹⁸ In *Palsgraf*, an unmarked package of fireworks exploded when it fell between cars of a train after it had been either dropped or jostled loose by a conductor attempting to assist the package's owner onto the train. Ms. Palsgraf was injured by a railroad scale that fell upon her, apparently the result of a crowd fleeing the explosion. See JOHN T. NOONAN, PERSONS AND MASKS OF THE LAW 111-20 (1976). In contrast, Darlene Trombetta and her aunt were crossing a city street when her aunt was struck and killed by the defendant's truck. *Trombetta v. Conkling*, 82 N.Y.2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678 (1993).

¹⁹⁹ See, e.g., *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961).

²⁰⁰ LANDES & POSNER, *supra* note 173, at 245.

²⁰¹ LANDES & POSNER, *supra* note 173, at 245.

*Economic Structure of Tort Law*²⁰² suggests that in the case of Darlene Trombetta, liability for negligent infliction of emotional distress to her as a bystander would be imposed. If administrative costs are no longer a bar, and *Trombetta* is not a freak case, then there is no reason to suppose that the increment in care is too difficult to discern.²⁰³ However, application of this formula does not generate a normative rule, for in theory anyone who could show a harm where the incremental probability of injury was not low²⁰⁴ could recover, so long as administrative costs remain low. Because of the unique posture of a negligently inflicted emotional distress bystander claim—dependent upon but not derivative of injury to another—it would be difficult to ascertain the optimal level of liability.²⁰⁵ Paradoxically, then, the limitless liability concern

²⁰² This is the "Hand formula" as first stated by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), and held by the authors "to be an accurate description of the negligence standard . . ." LANDES & POSNER, *supra* note 173, at 102. The Hand formula states that negligence will be found whenever the "burden of precautions (B) was less than the probability of harm times the gravity of the injury (PL), that is, $B < PL$." LANDES & POSNER, *supra* note 173, at 85.

²⁰³ LANDES & POSNER, *supra* note 173, at 244. The authors suggest that liability should be denied in any case since the harm to the bystander is a fraction of the harm the victim suffers and that given the low probability of the injury there will likely be little or no effect on the standard of care. LANDES & POSNER, *supra* note 173, at 244. Assuming that the physically injured victim suffers more than the emotionally injured bystander, the fact that the probability of harm is greater than the authors posit suggests a greater impact on care than the authors suggest.

²⁰⁴ When the incremental probability of injury from a failure to take care is low, this means that the accident is likely to have occurred anyway, regardless of whether there was a failure to take care. LANDES & POSNER, *supra* note 173, at 240. In the bystander context, the incremental probability of injury is not low, since the cause is always the tortfeasor's negligence to the victim. Even if in the context of an accident between the defendant and the victim where the accident would have happened anyway, it does not follow for the plaintiff bystander that it is "difficult to determine whether the nervous injury would have occurred anyway." LANDES & POSNER, *supra* note 173, at 244-45 n.34.

²⁰⁵ The dependent posture of a negligently inflicted bystander emotional distress claim suggests that specific deterrence (collective judgement as to the scope of liability) rather than general (market) deterrence is appropriate, since specific deterrence allows the determination of liability to be made on the basis of both market and non market factors. See CALABRESI, *supra* note 167, at 174-75 (discussing general versus specific deterrence). Since the accident has already occurred, the focus should be on reduction of "secondary" (resultant social) accident costs. See CALABRESI, *supra* note 167, at 27. Because liability tests based on formal status are both over and underinclusive (formal status has no necessary relation-

reemerges in this context because even if the efficiency theory is descriptively correct, it does not provide sufficient content to fashion a prospective norm. The efficiency approach indicates that the tort is compensable but fails to provide a norm to structure the tort in a fashion that addresses the original concern of limitless liability. This structural inability to provide a normative rule is the basis for the most sustained criticism of the law and economics school.²⁰⁶ Therefore, while the tools of the law and economics school are useful to establishing ways of thinking about negligently inflicted bystander emotional distress, its own premises—that the sole evaluative criteria should be efficiency concerns—coupled with the lack of other concerns indicates an inability to correctly posit a workable normative standard.

2. Individualism and Risk Taking

In contrast to the utilitarianism of the law and economics thinkers, other torts scholars have attempted to craft an alter-

ship to emotional injury) they are not efficient. See *supra* note 37. Given the ease with which courts employ straightforward functional-family analysis in a variety of other contexts (see *infra* note 312) the argument that high administrative costs justify a bright-line rule is not a strong one. For a discussion of the problems inherent in valuation and a suggestion that markets may be useful for valuing incommensurables, see Neil Duxbury, *Law, Markets and Valuation*, 61 BROOK. L. REV. 657 (1995).

²⁰⁶ See, e.g., Symposium, *supra* note 174; LANDES & POSNER, *supra* note 173, at 9-24 (discussing criticisms of the theory). In brief, the point which is frequently made is that since a purely positive theory of tort law lacks any normative or prescriptive component, it cannot itself form the basis for a normative theory of tort law. The inference is that tort law requires a normative component; this inference is made on the basis of the subsuming of some principle or policy in tort law. See, e.g., George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (arguing that tort law embeds corrective justice principles).

The authors suggest that the validity of their approach is independent of normative concerns. LANDES & POSNER, *supra* note 173, at 9, 255 n.62. This assertion has also been challenged on two grounds. First, the theoretical suppositions that the positive theory promulgates are not verifiable. See Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 238 (1991) (arguing that law and economics scholarship is not subject to accepted scientific analysis). Second, the theory's validity also depends in part on a finding that the same concerns must have motivated courts to decide cases on an efficiency basis in the 19th century. Rabin suggests that tort law was too riddled with contradictions in the 19th century to support the theory that utility concerns alone guided judicial decisionmaking. Rabin, *supra* note 27, at 950-52.

native theory that would provide a basis for understanding tort law. George Fletcher has articulated a concept of tort law as mediating between individuals who take risks. Fletcher has developed this concept in a series of articles in which he argues that tort law is best understood as the resolution of non-reciprocal risk taking.²⁰⁷ In other words, "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and [imposed on] the defendant. . . ."²⁰⁸ Under his theory, the original formulation of the test asked whether the party who absorbed the risk had agreed to do so; was there a reciprocity of risk, and if not, could the risk be excused?²⁰⁹ Members of a society were liable to each other only if they imposed unnatural risks upon each other; background or equivalent risk-taking did not result in liability.²¹⁰ For example, two airplanes flying in the same area subject each other to reciprocal risks, but there is no reciprocity of risk between the pilot of the plane and a person on the ground.²¹¹ Fletcher argues that reciprocal risk taking was displaced in the nineteenth century by the concept of reasonableness. The question changed from "Did A subject B to a nonreciprocal harm?" to "Was A's conduct reasonable?"²¹² The adoption of the utilitarian method of decisionmaking led to the abandonment of corrective justice concerns, resulting in the individual "suffer[ing] other deprivations in the name of a utilitarian calculus" because the standard of liability was no longer tied to an act, but to a weighing of social interests.²¹³ Fletcher makes clear that for him the principle of corrective justice is the foundation of tort law, and so individual rights must trump utilitarian concerns.²¹⁴

To apply this theory to a negligently inflicted bystander

²⁰⁷ Fletcher, *supra* note 206; George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 J. LAW & PHIL. 63 (1983). As with the law and economics movement, there is a vast body of literature on this subject. This Note confines its examination of this theory to its original form. For a thoughtful discussion which is beyond the scope of this Note, see COLEMAN, *supra* note 171.

²⁰⁸ Fletcher, *supra* note 206, at 542.

²⁰⁹ Fletcher, *supra* note 206, at 542.

²¹⁰ Fletcher, *supra* note 206, at 544-51.

²¹¹ Fletcher, *supra* note 206, at 542.

²¹² Fletcher, *supra* note 206, at 556-57.

²¹³ Fletcher, *supra* note 206, at 568.

²¹⁴ Fletcher, *supra* note 207, at 80.

emotional distress claim we must consider the assumptions that Fletcher makes. He states that the application of the corrective justice principle as applied through the "paradigm of reciprocity" requires both the availability of excuse defenses to liability, and the superiority of a corrective justice (i.e., individual) claim over a utilitarian concern.²¹⁵ Furthermore, the proper starting point for the analysis should be a consideration of the risk rather than the harm (ex ante rather than ex post).²¹⁶

Although in the case of Darlene Trombetta, ex ante risk analysis provides an answer to the question of liability, Fletcher's theory does not provide criteria for ordering risks that are not clearly nonreciprocal. Beyond his plane crash examples, Fletcher does not indicate what precisely distinguishes a reciprocal from a nonreciprocal risk.²¹⁷ In Darlene's case, both the plaintiff and the defendant were engaging in every-day background activities (crossing a street, driving a truck). Assuming that the act of driving the truck exposed Darlene to a greater risk than her crossing of the street did to the truck driver, her claim could still be resisted on the grounds that she assumed some risk in crossing the street. As Fletcher admits, since in the absence of a prior express waiver the determination of Darlene's risk-taking could be determined only on an ex post basis, this analysis collapses into a contributory/comparative negligence analysis.²¹⁸ Here, since the driver exposed the aunt—and by extension Darlene—to a clearly nonreciprocal risk, it is likely that under Fletcher's

²¹⁵ Fletcher, *supra* note 207, at 80.

²¹⁶ Fletcher, *supra* note 207, at 81.

²¹⁷ Fletcher suggests that the doctrine of proximate cause could be invoked to establish reciprocity; if the plaintiff's risk-taking was not the legal cause of the accident, then there was no reciprocal risk-taking, and the defendant should be liable. Fletcher, *supra* note 207, at 85. Although proximate cause does limit the scope of liability, it is not a device for balancing reciprocity of risk; it limits liability by requiring that an act be the legal cause of an accident. Defining a risk as not the proximate cause of an accident merely removes that risk-taking conduct from the lawsuit; it fails to provide any guide as to the reciprocity of the risk. Further, by failing to consider the potential for harm in risk-taking conduct unless it causes an injury, Fletcher's position requires that all analysis be performed on an ex post basis, since a risk that is not the proximate cause of a harm cannot be counted as a reciprocal risk. See also Fletcher, *supra* note 206, at 572 (defining reciprocity as a search for a metaphor for the "unifying features" of activities).

²¹⁸ Fletcher, *supra* note 207, at 85-86.

system Darlene could bring a successful action. Once we move beyond the realm of the clearly nonreciprocal risk, however, the failure of Fletcher's theory to provide adequate distinctions where the respective risks are not so clearly delineated prevents it from providing any guidance for resolving many negligently inflicted bystander emotional distress claims.

More importantly, Fletcher's emphasis on the acts of the individual fails to provide any meaningful constraint on liability. Like Landes and Posner, Fletcher's emphasis on a single principle generates unacceptable results.²¹⁹ First, under his doctrine, parties are free actors and so may assume any risk by waiving their rights. In allowing an actor to waive an entitlement protected by a liability rule, Fletcher is thus impliedly asserting that all choices are equal and hence bereft of any other concerns.²²⁰ Second, the rejection of a utilitarian factor in the mix of liability concerns raises definitional questions as to the scope of tort liability. Although Fletcher's scheme recognizes that it may be necessary to continue socially useful nonreciprocal-risk behavior, his scheme would require compensation for all those affected.²²¹ In the absence of any meaningful criteria for determining reciprocity, the ramifications of this position are troubling. In short, in his drive to provide a unifying theory that asserts the primacy of the individual, Fletcher fails to adduce any meaningful constraints. His emphasis on the explication of corrective justice through the paradigm of reciprocity restores the concerns of the individual that Landes and Posner have eliminated, but fails to provide any guidance for the development of a normative theory based upon the tension between the needs of society and the individual.²²²

²¹⁹ See Izhak Englund, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27 (1980), reprinted in TORT LAW 41-83 (Ernest J. Weinrib ed., 1991).

²²⁰ KELMAN, *supra* note 84, at 127-28.

²²¹ Fletcher, *supra* note 206, at 550.

²²² Englund believes that the bulk of American writing on tort (until 1980) is an attempt to create a formalistic theory of tort law. He places Posner (among others) in the functionalist group, which he defines as a group of writers who argue for pure economic efficiency, and labels writers like Fletcher traditionalists because they accept the traditional framework of the common law. He asserts that all of these writers are formalists in that all of their systems purport to be "self-contained, apolitical, and logical." Englund, *supra* note 219, at 31-32.

3. Balancing the Interests

Any negligently inflicted bystander emotional distress standard must consider the competing concerns surrounding the tort. As previously noted, these concerns are the fear of unlimited liability and related arguments contrasted with the need to address the harm that befalls an emotionally injured bystander. The key to resolving this conflict is twofold: first, balance the interests in a manner that will satisfy the concerns of both camps, and second, construct a framework for negligently inflicted bystander emotional distress that draws upon already existing principles that are appropriate to the claim.

It can be argued that if a negligently inflicted bystander emotional distress action is permitted, then no limit should be placed on it.²²³ Indeed, courts often use this argument to deny any recovery, on the theory that the scope of a negligently inflicted bystander emotional distress action has no principled limit.²²⁴ In New York, these fears have induced the court of appeals to circumscribe the class of potential plaintiffs so as to exclude all but a handful.²²⁵ Yet even commentators and courts that do advocate relaxing the rules to allow for a broader class of plaintiffs acknowledge the need to place some limit upon the size of any potential class of claimants.²²⁶ These writers agree that without some limitation on the group of potential claimants the possibility for limitless litigation is

Embracing formalism, Ernest Weinrib suggests that the formalism of private law concepts is irreconcilable with instrumentalist goals since these goals are applied to tort law rather than derived from it, so that "[i]nstead of being an intelligible normative phenomenon, tort law becomes a battleground of mutually limiting justifications." Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 525 (1989), reprinted in TORT LAW (Ernest J. Weinrib ed., 1991).

²²³ See Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984).

²²⁴ See *Trombetta v. Conkling*, 82 N.Y.2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678 (1993).

²²⁵ See *id.* at 554, 626 N.E.2d at 655, 605 N.Y.S.2d at 680 (defining the class of potential plaintiffs as "discrete [and] readily determinable").

²²⁶ See *Dunphy v. Gregor*, 642 A.2d 372, 377 (N.J. 1994) (noting that in the context of expanding recovery for negligently inflicted emotional distress to a woman who witnessed the death of her fiancé in an auto accident the problem of "limitless liability is avoided"); see also Miller, *supra* note 39 (arguing that while liability be unrestricted, damages be limited to economic loss).

present. If these concerns justify a limitation on recovery, it is important to examine their source so that the adopted limits reflect valid concerns.

Corrective justice and utility concerns inform the need for a limit on liability. Corrective justice suggests a limit on liability because it insists upon fairness for both plaintiff and defendant.²²⁷ Fairness concerns center on the concept of proportionality. As one commentator notes, "The Anglo-American judicial tradition maintains a deep abhorrence to the notion of disproportionate penalties for wrongful behavior."²²⁸ Thus it is not that courts are unwilling to impose unlimited liability; rather, they are unwilling to impose disproportionate liability, and thereby "offend[] the sense of justice."²²⁹ This concern informs tort law in both duty and proximate cause. Proximate cause restricts the consequences of an act, while duty restricts the scope of obligations by requiring a sufficient nexus (itself comprised of relational and foreseeable elements) between plaintiff and defendant to justify imposing liability.²³⁰ In both cases, courts restrict liability to prevent imposition of an obligation when the relationship between the victim and the wrongdoer is too attenuated.²³¹ Fairness concerns are also apparent in the threshold requirement for wrongdoing, requir-

²²⁷ Fletcher, *supra* note 206, at 547 n.40 ("Using the tort system to redistribute negative wealth (accident losses) violates the premise of corrective justice, namely that liability should turn on what the defendant has done, rather than on who he is.").

Aristotle posited the function of corrective justice as an effort to redress the imbalance between parties where one has suffered an injury at the hands of another:

[Where] the suffering and the action have been unequally distributed . . . the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant. For the term 'gain' is applied generally to such cases even if it be not a term appropriate to certain cases

THE COMPLETE WORKS OF ARISTOTLE 1786-87 (1132(a)(8) Jonathan Barnes ed. & W.D. Ross trans., 1984).

²²⁸ Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1534 (1985) (citing the constitutional prohibition against "cruel and unusual punishment"). See also Fletcher, *supra* note 206 (arguing that tort law imposes a penalty only for nonreciprocal risk creation).

²²⁹ OLIVER W. HOLMES, THE COMMON LAW 96 (Mark DeWolfe Howe ed., 1963). This theme is present in the New York decisions, as evinced by the court's use of "crushing" when discussing the imposition of liability. See, e.g., *Pulka v. Edelman*, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976).

²³⁰ ERNEST J. WEINRIE, THE IDEA OF PRIVATE LAW 158-67 (1995).

²³¹ *Id.*

ing a showing that the injury complained of is both the product of the defendant's act and that it is more than mere "background harm[],"²³² preventing spurious or minor claims, historically a concern in the negligently inflicted bystander emotional distress context.

Several utilitarian concerns also point toward a limit on liability. First, because society has not banned the activities that cause emotional distress, freedom from emotional distress is protected by liability rules rather than property or inalienability rules.²³³ The interest may be protected, but since an actor "may destroy the initial entitlement [here, the interest in emotional stability] if he is willing to pay an objectively determined value for it" such an interest is not an absolute right.²³⁴ Since society has not seen fit to establish a rule that would prohibit the involuntary transfer of this entitlement, it follows that there must be a limit on the level of compensation for the transfer.²³⁵

²³² *Id.* at 166; see also Givelber, *supra* note 39.

²³³ Calabresi & Melamed, *supra* note 44, at 33. The nature of the interest can be determined by the type of protection; property rights and inalienability rules are enforced through ex ante measures such as injunctions, while liability entitlements are protected by ex post actions which correct for the transfer.

²³⁴ Calabresi & Melamed, *supra* note 44, at 33. The lack of an absolute bar on causing mental distress reflects a balance the society has made. In essence, it has determined that for a variety of reasons, we are willing to allow a certain amount of emotional distress in return for some of the benefits that modern society offers. See CALABRESI, *supra* note 167, at 19 ("In accident law too, the decision to take lives in exchange for money or convenience is sometimes made politically or collectively without a balancing of the money value of the lives taken against the money price of the convenience, and sometimes made through the market on the basis of such a value.").

²³⁵ Under Calabresi and Melamed's theory, the hallmark of an entitlement protected by a liability rule is that the valuation of the entitlement is arrived at objectively. Calabresi & Melamed, *supra* note 44, at 33. This corresponds with the function of traditional tort law, which allows a cross section of society as represented in the jury to arrive at an objective evaluation of the value of the entitlement.

A negligently inflicted bystander emotional distress liability determination might be thought of as limning the boundary between private spheres which contain private rights and public spheres—policy decisions—because it touches on both the scope of protection afforded to private associational decisions and public liability concerns. Louis M. Seidman suggests that the location of a decision in the private or public sphere is a consequence of the type of decision to be made. Louis M. Seidman, *Confusion at the Border: Cruzan, "The Right to Die," and the Public/Private Distinction*, in *THE SUPREME COURT REVIEW* 1991 59-60 (1992). Arguably, since decisions to associate and raise children have historically been located

The efficiency argument runs this way: limitless liability would destabilize the economy since actors who might incur this liability could not protect against it.²³⁶ Thus in *Tobin*, the court stated that insurance alone could not cover the losses that it perceived would flow from allowing liability claims: "[T]he aggregate recoveries in a single accident . . . are not likely to stay within ordinary, let alone, compulsory insurance liability limits."²³⁷ Likewise, "[m]anufacturers . . . may be presumed to engage in cost-benefit analysis that quite explicitly take into account the immediate risks to potential personal injury victims. . . . [b]y contrast, the problem of widespread economic loss is all-pervasive."²³⁸ At the other end of the liability spectrum, these concerns also provide a justification for the necessity of showing harm so as to block meritless litigation.²³⁹ Together, these concerns—economic efficiency, fairness, the limits of corrective justice, and the need to establish a threshold for liability—indicate that the action must have both upper and lower boundaries if it is to achieve a balance between interests.

in the private sphere (*see, e.g., Poe v. Ullman*, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting)), the determination of the scope of liability should be premised at least in part on the recognition that these concerns are linked to private decisionmaking, and so should not be unreasonably circumscribed by a utilitarian calculus alone.

²³⁶ *See* Rabin, *supra* note 27, at 951.

²³⁷ *Tobin v. Grossman*, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559-60 (1969).

²³⁸ Rabin, *supra* note 228, at 1533.

²³⁹ Frivolous litigation claims may be seen as unfair to the defendant, *see supra* text accompanying notes 228-31, wasteful of system resources, *see supra* text accompanying notes at notes 199-200, or as a *type of claim*, rather than a *kind of harm*, that is not susceptible of redress by the legal system. Because consideration of the implications of this last claim is beyond the scope of this Note, this Note takes as its starting point the argument that society as currently constituted permits a certain level of background harm. Givelber, *supra* note 39.

In general, the level of injury that a party must show should be analogized to the types of injury that a victim must show to maintain an action. *See Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (discussing types of evidence that would be acceptable to show emotional injury); *see also* Miller, *supra* note 39 (arguing that since damages should be limited to economic losses the only proof that need be shown is evidence of economic loss).

IV. DEVELOPING A FRAMEWORK

A. *Organizing Principles*

As previously indicated, since one of the enduring problems with existing negligently inflicted bystander emotional distress rules is the lack of fit that results from borrowing inapposite rules, it is imperative that any principles imported to construct a framework for this tort bear a relationship to the interests that must be balanced and provide a standard that courts can adopt with a minimum of difficulty. In developing this framework, we should look to see if any spade work has already been performed, i.e. turn to an area of the law that has already wrestled with the difficulties inherent in determining the rights of parties in a world of complex and fluid relationships:²⁴⁰ family law.

At first glance, it might seem that family law would not be a useful source.²⁴¹ After all, family law governs relations between individuals,²⁴² while tort law addresses injury. Tort and family law do not share the same structure, nor a fully coextensive set of principles and policies. Nevertheless, family and tort law share points of intersection that can provide insights into mediating the negligently inflicted bystander emotional distress conflict.

First, it should be noted that family law is not a stranger

²⁴⁰ "The increased complexity and interdependence of modern society renders legal analysis based upon a concept of community that presupposes clear lines of membership, relatively little overlapping, and a fair degree of uniformity in the activities carried on, exceedingly difficult in many cases" Fletcher, *supra* note 206, at 549 n.46.

²⁴¹ Although it might appear that in "borrowing" from family law this Note advocates an approach rooted in "legal pragmatism" this approach is pragmatic only insofar as it is an attempt to suggest a solution to a perceived problem and is not an express embrace of any particular variant of "legal pragmatism." For an introduction to legal pragmatism, see PRAGMATISM IN LAW AND SOCIETY (M. Brint & W. Weaver eds., 1991).

²⁴² Martha Minow has defined family law as "includ[ing] the terrain where legal norms and social experiences of family interact[]" and "[f]amilies themselves . . . initially to embrace social units created by biological and/or affective ties among people who commonly contribute[] to one another's economic, moral, and psychological well-being." Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 825 (citations omitted).

to tort law: consortium is only the most obvious tort predicated on status conferred by family law. Second, family law itself has changed in a manner that suggests further rapprochement with tort law. Since the 1960s, family law has become increasingly "privatized."²⁴³ Claims within family law increasingly center on the rights of individuals within relationships; marriage, for example, has come to be seen as less of an economic partnership and more of a means to self fulfillment, with a consequent loosening of the restrictions upon entering and leaving it.²⁴⁴ Although the rights-based approach has been criticized for facilitating the weakening of the family as a buffer between the state and the individual,²⁴⁵ this approach can provide important insights into the resolution of the negligently inflicted bystander emotional distress dilemma precisely because it considers the value of relationships between individuals rather than relying on traditional status-based analysis. The jurisprudential methodology developed to generate rights ordering in the unwed fathers' rights cases²⁴⁶ can be used in a relational context to generate a negligently inflicted bystander emotional distress framework. Finally, the functional-family approach, which determines the degree of protection accorded a relationship based on an appraisal of whether the relationship functions in the same fashion to promulgate values in traditional family arrangements, can serve as the theoretical template for a negligently inflicted bystander emotional distress framework because, as previously noted, the injury is a function of the relationship.²⁴⁷ Because the functional-family analysis tracks the substance rather than the status of the relationship, the methodology developed in these cases

²⁴³ See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); Jana P. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

²⁴⁴ GLENDON, *supra* note 243, at 298-311; LASCH, *supra* note 47; Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959 (1987); Singer, *supra* note 243, at 1508-67.

²⁴⁵ See, e.g., GLENDON, *supra* note 243, at 298-311. For a criticism of the rights-based approach and a suggested alternative based on relational concerns, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

²⁴⁶ See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (citing *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972)).

²⁴⁷ See *supra* text at notes 34-39.

has specific usefulness for negligently inflicted bystander emotional distress in shaping both the scope of the tort and its underlying policy concerns.

As previously noted, the New York Court of Appeals has made use of the functional—family approach in a variety of contexts. In a series of zoning cases the court held that a group of unrelated individuals should be considered family for purposes of the statute where they live together in a fashion so as to form “the functional equivalent of a family.”²⁴⁸ In *Braschi v. Stahl Associates Co.*²⁴⁹ the court construed a rent-control statute as including as family a person whose relationship with the protected tenant was functionally the equivalent of a traditional family.²⁵⁰ Most recently, in *In re Jacob*,²⁵¹ the court held that the state’s adoption statute did not preclude a child’s adoption by the unmarried partner of the biological parent, finding that allowing those “who actually function as a child’s parents” to adopt accorded with statutory policy.²⁵²

While these decisions indicate that the court is not averse to applying the functional—family concept in certain contexts, it has refused to do so in others, most notably in *Trombetta*. The court also refused to apply the functional—family test in another adoption case, *Alison D. v. Virginia M.*²⁵³ In that case, the court refused to find that a homosexual former partner of a biological parent could be considered a parent for purposes of visitation rights.²⁵⁴

Reconciliation of these cases suggests the court used the functional-family analysis whenever the question presented concerned the rights of a family unit versus third parties. In

²⁴⁸ *Group House of Port Washington, Inc. v. Board of Zoning*, 45 N.Y.2d 266, 274, 380 N.E.2d 207, 211, 408 N.Y.S.2d 377, 381 (1978); see *supra* note 162 (citing cases).

²⁴⁹ 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (applying functional-family test to determine if a live-in companion qualifies as family member under rent-control statute).

²⁵⁰ In its decision, the court noted that the definition it adopted was “completely unrelated” to the analysis in the zoning cases. *Id.* at 212 n.3, 543 N.E.2d at 54 n.3, 544 N.Y.S.2d at 789 n.3. Nevertheless, the actual test adopted is one that gives protection under the statute to any household “having all of the normal familial characteristics.” *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

²⁵¹ 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995).

²⁵² *Id.* at 658, 660 N.E.2d at 399, 636 N.Y.S.2d at 718.

²⁵³ 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) (per curiam).

²⁵⁴ *Id.* at 657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

Braschi, the court employed a functional-family type analysis to give greater protection to the relationship.²⁵⁵ Likewise, in the zoning cases, the court gave protection to *groups* that acted as a family unit,²⁵⁶ and in *In re Jacob* the court acted to strengthen the family unit by allowing an adoption.²⁵⁷ In contrast, the court refused to grant visitation rights where this right would curtail the right of the biological parent.²⁵⁸ The functional-family test, then, is applied when its application would preserve or further a familial unit, but not when its application will infringe existing relational rights, or otherwise delegitimize the status of existing relationships.²⁵⁹ So long as there is no conflict with a preexisting right the court will recognize the interest.

This analysis might reasonably be contested on the ground that the cases adopting the functional-family analysis were cases that construed statutes, and so bear no relationship to each other.²⁶⁰ While it is beyond debate that the immediate

²⁵⁵ *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 53-54, 544 N.Y.S.2d 784, 789 (1989).

²⁵⁶ See *infra* note 262.

²⁵⁷ "[P]ermitting the adoptions allows the children to achieve a measure of permanency with both parent figures . . ." *In re Jacob*, 86 N.Y.2d 651, 659, 660 N.E.2d 397, 399, 636 N.Y.S.2d 716, 718 (1995).

²⁵⁸ *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656, 572 N.E.2d 27, 29, 569 N.Y.S.2d 586, 588 (1991).

²⁵⁹ This argument suggests that if individuals can achieve the same benefits through an informal act as they can through a formal act such as marriage, then the status of the institution will diminish. See *Jacob*, 86 N.Y.2d at 669, 660 N.E.2d at 406, 636 N.Y.S.2d at 725 (arguing that court should not endow "at will" relationships with benefits conferred by formal legal status) (Bellacosa, J., dissenting).

This argument assumes that we enter into marriages because we will obtain protection for this type of harm. Leaving aside the question of relationships not currently given state-backed status, such as same-sex relationships, this argument is flawed for two reasons. First, negligently inflicted bystander emotional distress is not a substitute for consortium. See *supra* note 37. Second, the structure of the current rule—recovery only to those in the zone of danger—is a test based on physical proximity rather than relationship. The addition of the physical proximity requirement does nothing to further the policy of marriage unless we believe that spouses will always be in the same zone of danger. Finally, this argument—assuming that preventing unmarried cohabitants from recovering will promote marriage—misses the mark, for the argument for allowing recovery does not rest on the status of marriage, but rather on the injury suffered as a result of the plaintiff's relationship with the victim.

²⁶⁰ A related argument might be made that this reconciliation occurs at an unjustifiably high level of abstraction, so that the reconciliation is unprincipled.

issue at hand in each case was one of statutory construction, the relevant question was "What is the purpose of the statute?"²⁶¹ In each case that adopted a functional-family test, the court construed the statute before it in a manner that furthered legislative policy and, in doing so, found that a functional-family analysis best furthered that purpose, where the purpose was articulated as the furtherance of the values present in the family.²⁶²

Two objections remain. First, the functional-family analysis has been applied only in the context of statutory interpretation. This suggests that the court is unwilling to apply the analysis in common law decisionmaking, perhaps because it is comparatively easy to cabin its use in a statutory context. Second, as noted above, the court has not used the analysis when there is a conflict that could reduce the scope of an existing familial bond. Protection is extended to the unit, not the individual. The court's refusal to adopt the functional-family analysis to determine liability in a *Trombetta*-type situation, (allowing it to define a truly "discrete" class of bystander plaintiffs), flows from the lack of a methodology to ascertain the

The problem with this argument is that it is an argument against coherence. Thus, Justice Scalia's resort to the most specific level in the due process context requires a finding of the most specific level; if one cannot be found, a higher level of abstraction is used. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). Even if coherence is rejected as a value in a legal system, these cases may be understood as individual examples of instrumental decisionmaking, here understood as the promotion of families for the values they inculcate. See Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984).

²⁶¹ "It is fundamental that in construing the words of a statute '[t]he legislative intent is the great and controlling principle.'" *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 207, 543 N.E.2d 49, 51, 544 N.Y.S.2d 784, 786 (1989) (citations omitted). See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (in the process of interpreting a statute, an interpreter "must do so in the way which best serves the principles and policies [the statute] expresses").

²⁶² See, e.g., *In re Jacob*, 86 N.Y.2d 651, 659, 660 N.E.2d 397, 399, 636 N.Y.S.2d 716, 718 (1995) (statutory purpose of promotion of child's best interests furthered by use of functional-family analysis); *Braschi*, 74 N.Y.2d at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 789 (purpose of preventing dislocation furthered by preserving "family units"); *Group House of Port Washington, Inc. v. Board of Zoning*, 45 N.Y.2d 266, 274, 380 N.E.2d 207, 209-10, 408 N.Y.S.2d 377, 381 (1978) (purpose of zoning statute is to further family values and recognition of group as family will further this purpose).

scope of rights of individuals within²⁶³ a nontraditional unit.

To resolve this dilemma, we must turn to the family law jurisprudence of the United States Supreme Court. While the Supreme Court's decisions in the area of due process and family rights are not made with the interests considered here in mind, the Court's efforts to establish a framework to determine the scope of individual rights in relation to other individuals provide a method and rationale for setting a standard to develop the rights of individuals in the negligently inflicted bystander emotional distress context, because in resolving these cases the Court has had to establish a methodology for ordering conflicting interests.²⁶⁴ Furthermore, in these decisions, the Court has recognized the importance of emotional attachments: "the constitutional shelter afforded such [personal] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others."²⁶⁵ Moreover, this methodology accords protection only to those interests deemed worthy of protection in other contexts.²⁶⁶

The most recent exposition of the Court's standard can be found in *Michael H. v. Gerald D.*²⁶⁷ In that case, the Court upheld a California statute that created an irrebuttable evidentiary presumption that a child born to a married couple

²⁶³ This Note will not address the case of the true bystander, e.g., the total stranger who witnesses an accident. Whether an individual who lacks any connection with the victim should recover damages based upon their perceptions of an incident requires a consideration of a set of concerns distinct from those considered here. First, the potential class of claimants is limitless. Second, since a true spectator lacks any nexus with the victim, it can be argued that entertaining these claims would require the abandonment of an objective standard of reasonableness because each plaintiff's claim would have to be adjudicated in the context of their own response. Finally, this Note argues that the rationale for extending liability is premised upon the link between the victim and the plaintiff; the unrelated bystander by definition lacks any such relationship and so suffers no injury to an affectational bond.

²⁶⁴ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion holding that state evidentiary presumption evinced a determination to accord primacy to father by marriage over biological father); *Lehr v. Robertson*, 463 U.S. 248 (1983) (greater due process protection—with consequent impingement on others—will be given a father who has "played a substantial role in raising his child" than to a mere biological father). *Id.* at 261-62 & nn.16-18; Minow, *supra* note 244; see also Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) (hereinafter "Developments").

²⁶⁵ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

²⁶⁶ See *infra* notes 269-73.

²⁶⁷ 491 U.S. 110 (1989).

living together was the product of the marriage.²⁶⁸ A man who had had a sexual relationship with a married woman who later had a child challenged the statute on due process grounds. A blood test showed that he had a greater than ninety-seven percent probability of being the father. Writing for the plurality, Justice Scalia rejected the claim, noting that the initial question for the Court when confronted with an assertion of a right of this order is to determine if the "asserted liberty interest [is] rooted in history and tradition."²⁶⁹ He held that the determination of whether an interest is in fact rooted in tradition may be resolved by looking to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."²⁷⁰ Here the Court looked to the history of the evidentiary presumption, and concluded that it established a tradition against awarding rights to a biological father in this instance.²⁷¹ Thus the initial question in determining if protection should be afforded is whether a societal tradition exists favoring the asserted right.

While at first glance it might seem odd to import this methodology into the negligently inflicted bystander emotional distress context, there are compelling reasons for its importation. In *Michael H.* the Court had to resolve competing claims, both of which had merit, rather than simply expand the level of protection to a person who had previously been denied it. The context—conflict and a need to order claims—is akin to the conflict New York courts face in debating the scope of legal legitimacy for those in nontraditional units. Second, the plurality suggests a rule that points to other indicia and so prevents the creation of indeterminate and difficult to define protections. Finally, the fact that the decision in *Michael H.* is the product of a search for the relevant level of generality for due process analysis is not a bar to its application; rather, it

²⁶⁸ *Id.* at 131-32.

²⁶⁹ *Id.* at 123. See also *Developments, supra* note 264, at 1177 ("In the family cases, the Court has consistently turned to tradition as a source of previously unrecognized aspects of the liberty protected by the due process clauses.").

²⁷⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989).

²⁷¹ *Id.* at 129 n.7 ("[W]e rest our decision not upon our independent 'balancing' of such interests, but upon the absence of any constitutionally protected right to legal parentage on the part of an adulterous natural father in Michael's situation, as evidenced by long tradition. That tradition represents a 'balancing' test that has already been made by society itself.").

provides an additional reason for the importation of its approach. In *Michael H.*, the Court's mission was to define the amount of protection that an interest should have. The plurality did so not by creating a new right, but rather by applying a methodology that looked to existing rules to ascertain if the interest asserted had support elsewhere in the law. This approach suits the negligently inflicted bystander emotional distress context admirably. In determining whether an interest has been injured, the project is not creating a new right, but rather looking at whether the interest affected is protected in other contexts for the same reason; that is, if it is protected in other contexts in order to further values that are similar to those protected by negligently inflicted bystander emotional distress claims, then it should be protected in the negligently inflicted bystander emotional distress context as well. The premises driving the methodology in *Michael H.*—the need to prioritize, limn, and define a right based on the degree of protection received in other contexts—are strikingly similar to the need in the negligently inflicted bystander emotional distress context to protect and limit the protection of the interest with reference to existing standards.²⁷²

²⁷² Justice Scalia's approach in *Michael H.* has not escaped criticism. Most of this criticism revolves around two issues. First, the requirement of the most specific level at which the tradition operates is a cramped view that fails to consider changes in American mores. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 136-57 (1989) (Brennan, J., dissenting); Tribe & Dorf, *supra* note 16. In response, it should initially be noted that in the tort context the concerns are not coextensive with the due process concerns implicated by this decision. Second, as noted below, a functional-family analysis must take into account changing morés. See *infra* note 273. This Note adopts Justice Scalia's approach for two reasons. First, it is the most restrictive, and so provides the greatest level of restraint on the number of potential plaintiffs. Second, it opts for a relatively straightforward methodology, which answers the objection that any negligently inflicted bystander emotional distress formula is hopelessly vague.

Two further objections can be made. First, the method is overly mechanical. This objection is not applicable in the negligently inflicted bystander emotional distress context. A judge applying this method would have to ascertain not only if relevant traditions existed, but whether these traditions provide protection for the same reasons—to further the values that we associate with negligently inflicted bystander emotional distress interests. Absent this symmetry, there is no reason to provide protection. The second objection—that this methodology is inherently restrictive (read conservative) because it is backward rather than forward looking—is correct, but misplaced. It must be emphasized that the intent here is not to create a new right, but rather to protect existing interests which are not currently recognized in the bystander context. The assumption here is that if it is protected else-

Tradition alone cannot provide the sole criteria for determining the scope of individual rights; at a minimum, tradition must be interpreted in a fashion consonant with the values that underlie the historic protection.²⁷³ The limits of an approach that limits itself to a consideration of whether the action is historically favored is evident in its application of negligently inflicted bystander emotional distress claims. Historically, negligently inflicted emotional distress actions have been limited not because of a tradition of societal disapproval, but because of fears of widespread liability and fraud.²⁷⁴ Thus New York courts have denied recovery even as they have found that the harm is legitimate.²⁷⁵ Commentators have argued that when considering the scope of due process rights that should be accorded to a family unit, the Supreme Court has made its determinations on the basis of whether the unit under scrutiny operates to preserve the same values that a traditional family does.²⁷⁶ If the Court finds that the values it has

where, then it can be protected in this context.

A further objection may be made on the basis that the rule is content sensitive because a judge may opt for a particular level of generality to ascertain if a relevant tradition exists. While the jurisprudential concerns implicated by this argument are beyond the scope of this Note, it may be observed that this concern is less pressing in this context since determining whether an otherwise recognized interest should be protected by a liability rule is a different operation than whether an interest should be recognized in any context. Like the argument as to the relevant level of generality in the elaboration of rights, this argument is beyond the scope of this Note. For a discussion as to the appropriate level of generality to select, see Tribe & Dorf, *supra* note 16, and Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

²⁷³ Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977); see also Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 842-45 (1977) (discussing definition of "family" and finding that it may be other than biological). In the plurality opinion, Justice Scalia seemed to note the need for flexible analysis, noting that his analysis could lead to a different result given a different set of facts: "We limit our pronouncement to the relevant facts of this case because it is at least possible that our traditions lead to a different conclusion [where there is no conflict between the parties]." *Michael H.*, 491 U.S. at 129 n.7. Precisely what constitutes a family for decisional purposes is left open; the decision expressly limits itself to finding that a due process interest is not exhibited in this case. *Id.* at 123 n.3.

²⁷⁴ See McNiece, *supra* note 17.

²⁷⁵ Tobin v. Grossman, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 560 (1969) (refusing to allow recovery for an emotional distress claim on the part of a mother whose son was injured but noting, "Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential physical harm.").

²⁷⁶ *Developments*, *supra* note 264 at 1177-87. Martha Minow suggests that the

historically protected are present, then the Court affords the group protection, regardless of its formal status.²⁷⁷ Because negligently inflicted bystander emotional distress also operates to protect the same values, the same approach—coupling traditional values with a functional approach²⁷⁸—can be used to determine the scope of liability in a negligently inflicted bystander emotional distress action.

This approach accords protection to a relationship whenever the relationship operates to protect the same traditions that serve as the justification for the protection of other relationships.²⁷⁹ This approach not only seeks to preserve core values traditionally protected, but also gives a court more flexibility to fashion substantive rules, since the application of a content-based standard rests upon the values that deserve protection rather than the legal status of the parties.

B. Application

1. Negligently Inflicted Bystander Emotional Distress as a Historically Protected Interest

The threshold question under the plurality's theory articulated in *Michael H.* is whether society has demonstrated a desire to protect the interest.²⁸⁰ The hodgepodge of rules developed over the years indicates that society does value the protection of emotional well-being, even if it cannot come to a clear consensus as to what the scope of that rule should be. The elimination of the requirement of physical impact for a direct emotional injury such as fright demonstrates that society values the protection of emotional well-being sufficiently highly as to allow an action that lacks a physical injury.²⁸¹

Similarly, society has demonstrated a willingness to pro-

approach adopted in the family law cases is a rights approach cloaked in the rhetoric of tradition. Minow, *supra* note 244.

²⁷⁷ See *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977).

²⁷⁸ *Developments*, *supra* note 264, at 1182. Cf. MINOW, *supra* note 245 (advocating a relational rather than pure rights-based approach).

²⁷⁹ *Developments*, *supra* note 264, at 1182.

²⁸⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 129 n.7 (1989).

²⁸¹ See *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (eliminating requirement of physical impact in claim for negligent infliction of emotional distress).

tect the emotional interests of the indirectly affected. The earliest examples of this protection are found in the cases that allow recovery for the negligent mishandling of a corpse, or a message regarding the death of a loved one.²⁸² Although it has been argued that the negligent party owed a duty to the person who received the message or who witnessed the mishandling, and that the liability springs from the creation of that duty,²⁸³ the better explanation for liability where the plaintiff is a bystander is the relationship between the deceased and the plaintiff.²⁸⁴ Since no tort duty to bystanders exists in the absence of a relationship,²⁸⁵ the existence of a relationship provides the criterion for establishing liability.

Other rules such as the zone of danger rule and the *Dillon* foreseeability test also indicate that an emotional interest is protected by negligent infliction claims; the debate has centered on the scope of liability rather than the validity of the claim. While each rule limits the class of persons who may recover, none is an absolute bar, thus demonstrating society's determination to protect that interest as well as rooting it in tradition.

In *Michael H.*, Justice Scalia found that the best method to determine the appropriate level of protection for a right was to place that right at the "most specific level" at which it could

²⁸² See *Speigel v. Evergreen Cemetery Co.*, 186 A. 585, 588 (N.J. 1936) (liability for emotional distress imposed where cemetery firm did not bury father with family members present as per agreement); *Gostkowsky v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 232 N.Y. 320, 186 N.E. 798 (1933) (damages awarded for disinterring of wife's corpse and reburial in another plot without permission); see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 63 nn.81-88 (5th ed. 1984) (collecting cases); see also Green, *supra* note 15, at 489.

²⁸³ *Johnson v. State*, 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590 (1975) (liability imposed where hospital negligently informed daughter that mother had died; court found duty running to daughter).

²⁸⁴ See *Speigel v. Evergreen Cemetery Co.*, 186 A. 585, 588 (N.J. 1936) (holding that the defendant's failure to bury father in accord with instructions "was a wrongful invasion of plaintiffs' relative rights springing from the civil and domestic relations. It was a 'legally protected interest' of the plaintiffs, the tortious invasion of which is actionable and makes the actor liable for mental or emotional distress.").

²⁸⁵ *Johnson v. State*, 37 N.Y.2d 378, 383, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 643 (1975). While the court distinguished *Tobin* on the ground that the injury was "direct," the basis for the duty was the existence of the mother-daughter relationship. *Id.*

be asserted.²⁸⁶ Since the tradition of support for this claim exists, the next defining act must be the establishment of the most specific level. For negligently inflicted bystander emotional distress, the most specific level must be within the context of the family, functionally defined. Case law demonstrates that when recovery is permitted under less restrictive circumstances, the requirement of a relationship with the victim remains.²⁸⁷ This relationship must be substantial; it cannot be mere acquaintance.²⁸⁸ Parties who can claim injury are those who stand in the position of family member.²⁸⁹ Therefore, the scope of the right asserted (the ability to maintain an action for negligently inflicted bystander emotional distress) should be limited to those who stand in the position of family member.

The threshold question for determining family membership should be based upon a functional analysis rather than a rule-bound application; the family is afforded protection because of its function, not its status.²⁹⁰ Because the family is the repository of so many fundamental values, the role that individuals play in the family is important, not their formal relationship.²⁹¹ Defining the family in functional terms has

²⁸⁶ *Michael H. v. Gerald D.*, 491 U.S. 110, 129 n.7 (1989).

²⁸⁷ This requirement is shown in the third prong of the *Dillon* rule, as modified by *Elden* and *La Chusa*, so that only parties who can show a specific relationship with the victim can recover. See *supra* note 93. States that have adopted the *Dillon* test have also kept this requirement. See, e.g., *Champion v. Grey*, 478 So. 2d 17, 20 (Fla. 1985) (requiring "an especially close emotional attachment to the directly injured person"). Generally, when the state has clung to a more restrictive rule, such as the zone of danger rule, the importance of the familial relationship is less (indeed, under a pure zone of danger rule, a stranger could recover); but see *RESTATEMENT (SECOND) OF TORTS* § 313 (Reporter's Notes 1963) (no recovery for emotional distress resulting from harm to another for those who are unrelated to the victim).

²⁸⁸ *Champion*, 478 So. 2d at 20.

²⁸⁹ See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 n.53 (1977) ("the legal status of families has never been regarded as controlling [for due process purposes]").

²⁹⁰ *Id.* As Justice Harlan has noted:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

²⁹¹ See *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977); *Jimenez v.*

other advantages as well. Because a functional-family definition restricts the scope of liability in a manner that does not rely on the use of any other category such as gender, it avoids injustice.²⁹² Additionally, it recognizes that many American families no longer resemble two parent households.²⁹³ A functional approach that builds upon the traditions recognized in the common law gives courts the flexibility they need to decide cases in a fluid society based upon a clear and easily definable premise: so long as the actor functions in a manner consistent with a member of a traditional household, that person will fall within the ambit of the rule.

C. *Fashioning a Remedy*

Since a functional family relationship that preserves traditionally protected values also demonstrates the presence of an affectational bond, protecting such a relationship suggests the scope of the remedy. Only those who have a relationship that furthers values synonymous with those that provide the rationale for originally according protection to the family should be able to maintain an action. Darlene Trombetta, who had a mother-daughter relationship with her aunt, or a same-sex couple raising children could maintain an action, but parties to an incestuous relationship could not: only the first two examples further values thought important. While this test resolves the threshold issue of establishing a class of potential plaintiffs, it does not address the question of which of these plaintiffs have suffered a cognizable harm. Not every person who meets the threshold relational criteria necessarily should be able to recover for negligently inflicted bystander emotional distress if they did not actually suffer emotional distress as a result of the injury to the victim. The answer to this problem lies in the application of traditional tort principles, because the

Weinberger, 417 U.S. 628 (1973) (denial of food stamp benefits to unrelated members of a household held denial of equal protection).

²⁹² See *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down on equal protection grounds New York statute that barred the unwed father the right to block an adoption).

²⁹³ See *supra* note 48 and accompanying text.

traditional requirements of showing both a causal relationship as well as damages allows for the use of time-tested principles to be applied to this tort.

1. Causation

Recovery in negligence is predicated upon the violation of a normative standard; that is, a wrong.²⁹⁴ Absent an act, there is no recovery.²⁹⁵ In other words, in the negligently inflicted bystander emotional distress situation, a plaintiff must show that the defendant's act that injured the victim did in fact cause the emotional distress that the plaintiff suffered. Usually the analysis will be straightforward; for example, in Darlene Trombetta's case, the question of cause is not difficult to resolve since she alleged that she suffered emotional distress as a result of witnessing her aunt's death. In other cases, the doctrines of cause in fact and proximate cause provide a suitable level of restriction to prevent spurious claims.

Assuming a relationship such that a duty exists, a court might still find that the particular accident was unforeseeable, or too removed causally to allow recovery. Causation doctrine (cause in fact and proximate cause) has been invoked both as a device for extending liability and as a device for limiting it, depending upon the conduct at issue.²⁹⁶ The argument that negligently inflicted bystander emotional distress recovery is problematic because it is impossible to define the foreseeable plaintiff has been asserted in New York.²⁹⁷ This argument, based on the California experience, misses the point. The threshold question is not foreseeability but duty.²⁹⁸ Foreseeability and proximate cause limit liability where a duty already exists. By using proximate cause to examine the causal relationship between the defendant's act and the harm, rather than to establish a class of plaintiffs, courts can use these familiar doctrines to screen cases for the requisite causal connection.

²⁹⁴ Weinrib, *supra* note 222, at 525.

²⁹⁵ COLEMAN, *supra* note 171, at 212 (footnote omitted).

²⁹⁶ See HART & HONORE, *supra* note 97, at 262-66.

²⁹⁷ Tobin v. Grossman, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 560 (1969).

²⁹⁸ See *supra* notes 97-99.

Two cases illustrate the advantages of this approach. In *Ochoa v. Superior Court*,²⁹⁹ the California Supreme Court found that the mother of a child who had died as a result of negligent treatment had stated a claim for negligently inflicted bystander emotional distress under the *Dillon* formula even though the harm she suffered came about over a period of several days as her son's condition deteriorated. The court held that she could recover even though there was no sudden accidental occurrence.³⁰⁰ In *Kelly v. Kokua Sales and Supply Ltd.*,³⁰¹ the Hawaii Supreme Court imposed a proximity limit on negligently inflicted bystander emotional distress actions. The court refused to allow liability where the grandfather living in California died from shock upon receiving word that his granddaughter had been killed in an auto accident in Hawaii. The court held that the defendant was not liable because the plaintiff was not located a reasonable distance from the scene.³⁰²

In the case of Ms. Ochoa, the record indicates that she did in fact function as the decedent's mother.³⁰³ In this case, she would meet the threshold requirement as a potential plaintiff. Application of traditional proximate cause doctrine would demonstrate that her son's death was both the cause in fact and the legal cause of her emotional injury.³⁰⁴ So long as she could prove the remaining elements of negligence she would be able to maintain an action. In the case of Mr. Kelly, the answer to the threshold question is not clear from the record, however, it is unlikely that if he lived in California while his daughter lived in Hawaii that they had a relationship that currently furthered protected values.³⁰⁵ Absent such a show-

²⁹⁹ 703 P.2d 1 (Cal. 1985).

³⁰⁰ *Id.* at 7.

³⁰¹ 532 P.2d 673 (Haw. 1975).

³⁰² *Id.* at 676.

³⁰³ *Ochoa v. Superior Court*, 703 P.2d 1, 6 (Cal. 1985).

³⁰⁴ *Id.*

³⁰⁵ This case also illustrates the necessity of requiring a potential plaintiff to show that the relationship which they claim functions as a family is current; otherwise an estranged family could well recover, as could a blood relative who had not seen her daughter in twenty years. In this situation, it is unlikely that the person would suffer severe emotional distress since the affectational bond by definition is likely to be less strong. BOWLBY, *supra* note 34, at 103; Liebson, *supra* note 20, at 196.

ing by the plaintiff, the plaintiff could not recover. Liability determinations may be made in a fashion consonant with the principles underlying the tort, rather than crudely limiting liability by deciding that Mr. Kelly is not reasonably located near his daughter. This is a determination that bears no relationship—other than an effort to limit liability—to the issue presented.

D. *Damages*

The other requirement is the traditional one of damages. In order to ultimately collect damages, the plaintiff must prove injury; absent a showing of harm there can be no recovery. Like other torts, negligently inflicted bystander emotional distress protects the invasion of a specific interest; it does not protect against the slings and arrows of misfortune, sadness, or loss.³⁰⁶ Similarly, it is not an action for consortium, and so the loss of a loved one will not, by itself, make out a claim for negligently inflicted bystander emotional distress.³⁰⁷ Rather, the loss must induce a shock and attendant manifestations of emotional distress in the person who suffers it so that recovery is justifiable. To make out a case for negligently inflicted bystander emotional distress, then, a claimant must show that she or he has suffered emotional distress as a result of the shock occasioned by a harm to the victim.³⁰⁸ In 1961, the court of appeals recognized that it was possible to prove emo-

³⁰⁶ This is nothing other than the recognized principle that absent the invasion of a protected interest, there is no cognizable harm. See, e.g., Rabin, *supra* note 27, at 951; cf. HOLMES, *supra* note 229, at 110.

³⁰⁷ This distinguishes the negligently inflicted bystander emotional distress action from consortium; while a person could recover in a consortium action for the loss of services even if they did not witness the injury to the spouse, they could not recover for negligently inflicted bystander emotional distress unless they pled and proved a cognizable emotional harm to themselves which flowed from their perception of the injury to the victim. Thus a spouse might recover for consortium but not negligently inflicted bystander emotional distress, while an unrelated caretaker could recover for negligently inflicted bystander emotional distress alone.

³⁰⁸ See Liebson, *supra* note 20, at 195-201; *Negligently Inflicted Mental Distress*, *supra* note 20, at 1256-62. The damages flow not from the shock itself, which is evanescent, but from the trauma occasioned by the shock. "From a medical perspective, mental distress resulting from a negligent act can be characterized as a reaction to a traumatic stimulus." *Negligently Inflicted Mental Distress*, *supra* note 20, at 1248 (citations omitted).

tional distress to a jury without the need to show an impact.³⁰⁹ In evaluating the seriousness of emotional distress, New York courts have the advantage of over thirty years of determining the genuineness of an emotional distress claim, in addition to any subsequent medical advances in the determination of distress from a response to psychic stimuli.³¹⁰

Nevertheless, courts often assert the difficulty of proving damages as a rationale for denying liability, despite the reality that the devices for determining damages are at hand. Here the damages question consists of two parts: establishing the relationship and establishing the harm. Since emotional distress is manifest in the same form in both the victim and the related bystander, techniques already in use for identifying emotional distress in plaintiffs can be used with the same facility to discern the degree of harm a related bystander suffers.

In making a determination, two further questions must be asked. Is this relationship one that operates to preserve traditionally protected values? Did it operate in this fashion in this instance? The first question considers the function of the relationship; the second considers the specific evidence available to consider the magnitude of the injury.

The functionality issue turns on the application of the standard outlined above to limit liability. Plaintiffs would have to demonstrate first that the relationship promoted values that

³⁰⁹ *Battalla v. New York*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 37 (1961) ("In the difficult cases, we must look to the quality and genuineness of proofs and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims.").

³¹⁰ Although the *Trombetta* court cited the fear of fabricated claims as one of the rationales for denial of liability, the court did not offer any explanation to distinguish the determination of a negligently inflicted emotional distress claim from a negligently inflicted bystander emotional distress claim. The validity of the distinction is dubious, for while the cause of the injury is different, the nature of the injury may be the same.

This Note does not address the argument from incommensurability. Whatever the merits of this argument, it has been implicitly rejected in this context through the allowance of recovery for psychic harm absent a physical injury. Moreover, since negligently inflicted bystander emotional distress is a tort based upon an injury to a person, rather than a recovery permitted on the basis of status, the arguments advanced against extending consortium damages are not applicable here. *Cf. Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977) (refusing to extend consortium recovery to allow children to recover for injury to parent on policy and incommensurability grounds); see generally *Duxbury*, *supra* note 205.

the Supreme Court has identified as worthy of protection.³¹¹ This would require a showing at a low level of generality that the identified values historically were protected, and that the relationship at issue functioned to further these identified values. For example, Darlene Trombetta could identify the values protected in her relationship with her aunt as those coextensive with a mother-daughter (or at a slightly higher level of generality, parent-child) relationship. She would then have to show that the relationship did indeed further these values. So long as the claimant could show that the relationship with the victim functioned in a manner that upheld traditionally protected values, this relationship would be recognized for negligently inflicted bystander emotional distress purposes regardless of its actual form. Since the form is secondary to function, the claimant must also demonstrate that the relationship did actually promote these values.

Courts have often resisted negligently inflicted bystander emotional distress claims on precisely this point, arguing that any determination of liability would entangle them in a morass of evidentiary problems. In fact, evidentiary standards already exist to determine the validity of the claim. Since the standards for determining the emotional distress suffered are already available, the resolution of a claim turns on the evaluation of the relationship. In defining evidentiary standards to evaluate the relationship, New York can draw on the rules it has already established in its functional-family and consortium decisions.

These decisions provide a series of guidelines for establishing if a relationship was of a kind that is worthy of protection. Functional—family guidelines require that the parties hold themselves out in a fashion that indicates a relationship, demonstrate a measure of permanence, and fulfill a role that a traditional unit would fulfill (e.g., spousal or parent-child).³¹²

³¹¹ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 & n.12 (1977). The values identified are in a sense functional, in that the protection accorded the family (or similar associational groups) is based upon their function as dominant societal value reproduction engines rather than as inculcators of specific values. See *id.* at 503-04: "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." (footnote omitted). See generally LASCH, *supra* note 47.

³¹² In *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784

Consortium rules provide additional standards by which to determine the degree of harm suffered. Like negligently inflicted bystander emotional distress, the tort of consortium attempts to provide a remedy for an intangible wrong.³¹³ The scope of the injury, and awards of consortium damages derive from accepted negligence and evidentiary rules.³¹⁴ The simi-

(1989), the court of appeals identified several factors to determine whether a homosexual couple could be considered a functional family for the purposes of New York City's rent-control laws. The court stated the determination

should be based upon an objective examination of the relationship of the parties. In making this assessment, [a court should look to] a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.

Id. at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. See *infra* note 319; see also James D. Esseks, *Recent Developments*, 25 HARV. C.R.-C.L. L. REV. 183 (1990).

Given the broad range of factors the *Braschi* court deemed useful for making a determination of familial status in this context, the argument that it would be too difficult to ascertain the nature of the relationship in a negligently inflicted bystander emotional distress case seems disingenuous. Considering the well-known scarcity of rent-controlled apartments in Manhattan, it is unlikely that fraud is less of a problem in the context of succession rights to low cost apartments in New York than it would be in the context of negligently inflicted bystander emotional distress claims. Finally, as previously noted, the court fails to provide a rationale for the use of the functional-family or *Braschi* tests in some contexts but not others. See *supra* notes 161-63. A court might well consider establishing a different set of rules, but to argue that it is not possible to ascertain the nature of the relationship is disingenuous given the tests already in use.

³¹³ "The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more." *Millington v. Southeastern Elevator Co., Inc.*, 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968) (citations omitted) (upholding right of wife to maintain action for loss of husband's services). As the court noted in *Millington*, the argument that these intangible damages are too conjectural to measure is meritless, for this would mean that pain and suffering damages likewise could not be compensable. *Id.* at 507, 239 N.E.2d at 902, 293 N.Y.S.2d at 312. The sole evidentiary distinction is the formal proof of marriage, but status is not relevant to the determination of the quality of the injury. Finally, the possibility of double recovery for emotional distress and consortium can be avoided through adjustment of damages or a joint trial. *Id.* at 502, 239 N.E.2d at 899, 293 N.Y.S.2d at 307.

³¹⁴ *Id.* at 507-08, 239 N.E.2d at 902, 293 N.Y.S.2d at 311-12. See also *Delosovic v. City*, 143 Misc. 2d 801, 541 N.Y.S.2d 685 (New York County 1989), *aff'd*, 174 A.D.2d 407, 572 N.Y.S.2d 857 (1st Dep't), *appeal denied*, 79 N.Y.2d 751, 588 N.E.2d 96, 580 N.Y.S.2d 198 (1991) (holding that consortium claim could be maintained by husband of mother who witnessed her two children run over by tractor trailer while crossing street with plaintiff where mother was in zone of danger but not physically injured).

larity in the type of injury that is quantified in consortium claims provides a useful, ready-to-use method to determine the scope of damages in a negligently inflicted bystander emotional distress action.³¹⁵ Thus the New York courts already have at hand the tools to readily determine the validity of the plaintiff's claim.

Courts that do allow negligently inflicted bystander emotional distress claims have adopted rules which could also serve as a model. In 1994 the New Jersey Supreme Court held in *Dunphy v. Gregor*³¹⁶ that a fiancé could recover damages for emotional distress suffered as a result of watching her fiancé, who was changing the tire on a friend's car, being struck by another car and then dragged to his death. Noting that "[t]he quality of the relationship creates the severity of the loss," the court allowed recovery.³¹⁷ Finding that the degree of harm suffered rested upon an investigation of the nature of the relationship, the court found "no special obstacles in the context of bystander liability."³¹⁸ In its decision, the court noted that similar investigations were made into personal aspects of relationships in context, and proposed a set of factors to use to evaluate the relationship.³¹⁹ The decision recognized

³¹⁵ See, e.g., *Delosovic*, 143 Misc. 2d at 812, 541 N.Y.S.2d at 693 ("A zone of danger' injury to a person's emotions is a violation of an independent duty of reasonable care owed to that person and a spouse is therefore entitled to pursue a consortium claim.").

³¹⁶ 642 A.2d 372 (N.J. 1994).

³¹⁷ *Id.* at 377-78.

³¹⁸ *Id.* at 378.

³¹⁹ *Id.* at 379 ("the fact that people are unmarried does not make that inquiry any more intrusive or problematic"). The determination of the quality of the relationship

must be guided . . . "by a standard that focuses on those factors that identify and defined the intimacy and familial nature of such a relationship. That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions of a life together, the extent and quality of shared experience"

Id. at 378.

This list of factors is similar to those enumerated in *Braschi*. See *supra* note 312. These factors are thus general determinants for establishing the quality of a relationship between two unmarried adults. The fact that they have been developed by different courts for different applications does not diminish their utility in the negligently inflicted bystander emotional distress context; indeed, their similarity underscores the premise that there is no cogent reason for not applying this test to determine the scope of liability. For the evaluation of other types of rela-

that the use of a standard which would enable the trier to determine the depth of the relationship would not burden either courts or defendants, and would result in substantial justice for those suffering "indelibly stunning" emotional injuries.³²⁰

CONCLUSION

This Note has tried to show that the denial of liability for negligently inflicted bystander emotional distress in New York is based upon grounds that the courts of the state have rejected in a variety of other areas. Moreover, these grounds are not even intellectually honest, since they rest upon unexamined premises. The current law—a person can recover if they are an immediate family member and are within the zone of danger—bears little or no relationship to the interest the tort protects, or to the harm that people suffer. The continual recourse to the bogeyman of unlimited liability is counterproductive because it undermines the legitimacy of the courts, does not promote efficiency and fails to do justice to those who can show that they have been injured by negligent acts. It is possible to construct a standard that takes account of the need to control liability and that promotes the values inherent in significant relationships. The method for constructing this standard already exists in the realm of due process jurisprudence, where both the Supreme Court and the New York Court of Appeals have defined families in terms of their function. Applying this rule to negligently inflicted bystander emotional distress actions would go far toward reconciling the conflicts inherent between abuse of the tort system and promoting justice.

The New York Court of Appeals has long recognized that the reformation of the common law is its unique responsibility.³²¹ To date, the court has refused to revisit this issue,

tionships, such as those between children and their care-givers, the determination could be made on the basis of whether the care-giver performs traditional child rearing functions.

³²⁰ *Id.* at 377.

³²¹ "We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice." *Woods v. Lancet*, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951).

choosing instead to rely on untested assumptions. In requiring a multiplicity of requirements for recovery for emotional distress for bystanders, the court has clung to a rigid argument, which, whatever its applicability years ago, has lost its underpinnings. In this age of increasing fragmentation of traditional family structures and the consequent fraying of the social fabric, it is ironic indeed that the law should find itself the handmaiden of the forces unraveling the social fabric.

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