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## WHEN FOOD IS A WEAPON: PARENTAL LIABILITY FOR FOOD ALLERGY BULLYING

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*"I'm going to kill you with this peanut butter cracker."*<sup>1</sup>

### ABSTRACT

Food allergies in children are rising at an alarming pace. Increasingly, these children face an added threat: bullies targeting them because of their allergies. This bullying can take a life-threatening turn when the bully exposes the victim to the allergen. This article is the first major legal analysis of food allergy bullying. It explores the legal system's failure to adequately address the problem of food allergy bullying and makes the case for focusing

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<sup>1</sup> Nicole Smith, *Food Allergy Bullying—What's the Solution?*, ALLERGIC CHILD, June 25, 2013, <https://home.allergicchild.com/food-allergy-bullying-whats-the-solution/> (describing food allergy bullying incident among first graders); see also Sally Kuzemchak, *Food Allergy Bullying is Heartbreaking and Real*, PARENTS, <https://www.parents.com/recipes/scoop-on-food/food-allergy-bullying-is-heartbreaking-and-real/> ("One day at lunchtime, a boy in Will's group began to taunt him, coming at him with a peanut butter sandwich in a threatening way and saying something along the lines of 'I could kill you with this sandwich.'"); Suzanne Allard Levingston, *Bullies Use a Small But Powerful Weapon to Torment Allergic Kids: Peanuts*, WASH. POST, May 28, 2017, [https://www.washingtonpost.com/national/health-science/bullies-use-a-small-but-powerful-weapon-to-torment-allergic-kids-peanuts/2017/05/26/a296a878-292f-11e7-be51-b3fc6ff7face\\_story.html?noredirect=on&utm\\_term=.cb18697ac3a2](https://www.washingtonpost.com/national/health-science/bullies-use-a-small-but-powerful-weapon-to-torment-allergic-kids-peanuts/2017/05/26/a296a878-292f-11e7-be51-b3fc6ff7face_story.html?noredirect=on&utm_term=.cb18697ac3a2) (describing how bully wiped peanut butter on an allergic child and said "I dare you to die today"); Roni Caryn Rabin, *In Allergy Bullying, Food Can Hurt*, N.Y. TIMES, Feb. 15, 2018, <https://www.nytimes.com/2018/02/15/well/family/in-allergy-bullying-food-can-hurt.html> (recounting father's story of allergic son being taunted with a peanut butter sandwich by child saying "let's see if he dies").

on the potential tort liability of the bully's parents. Parents who become aware of their child's bullying behavior and fail to take adequate steps to stop it are tacitly encouraging it and should be liable for their child's conduct. So too should parents who enable the bullying by flouting school policies and sending their child to school with a prohibited food that is then used to bully or by modeling intolerant behavior that their child mimics at school. This will ensure that parents who contribute to their child's bullying are held accountable and that the bully's victim receives justice.

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## I. INTRODUCTION

More children than ever are allergic to one or more foods.<sup>2</sup> For children with food allergies, the world can be a dangerous place.<sup>3</sup> Food is an integral part of daily life, and often, determining what an allergic child can safely eat is anything but straightforward. A wrong choice can have severe, even fatal, consequences.<sup>4</sup> The stress is worsened by the skeptics who think food allergies are either not real or are exaggerated, rather than a potentially life-

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<sup>2</sup> See Kristen D. Jackson et al., U.S. Centers for Disease Control & Prevention, *Trends in Allergic Conditions Among Children: United States, 1997-2011*, NCHA Data Brief No. 121, May 2013, <https://www.cdc.gov/nchs/data/databriefs/db121.pdf> (reporting increase from 3.4% to 5.1% of children having food allergies between 1997 and 2011).

<sup>3</sup> See generally Linda L. Quach and Rita M. John, *Psychosocial Impact of Growing Up with Food Allergies*, J. FOR NURSE PRACTITIONERS, June 2018, at 477.

<sup>4</sup> See *infra* notes 16-19 and accompanying text.

threatening condition that must be taken seriously.<sup>5</sup>

Children spend a substantial portion of their waking hours at school. And in school, food is everywhere, from the cafeteria to the classroom. Snacks and treats seem to accompany every event or celebration, and food is often used in classroom activities and projects. Safely navigating school—without parents there to help—can be especially challenging for a child with food allergies.<sup>6</sup>

Increasingly, allergic children are facing another serious threat at school: being bullied because of their allergy. Of the over 5 million children with food allergies,<sup>7</sup> one-third are bullied specifically because of their allergy,<sup>8</sup> usually by a classmate.<sup>9</sup> The bullying can range from being teased for not being able to eat the particular food to being assaulted with or force-fed the food and everything in between.<sup>10</sup> Food allergy bullying can be more even more harmful than traditional bullying because some children are put in grave danger by mere skin contact with or inhalation of the allergen, and if an allergic child ingests the food, the bullying can be deadly.<sup>11</sup>

How do parents factor into all of this? Parents are of course a crucial influence in their children's behavior, and parents of bullies are no

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<sup>5</sup> See *infra* notes 33-38 and accompanying text.

<sup>6</sup> See Elizabeth Landau, *Allergy Bullying: When Food is a Weapon*, CNN, Jan. 7, 2013, <https://www.cnn.com/2013/01/05/health/bullying-food-allergies/index.html> (“It’s hard for parents of food-allergic children to keep them safe at school when there are so many opportunities to eat snacks and meals with unsafe ingredients.”).

<sup>7</sup> See Food Allergy Research & Educ., *Facts & Statistics*, <https://www.foodallergy.org/life-with-food-allergies/food-allergy-101/facts-and-statistics> (hereinafter *FARE Facts & Statistics*) (“Researchers estimate that 32 million Americans have food allergies, including 5.6 million children under age 18.”).

<sup>8</sup> Dr. Jay Lieberman at the Jaffe Food Allergy Institute of Mount Sinai School of Medicine conducted the first study of food allergy bullying in 2010 and reported that 35.2% of school-aged children were bullied because of their food allergy. See Jay A. Lieberman et al., *Bullying Among Pediatric Patients with Food Allergy*, *ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY*, Oct. 2010, at 283. Dr. Lieberman based these results on 353 responses, mostly by parents of food-allergic children, to a survey designed by a pediatric allergist specializing in food allergies and a bullying expert, among others. *Id.* at 282-83. After widespread reporting on these results, in 2013, Dr. Eyal Shemesh of Mount Sinai designed a study of 251 food-allergy families and essentially replicated Dr. Lieberman’s results, finding that 31.5% of these children reported bullying due to their food allergies. See Eyal Shemesh et al., *Child and Parental Reports of Bullying in a Consecutive Sample of Children with Food Allergy*, *PEDIATRICS*, Jan. 2013, at e10.

<sup>9</sup> Lieberman et al., *supra* note 8, at 283 (79.8% of food allergy bullies were classmates).

<sup>10</sup> See *infra* notes 71-81 and accompanying text.

<sup>11</sup> See *infra* notes 82-85 and accompanying text.

exception.<sup>12</sup> When schools implement policies, such as establishing nut-free classrooms, to protect allergic children, parents of the non-allergic children are sometimes the most vocal critics.<sup>13</sup> Some have resisted these policies, even picketed the school to have the policies revoked, in the name of their child's supposed "right" to eat certain foods. Others go further, defying school policies that ban certain foods and sending their children to school with dangerous food—food that could kill a classmate. While parental opinions about school policies will naturally vary, parents must be discouraged from promoting behaviors that threaten other children's education and even their lives.

This raises the issue of whether parents who engage in such behavior should bear any legal responsibility if their children become food allergy bullies. Very little if any civil litigation exists for food allergy bullying at all, much less for parental liability. General bullying litigation has included parents to a limited extent, but most cases appear to have settled.<sup>14</sup> Thus, analyzing potential parental liability for food allergy bullying requires drawing on general parental liability negligence law.

This article advocates that parents of food allergy bullies should be liable for their child's conduct when the parents' actions contributed the bullying. Part II provides necessary background information regarding food allergies and the negative attitudes surrounding them. Part III details the challenges food allergies create in schools and how schools have responded to the ever-increasing number of children with food allergies. Part IV explains the problem of food allergy bullying in schools and the unique dangers it poses for allergic children.

Part V then makes the case for parental liability for food allergy bullying in certain situations. It first explores the reasoning for focusing liability on parents by pointing out the shortcomings of other legal remedies and explaining the importance of parents in facilitating or stopping food allergy bullying. It then lays out the existing legal framework for parental liability in general and shows how courts have limited parents' duties regarding their children's tortious conduct so that parents can escape liability in all but the most egregious cases. From there, it argues for lifting these unjustified common law restrictions and imposing an ordinary duty of care in food allergy bullying cases. This would allow juries to assess the reasonability of a broad range of parental behaviors that might contribute to food allergy

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<sup>12</sup> See *infra* notes 107-114, 173-177 and accompanying text.

<sup>13</sup> See *infra* notes 52-53, 57-61 and accompanying text.

<sup>14</sup> See *infra* notes 144-146 and accompanying text.

bullying while protecting parents who do their best to control their children. Though not a cure-all for food allergy bullying, parental liability in these circumstances promotes the public policy goals of encouraging parents to raise responsible children and protecting vulnerable members of society while not unduly interfering with parental rights. Part V concludes by looking ahead to see how parental liability might fare in jurisdictions that adopt the new Restatement (Third) of Torts: Physical and Emotional Harm.

## II. FOOD ALLERGIES IN SOCIETY

To understand the problem of food allergy bullying and what to do about it, one must first understand how food allergies work and how American society views food allergies and those who suffer from them.

### A. Food Allergy Basics

Food allergies are serious business. A food allergy occurs when the body's immune system mistakenly responds to a certain food as if it were harmful.<sup>15</sup> Responses can range from skin irritations to gastrointestinal and respiratory symptoms.<sup>16</sup> Some food-allergic individuals experience anaphylaxis, a severe condition that can lead to constricted airways, throat swelling, a drastic drop in blood pressure, unconsciousness, and even death.<sup>17</sup> A person experiencing anaphylaxis can die within minutes.<sup>18</sup> Reactions vary from person to person, and each individual's allergic response to a particular exposure is unpredictable—what once caused a skin rash could result in anaphylaxis the next time.<sup>19</sup>

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<sup>15</sup> See U.S. Centers for Disease Control & Prevention, *Food Allergies in Schools*, <https://www.cdc.gov/healthyschools/foodallergies/> (hereinafter *CDC Food Allergies*).

<sup>16</sup> See *FARE Facts & Statistics*, *supra* note 9; U.S. Food & Drug Admin., *Food Allergies: What You Need to Know*, <https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAllergens/ucm079311.htm> (hereinafter *FDA Food Allergies*).

<sup>17</sup> See *FDA Food Allergies*, *supra* note 16; Laurent L. Reber et al., *The Pathophysiology of Anaphylaxis*, *J. OF ALLERGY & CLINICAL IMMUNOLOGY*, Aug. 2017, at 335.

<sup>18</sup> See Am. Coll. of Allergy, Asthma & Immunology, *Food Allergy*, <https://acaai.org/allergies/types/food-allergy> (hereinafter *ACAAI Food Allergy*) (“Anaphylaxis can occur within seconds or minutes of exposure to the allergen, can worsen quickly and can be fatal.”); U.S. Centers for Disease Control & Prevention, *Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs*, 2013, at 20, [https://www.cdc.gov/healthyschools/foodallergies/pdf/13\\_243135\\_A\\_Food\\_Allergy\\_Web\\_508.pdf](https://www.cdc.gov/healthyschools/foodallergies/pdf/13_243135_A_Food_Allergy_Web_508.pdf) (hereinafter *CDC Voluntary Guidelines*) (“Death due to food-induced anaphylaxis may occur within 30 minutes to 2 hours of exposure.”).

<sup>19</sup> See *ACAAI Food Allergy*, *supra* note 18 (“Symptoms of a food allergy can range from

About 32 million Americans have food allergies, including up to eight percent of children.<sup>20</sup> That is 5.6 million children, or one in every thirteen.<sup>21</sup> Ninety percent of food allergy reactions result from exposure to one of the eight major food allergens: eggs, fish, shellfish, tree nuts, peanuts, wheat, dairy, and soybeans.<sup>22</sup> Forty percent of children with food allergies have had a severe or life-threatening reaction.<sup>23</sup> A food allergy reaction sends someone to the emergency room every three minutes.<sup>24</sup> Each year, anaphylaxis from food allergies results in 30,000 emergency room visits, 2,000 hospitalizations, and 150 deaths.<sup>25</sup> For reasons that are difficult to determine,<sup>26</sup> the prevalence of food allergies among American children is increasing at an alarming rate, with the Centers for Disease Control reporting a fifty percent increase between 1997 and 2011.<sup>27</sup>

Because no cure currently exists for food allergies, strictly avoiding the

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mild to severe. Just because an initial reaction causes few problems doesn't mean that all reactions will be similar; a food that triggered only mild symptoms on one occasion may cause more severe symptoms at another time.”); *CDC Food Allergies*, *supra* note 15 (“The symptoms and severity of allergic reactions to food can be different between individuals, and can also be different for one person over time.”).

<sup>20</sup> See *CDC Voluntary Guidelines*, *supra* note 18, at 9 (“Food allergies are a growing food safety and public health concern that affect an estimated 4%-6% of children in the United States.”); *FARE Facts & Statistics*, *supra* note 9 (“Researchers estimate that 32 million Americans have food allergies, including 5.6 million children under age 18.”); David M. Fleischer et al., *Allergic Reactions to Foods in Pre-School Aged Children in a Prospective Observation Food Allergy Study*, *PEDIATRICS*, July 2012, at e26 (“Allergic reactions to food affect up to 8% of children.”).

<sup>21</sup> *FARE Facts & Statistics*, *supra* note 9.

<sup>22</sup> *CDC Food Allergies*, *supra* note 15; *FDA Food Allergies*, *supra* note 16.

<sup>23</sup> See *FARE Facts & Statistics*, *supra* note 9.

<sup>24</sup> See Sunday Clark et al., *Frequency of US Emergency Department Visits for Food-Related Acute Allergic Reactions*, *J. OF ALLERGY & CLINICAL IMMUNOLOGY*, Mar. 2011, at 682; *FARE Facts & Statistics*, *supra* note 9.

<sup>25</sup> U.S. Food & Drug Admin., *Frequently Asked Questions About Food Allergies*, <https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAllergens/ucm530854.htm>; see also *FARE Facts & Statistics*, *supra* note 9.

<sup>26</sup> See Hugh S. Sampson, *Peanut Allergy*, 346 *NEW ENG. J. MED.* 1294, 1297 (2002).

<sup>27</sup> See Jackson et al., *supra* note 2 (food allergies in children increased from 3.4% to 5.1% between 1997 and 2011); see also *FARE Facts & Statistics*, *supra* note 9 (“The [CDC] reports that the prevalence of food allergy in children increased by 50 percent between 1997 and 2011.”); Perri Klass, *Life-Threatening Allergic Reactions Rising in Children*, *N.Y. TIMES*, Apr. 4, 2018, <https://www.nytimes.com/2018/04/09/well/family/life-threatening-allergic-reactions-rising-in-children.html> (describing Blue Cross Blue Shield report showing emergency room visits among its subscribers for anaphylaxis in children doubled between 2010 and 2016).

allergen is the safest course of action,<sup>28</sup> but that is easier said than done. For some people, even a tiny exposure to the allergen can cause an allergic response, including anaphylaxis.<sup>29</sup> Food that is manufactured on the same equipment or in the same facility as an allergen might be contaminated with the allergen, even though it is not an intended ingredient.<sup>30</sup> Accidental ingestion happens frequently through a variety of mechanisms.<sup>31</sup> Though

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<sup>28</sup> *CDC Food Allergies*, *supra* note 15; *FDA Food Allergies*, *supra* note 16; Fleischer et al., *supra* note 20, at e26. Though promising treatments are being developed to help desensitize some individuals to their allergens, these treatments do not “cure” the allergy, require lifelong maintenance, are unavailable to patients with the highest risk of anaphylaxis, and simply do not work for many people. See Elizabeth Feuille & Anna Nowak-Wegrzyn, *Allergen-Specific Immunotherapies for Food Allergy*, *ALLERGY ASTHMA IMMUNOL. RES.*, May 2018, at 189, 204; Robert A. Wood, *Food Allergen Immunotherapy: Current Status and Prospects for the Future*, *J. OF ALLERGY & CLINICAL IMMUNOLOGY*, Apr. 2016, at 974, 979-80.

<sup>29</sup> See Reber et al., *supra* note 17, at 335 (explaining that anaphylaxis can be triggered by “minute amounts” of exposure to allergic foods); Belen M. Tan et al., *Severe Food Allergies by Skin Contact*, 86 *ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY* 583, 586 (2001) (“Severe food allergic reactions can occur through noningestant exposure (skin contact or inhalation), to even minute quantities of the offending allergen.”); see also James E. Gern et al., *Allergic Reactions to Milk-Contaminated ‘Nondairy’ Products*, 324 *NEW ENG. J. MED.* 976, 976 (1991) (reporting study of patients with allergic reactions to trace amount of milk in products labeled as “nondairy”); Jonathan O’B. Hourihane et al., *An Evaluation of the Sensitivity of Subjects with Peanut Allergy to Very Low Doses of Peanut Protein: A Randomized, Double-Blind, Placebo-Controlled Food Challenge Study*, *J. OF ALLERGY & CLINICAL IMMUNOLOGY*, Nov. 1997, at 596 (explaining study findings showing allergic response to very low doses of peanut protein).

<sup>30</sup> See Sampson, *supra* note 26, at 1296 (stating that “inadvertent exposure” from sources such as peanut contamination of manufacturing equipment results in “an allergic reaction every three to five years in the average patient with peanut allergy”); The Threshold Working Grp., U.S Food & Drug Admin. & U.S Dep’t of Health & Human Servs., *Approaches to Establish Thresholds for Major Food Allergens and for Gluten in Food*, at 21 (2006) <https://www.fda.gov/downloads/Food/IngredientsPackagingLabeling/UCM192048.pdf> (noting that cross-contact may occur when trace amounts of a food allergen is airborne or present on production machinery and “has been shown to lead to allergic reactions in consumers on numerous occasions”); see also Mary Lynn Smith, *Allergic Reaction to Peanut Residue Kills 22-Year-Old Twin Cities Man*, *STAR TRIBUNE* (Jan. 22, 2016), <http://www.startribune.com/peanut-allergy-kills-22-year-old-twin-cities-man/366152021/> (reporting on death of man who ate chocolate contaminated with peanut residue); Sara Bensoff, Comment, *May Contain: Allergen Labeling Regulations*, 162 *U. PENN. L. REV.* 1465, 1469 (2014) (“Some food allergy sufferers can have allergic reactions to very small amounts of allergens, including food products that were only in cross-contact with allergens.”).

<sup>31</sup> See *CDC Voluntary Guidelines*, *supra* note 18, at 9 (“Studies show that 16%-18% of children with food allergies have had a reaction from accidentally eating food allergens while at school.”); Fleischer et al., *supra* note 20, at e25 (demonstrating high frequency of food allergy reactions caused by accidental exposure to allergens); see also Heather Martone, Note, *2.2 Million Children Left Behind: Food Allergies in American Schools—A Study of*

ingesting allergens causes most reactions, mere skin contact or inhalation can trigger a reaction in rare instances.<sup>32</sup>

### B. Negative Attitudes About Food Allergies

Despite the seriousness of food allergies, many people view them with skepticism or downright hostility. Some think food allergies are a fake condition.<sup>33</sup> Others understand that food allergies are real but believe food allergy concerns are exaggerated, both in the numbers of people afflicted and in the gravity of the condition.<sup>34</sup> These skeptics cannot understand how a

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*the Food Allergy and Anaphylaxis Management Act*, 18 J.L. & POL'Y 775, 790 (2010) (“Food allergy sufferers can only prevent experiencing an allergic reaction by avoiding their trigger food, but this is not always possible because of cross contamination, insufficient labeling, and accidental ingestion of allergens.” (footnotes omitted)).

<sup>32</sup> See Tan et al., *supra* note 29, at 583 (stating that although reactions are “generally triggered through ingestion,” “skin contact and inhalation can also trigger allergic reactions” and describing five instances of severe food allergy reactions from skin contact or inhalation); see also Greg Bradbury, *Banana Prank Sends Teacher to Hospital, Students to Court*, ABC NEWS, July 31, 2019, <https://abcnews.go.com/US/banana-prank-sends-teacher-hospital/story?id=64691960> (reporting incident where banana-allergic teacher went into anaphylactic shock after students intentionally caused her to touch banana); G. Liccardi et al., *Severe Allergic Reaction Induced by Accidental Skin Contact with Cow Milk in a 16-Year-Old Boy. A Case Report*, 14 J. INVESTIGATIVE ALLERGOLOGY & CLINICAL IMMUNOLOGY 168, 168 (2004) (describing instance where boy had severe allergic reaction to a drop of milk splashed onto his shoulder).<sup>9</sup>

<sup>33</sup> See Claire Gagné, *Food Allergy Backlash Boards the Bus*, ALLERGIC LIVING, July 2, 2010, <https://www.allergicliving.com/2010/07/02/food-allergy-backlash-grows-1/> (describing trend in food allergy reporting where “[s]uddenly it was fashionable to dismiss food allergy as a made-up phenomenon” and noting “there have always been people who are doubtful that food allergy even exists”); Lavanya Ramanathan, *It’s Bad Enough to Have a Food Allergy. But Then You Have to Deal with the Skepticism*, WASH. POST., Sept. 25, 2018, [https://www.washingtonpost.com/lifestyle/magazine/its-bad-enough-to-have-a-food-allergy-but-then-you-have-to-deal-with-the-skepticism/2018/09/21/80d2e1f8-89d6-11e8-8aea-86e88ae760d8\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/its-bad-enough-to-have-a-food-allergy-but-then-you-have-to-deal-with-the-skepticism/2018/09/21/80d2e1f8-89d6-11e8-8aea-86e88ae760d8_story.html) (“[T]ell someone that you have a food allergy, and there’s a good chance they’ll roll their eyes in disbelief.”); Joel Stein, *A Nut Allergy Skeptic Learns the Hard Way*, TIME, Aug. 14, 2010, <http://content.time.com/time/magazine/article/0,9171,2007417,00.html> (explaining how, after his son was diagnosed with a nut allergy, the columnist regretted his prior writing in which he proclaimed: “Your kid doesn’t have an allergy to nuts. Your kid has a parent who needs to feel special.”); Beth Teitell, *Skeptics Add to Food Allergy Burden for Parents*, BOSTON GLOBE (Feb. 11, 2014), <https://www.bostonglobe.com/lifestyle/2014/02/11/with-one-child-food-allergy-restricting-another-allergy-moms-say-they-face-skepticism/Hi9h2AGwDyCzAB0NsCRX9O/story.html> (“[S]ome parents say they face disbelief that their children’s allergies exist at all.”).

<sup>34</sup> See Teitell, *supra* note 33 (“[P]eople think we’re all misdiagnosed, that we’re hypochondriacs,” says food allergy mom who runs a local parent support group); Kennedy, *Why I Mock “Attachment Parenting and the Kids It Produces*, REASON, Apr. 29, 2012, <https://reason.com/2012/04/29/why-i-mock-attachment-parenting-and-the> (“Now some



small amount of a food could hurt anyone.<sup>35</sup> They accuse parents of overprotecting their children or embellishing the extent of the allergy or its risks to garner attention or make themselves feel special.<sup>36</sup> Still others appear to be unconcerned for the needs or safety of allergic individuals, stressing instead their purported right to eat whatever they want, whenever they want to eat it.<sup>37</sup> Adding fuel to this fire are people who falsely claim to have a food allergy, either out of ignorance or because it is perceived as a convenient way to avoid eating a disfavored food.<sup>38</sup>

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food allergies are deadly, but for some reason an irrationally large percentage of parents want to force their ‘sensitive’ kids into this group. When half your kid’s class is defined as wheat, dairy, and nut sensitive, you should roll your eyes.”); *see also* Ed Pilkington & Martin Pengelly, *Chris Christie Accuses Jared Kushner of Political “Hit Job” in Explosive New Book*, THE GUARDIAN, Jan. 15, 2019 <https://www.theguardian.com/us-news/2019/jan/15/chris-christie-book-jared-kushner-accusations-hit-job> (recounting anecdote in Chris Christie’s book when Donald Trump insisted on ordering scallops for Christie’s dinner, even though Christie is allergic to them).

<sup>35</sup> *See* Food Allergy Research & Educ., *Food Allergy Research & Education Urges Public to Understand Severity of Food Allergy with New Awareness Campaign*, May 19, 2017, <https://www.foodallergy.org/about/media-press-room/food-allergy-research-education-urges-public-to-understand-severity-of-food> (“What many people don’t understand is that these life-threatening reactions sometimes can be caused by the tiniest exposure to an allergen.”); Teitell, *supra* note 33 (“[S]ome parents of kids with allergies say they’re challenged by people who don’t understand that even trace amounts of a food can trigger a potentially fatal allergic reaction, or anaphylaxis.”).

<sup>36</sup> *See* Gagné, *supra* note 33 (describing backlash against food allergy parents as portraying them “as hysterical, anxiety-ridden and even needing to ‘feel special’”); Ishani Nath, *Parents Sue School Board, Principal in Shocking Allergy Rights Case*, ALLERGIC LIVING, Dec. 9, 2014, <https://www.allergicliving.com/2014/12/09/parents-sue-school-board-and-principal-in-shocking-allergy-rights-case/> (explaining that school officials reported parents of young child with peanut allergy to department of child services for insisting on school accommodations of her allergy and that the department’s investigation showed the report was “utterly unsubstantiated”); Teitell, *supra* note 33 (“[S]ome parents of allergic children say they are sometimes branded hypochondriacs or labeled as overprotective by neighbors, late-night comics, and even grandparents.”); Stein, *supra* note 33 (recounting author’s prior belief that children did not have food allergies but instead had “a parent who needs to feel special”).

<sup>37</sup> *See* Julie Weingarden Dubin, *Allergy Backlash: Skeptic Moms Flout No-Peanut Rules*, TODAY, June 21, 2011, <https://www.today.com/parents/allergy-backlash-skeptic-moms-flout-no-peanut-rules-1C7398269> (quoting a comment from a food allergy skeptic: “It’s not fair to turn a whole school upside down for ONE student...Peanut butter sandwiches are just about the only thing my kid will eat. Multiple kids have to suffer so one kid can ‘enjoy’ a normal childhood...yeah, screw that.”); Lisa Rutledge, *Cambridge Mom Calls for End to Nut Bans in Schools*, CAMBRIDGE TIMES, Oct. 27, 2018, <https://www.cambridgetimes.ca/news-story/8989124-cambridge-mom-calls-for-end-to-nut-bans-in-schools/> (reporting on Canadian mother who protested school’s nut-free policy because it restricted her non-allergic daughter’s food choices).

<sup>38</sup> *See* Neil Swidey, *Why Food Allergy Fakers Need to Stop*, BOSTON GLOBE MAG., Oct. 14, 2015, <https://www.bostonglobe.com/magazine/2015/10/14/why-food-allergy-fakers->

Media portrayals of food allergies exacerbate this negativity. Food allergies are often the butt of jokes in television shows and movies.<sup>39</sup> In 2018, an animated children’s movie set up what it apparently intended as a comic scene in which a character was intentionally barraged with his allergen—blackberries—and then fumbled through using his emergency medicine when one got in his mouth.<sup>40</sup> A recent sit-com episode featured a joke about how someone could “take . . . out” a peanut-allergic kid “with a bag of trail mix.”<sup>41</sup> A stand-up comedian quipped, “If being near a nut can kill you, do we really want that in the gene pool?”<sup>42</sup> These portrayals reinforce the idea that food allergies are trivial at best. They have been shown to influence attitudes towards food allergy policies in school and signal to children that such antagonistic behavior is acceptable.<sup>43</sup> This is not unlike those who have argued that the risk from the rising rate of measles infections is overblown, citing an episode of *The Brady Bunch* that made light of the entire family contracting the measles.<sup>44</sup>

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[need-stop/PB6uN8NF3eLWFjXnKF5A9K/story.html](https://www.need-stop.org/stop/PB6uN8NF3eLWFjXnKF5A9K/story.html) (imploping “food allergy fakers” to stop describing their food preferences as allergies because it “erode[s] hard-won progress for people with genuine allergies and disorders”); Teitell, *supra* note 33 (stating that skepticism regarding the existence of food allergies is “fed in part by the enormous number of Americans who avoid things like gluten or dairy for lifestyle rather than life-and-death reasons”).

<sup>39</sup> See Food Allergy Research & Educ., *Statement by Food Allergy Research & Education and Members of Clinical Advisory Board on Depiction of Food Allergies in Entertainment Media*, Feb. 13, 2018, <https://www.foodallergy.org/about/media-press-room/statement-by-food-allergy-research-education-and-members-of-clinical> (hereinafter *FARE Media Statement*) (summarizing 2016 study analyzing 115 television shows and movies referencing food allergies and concluding that 59% contained humorous depictions that downplayed the seriousness of the allergy).

<sup>40</sup> See CBC Radio, *Allergy Bullying: It’s Real, and It’s Dangerous*, Aug. 31, 2018, <https://www.cbc.ca/radio/whitecoat/allergy-bullying-it-s-real-and-it-s-dangerous-1.4627456> (discussing incident in *Peter Rabbit* movie); *FARE Media Statement*, *supra* note 3939 (same).

<sup>41</sup> See CBC Radio, *supra* note 40 (discussing episode of rebooted *Roseanne* television series).

<sup>42</sup> *Id.*; see also Teitell, *supra* note 33 (commenting on food allergy jokes by late-night comedians).

<sup>43</sup> See *FARE Media Statement*, *supra* note 39 (reporting research results that “food allergies indeed do seem to be treated humorously in the media more often than not, and this can matter” because “[t]he humorous treatment decreased food-allergy-related policy support for elementary schools via decreased perceptions of the seriousness of food allergies”); see also CBC Radio, *supra* note 40 (“Some illnesses we elevate and say the people who are dealing with them are very heroic, and others we make the butt of jokes and we dehumanize them.”).

<sup>44</sup> See Gwynne Hogan, *‘Brady Bunch’ Episode Fuels Campaigns Against Vaccines—And Marcia’s Miffed*, NAT’L PUB. RADIO, Apr. 28, 2019,

## II. FOOD ALLERGIES IN SCHOOL

At school, food is everywhere. Of course, children eat lunch at school. Along with lunch, the federal government provides programs for breakfast and dinner in many schools.<sup>45</sup> Outside the cafeteria, food is often brought into classrooms for snacks, class parties, and celebrations, particularly in elementary school. Aside from eating, food is used for crafts and science experiments. Field trips and extracurricular activities can also involve snacks and meals.<sup>46</sup>

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<https://www.npr.org/sections/health-shots/2019/04/28/717595757/brady-bunch-episode-fuels-campaigns-against-vaccines-and-marcia-s-miffed>.

<sup>45</sup> See U.S. Dep't of Agric., Food & Nutrition Service, *School Meals*, <https://www.fns.usda.gov/school-meals/child-nutrition-programs>.

<sup>46</sup> See Food Allergy Research & Educ., *Managing Food Allergies in the Classroom*, <https://www.foodallergy.org/education-awareness/community-resources/your-back-to-school-headquarters/managing-food-allergies-in> (hereinafter *FARE Classroom Food Allergies*) (providing ways to reduce allergen exposure at school, including restricting food from classrooms, finding ways to celebrate that do not involve food, avoiding using food in craft and science projects, and rewarding children with non-food items); Levingston, *supra* note 1 (reporting on allergic child's difficulties dealing with a classroom experiment involving exploding peanuts); Jeanne M. Lomas & Kirsi M. Järvinen, *Managing Nut-Induced Anaphylaxis: Challenges and Solutions*, J. OF ASTHMA & ALLERGY, Oct. 29, 2015, at 118, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4631427/> (“Most peanut and tree nut reactions at school occur in the classroom and are due to utilization of nuts in craft projects or nut exposure during celebrations such as for a birthday.”); C. Lynne McIntyre et al., *Administration of Epinephrine for Life-Threatening Allergic Reactions in School Settings*, PEDIATRICS, Nov. 2005, at 1139 (documenting allergic reactions in school from parties and special events, cooking classes, and a class project involving peanut butter); U.S. Centers for Disease Control & Prevention, *Managing Food Allergies in Schools*, [https://www.cdc.gov/healthyschools/foodallergies/pdf/teachers\\_508\\_tagged.pdf](https://www.cdc.gov/healthyschools/foodallergies/pdf/teachers_508_tagged.pdf) (hereinafter *CDC School Food Allergies*) (recommending that schools “[a]void using allergens in classroom activities, includes arts and crafts, counting, science projects, parties, holiday and celebration treats, or cooking”); *see also* Levingston, *supra* note 1 (discussing classroom experiment involving exploding peanuts); Wendy Mondello, *Food Allergy Bullying, GLUTEN FREE AND MORE*, Apr. 23, 2018, <https://www.glutenfreeandmore.com/issues/food-allergy-bullying-2/> (recounting story of fifth grader who suffered anaphylactic reaction from science experiment involving peanut butter). Some schools are banning food from classroom parties and special events, both out of concern for food allergic children and to promote children's health by disassociating food from celebrations. *See* Brenda Goodman, *Sweets Ban at School Parties May Cut Calorie Overload*, WEBMD, Nov. 18, 2011, <https://www.webmd.com/children/news/20111118/sweets-ban-at-school-parties-may-cut-calorie-overload#1>; Lindsay Lowe, *No More Cupcakes...And Carrots? School District Bans All Food From Class Parties*, TODAY, Aug. 26, 2016, <https://www.today.com/parents/no-more-cupcakes-carrots-school-district-bans-all-food-class-t102055>.

The combination of ubiquitous food and burgeoning numbers of food-allergic children creates logistical and safety challenges for schools.<sup>47</sup> The average classroom has two children with a food allergy.<sup>48</sup> Because peanuts are one of the most prevalent and dangerous allergens,<sup>49</sup> schools frequently implement policies involving nuts, especially peanuts. Nut-free cafeteria tables are common, and many schools ban nuts from the entire school or at least from classrooms containing a nut-allergic child.<sup>50</sup> Because candy (especially chocolate) and baked goods often share preparation or manufacturing equipment with nuts,<sup>51</sup> nut-free classrooms might be chocolate- and cupcake-free too.

Given the popularity of peanut butter—not to mention candy, cookies, and birthday cake—most kids are not happy when these items are prohibited,

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<sup>47</sup> See Landau, *supra* note 6 (“It’s hard for parents of food-allergic children to keep them safe at school when there are so many opportunities to eat snacks and meals with unsafe ingredients.”); McIntyre et al., *supra* note 32, at 1134 (“The potential for life-threatening allergic reactions in children has emerged as a significant health issue for schools.”).

<sup>48</sup> *FARE Facts & Statistics*, *supra* note 9; Ramanathan, *supra* note 33.

<sup>49</sup> See Lisa M. Bartnikas et al., *Impact of School Peanut-Free Policies on Epinephrine Administration*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Aug. 2017, at 465, [https://www.jacionline.org/article/S0091-6749\(17\)30472-4/pdf](https://www.jacionline.org/article/S0091-6749(17)30472-4/pdf) (“Peanut allergy is the third leading food allergy in US children and rates are rising.”); *CDC Voluntary Guidelines*, *supra* note 18, at 19 (noting that peanuts account for 50-62% of fatal or near-fatal food allergy reactions); McIntyre et al., *supra* note 32, at 1136 (reporting study in which 25% of allergic reactions at school causing anaphylaxis involved students with only peanut or tree nut allergies); Sampson, *supra* note 26, at 1294 (“Allergies to peanuts and tree nuts account for the majority of fatal and near-fatal anaphylactic reactions.”).

<sup>50</sup> See Bartnikas et al., *supra* note 49, at 465; Grace Chen, *Why Peanuts are Being Banned at Public Schools*, PUBLIC SCH. REV., Apr. 6, 2018, <https://www.publicschoolreview.com/blog/why-peanuts-are-being-banned-at-public-schools>; Elizabeth McQuaid & Barbara Jandasek, *Children’s Food Allergies: Another Target for Bullying?*, LIFESPAN, Sept. 2013, <https://www.lifespan.org/centers-services/bradley-hasbro-childrens-research-center/school-issues/childrens-food-allergies>; David R. Stukus, *Peanut-Free Schools: What Does It Really Mean, and Are They Necessary?*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Aug. 2017, at 391, [https://www.jacionline.org/article/S0091-6749\(17\)30666-8/pdf](https://www.jacionline.org/article/S0091-6749(17)30666-8/pdf).

<sup>51</sup> See Terence J. Furlong et al., *Peanut and Tree Nut Allergic Reactions in Restaurants and Other Food Establishments*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Nov. 2001, at 1294 (reporting study finding frequent allergic reactions to dessert foods in places like bakeries and ice cream shops); KidsHealth, *Nut and Peanut Allergy*, <https://kidshealth.org/en/parents/nut-peanut-allergy.html> (stating that cookies, baked goods, and candy are “[s]ome of the highest-risk food for people with peanut or tree nut allergy” because of the risk of cross-contamination or the inclusion of nuts as a hidden ingredient); Lomas & Järvinen, *supra* note 46, at 118-19, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4631427/> (stating that children’s parties and bakeries are among high-risk situations for cross-contamination and accidental exposure to nuts).

and all too often, neither are their parents.<sup>52</sup> School is a microcosm of the skepticism and negativity about food allergies in the world at large. Parents and other students do not want their school food choices restricted, and they see the solution as simple: allergic kids should just not eat the food they are allergic to.<sup>53</sup>

If only it were that simple. Accidental ingestion is a huge risk, especially with younger children.<sup>54</sup> And children are messy eaters. The stray bit of peanut butter on one child's hand can transfer, for example, to a table or doorknob, creating the risk that an allergic child will unknowingly touch and then ingest the allergen.<sup>55</sup> Because some allergic children react to skin contact with or inhalation of an allergen, having contact with the allergen puts those children at great risk.<sup>56</sup>

Despite this threat, some skeptical parents or those who are unaware of the danger resist schools' efforts to protect allergic children.<sup>57</sup> Some

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<sup>52</sup> See Carina Hoskisson, *Why Do Your Kid's Allergies Mean My Kid Can't Have a Birthday?*, HUFFINGTON POST, Apr. 22, 2014, [https://www.huffpost.com/entry/why-do-your-kids-allergies-mean-my-kid-cant-have-a-birthday\\_n\\_4767686](https://www.huffpost.com/entry/why-do-your-kids-allergies-mean-my-kid-cant-have-a-birthday_n_4767686).

<sup>53</sup> See Kennedy, *supra* note 34 (opining that parents with allergic children should not "force an entire group of otherwise healthy kids to alter their lunch and snack selections based on their deficits"); Landau, *supra* note 47 (recounting comment posted regarding food allergy accommodations in school: "It is completely unfair and ridiculous to expect 4500 other families to change their eating habits because you can't teach your kid not to touch someone else's food."); Jill Pond, *Leave Your Stupid Peanut Butter at Home*, BLUNT MOMS, Aug. 22, 2016, <https://bluntmoms.com/leave-stupid-peanut-butter-home/> (describing negative comment relating to nut-free policies, including "The whole class has to change for one or two kids? Why can't those kids just stay away from nuts?"); Rutledge, *supra* note 37 (discussing mother who kept her daughter home from school while she challenged school's nut ban because the policy "restricts rights to food choices"); see also Bartnikas et al., *supra* note 49, at 472 (stating that nut-free policies restrict other students' food choices and may cause frustration for students and families).

<sup>54</sup> See Fleischer et al., *supra* note 20, at e25 (discussing high frequency of food allergy reactions caused by accidental exposure to allergens among young children); Teitell, *supra* note 33 (describing allergic reaction when dairy-allergic toddler ate a milk-soaked Cheerio she found in a chair crevice); see also *supra* note 31 and accompanying text.

<sup>55</sup> See Wade TA Watson, *Persistence of Peanut Allergen on a Table Surface*, ALLERGY, ASTHMA & CLINICAL IMMUNOLOGY, Feb. 2013, at 2 (remarking that "[p]eanut allergen is very robust" and demonstrating that table smeared with peanut butter and not cleaned for 110 days still contained the allergen); see also Michael Borella, Student Note, *Food Allergies in Public Schools: Toward a Model Code*, 85 CHI.-KENT L. REV. 761, 764-65 (2010) ("It is no secret that some children are messy eaters and often fail to wash their hands thoroughly with soap and water after eating. The residue from one child's peanut butter sandwich can easily find its way onto the desk or clothes of a child with a peanut allergy.").

<sup>56</sup> See *supra* note 32 and accompanying text.

<sup>57</sup> See Borella, *supra* note 55, at 765 ("[P]arents who do not have children with food

intentionally send banned food to school with their children because they or their children prefer that food.<sup>58</sup> Others have pushed to have the policies rescinded, including staging protests, proclaiming “Our kids have rights too.”<sup>59</sup> Some have even suggested that severely allergic children should be forcibly removed and home-schooled rather than the school being made safe for those children.<sup>60</sup>

Tensions can run high, as parents of food-allergic children act to protect their children, while some parents of the other children, out of ignorance or hostility, resist these efforts, all the while leaving schools navigating the middle. Sandwiches, snacks, and science experiments become flashpoints.<sup>61</sup>

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allergies may resist restrictions on what their non-allergic children are allowed to eat and where they are allowed to eat it.”); Stukus, *supra* note 50, at 391 (“[P]arents of nonallergic children have used social media and online forums to express displeasure over limitations on their children imposed by food bans, including limiting their lunch choices or ability to bring food-based treats for classroom celebrations.”).

<sup>58</sup> See Dubin, *supra* note 37 (“Though more schools take measures to protect kids with food allergies, and most parents are sensitive to the dangers, a small but vocal group of parents think such allergies are exaggerated, even invented. Some even send junior off to his nut-free class with a peanut-butter-and jelly sandwich.”); Rutlege, *supra* note 37 (describing mother’s protest of school’s nut-free policy after her daughter came home hungry because she was not allowed to eat the peanut butter her mother packed in her lunch); Nicole Smith, *Parents Who Bully About Food Allergies*, ALLERGIC CHILD, Oct. 13, 2012, <https://home.allergicchild.com/parents-who-bully-about-food-allergies/> (“One Mom announced at a PTO meeting that she was done following ‘all the no peanuts rules’ and was bringing peanut butter cookies to Field Day for all the students.”); see also Bartnikas et al., *supra* note 49, at 465 (noting that nut bans are “difficult to enforce”).

<sup>59</sup> Mary Quinn O’Connor, *Amid Protest, Florida School Stands Behind Tough New Peanut Allergy Regulations*, FOX NEWS, Mar. 15, 2011, <https://www.foxnews.com/us/amid-protest-florida-school-stands-behind-tough-new-peanut-allergy-regulations>; see also Kim Shiffman, *Pickets for Peanuts?*, ALLERGIC LIVING, Mar. 25, 2011, <https://www.allergicliving.com/2011/03/25/pickets-for-peanuts/> (“‘You can’t take peanut butter and jelly—or any right-away from my child,’ yelled one angry protester to the mother of another peanut-allergic child at the school. ‘Keep your child at home!’”); Teitell, *supra* note 33 (discussing lawyer who has been approached to represent families unhappy with school’s nut ban).

<sup>60</sup> See Margaret Hartmann, *Parents Protest to Remove 6-Year-Old with Peanut Allergy from Class*, JEZEBEL, Mar. 22, 2011, <https://jezebel.com/parents-protest-to-remove-6-year-old-with-peanut-allerg-5784267> (reporting on parental protests to have peanut-allergic girl home-schooled and school’s nut-free policies rescinded); Landau, *supra* note 47 (quoting comment on food allergy bullying article: “[H]ow about you keep your sickly kid home? That is what homeschooling is for.”).

<sup>61</sup> The gamut of negativity and skepticism played out in miniature in the comments of a recent *New York Times* article about the difficulties one mother faced in working with a children’s theater program to accommodate her peanut-allergic child. See, e.g., Roni Caryn Rabin, *In a Children’s Theater Program, Drama Over a Peanut Allergy*, N.Y. TIMES, Jan. 16, 2019, <https://www.nytimes.com/2019/01/16/well/eat/peanut-nut-food-allergy->

## IV. THE PROBLEM OF FOOD ALLERGY BULLYING

Food allergy bullying is a new twist on an age-old problem. With so much tension over accommodating food allergies in schools, it should perhaps come as no surprise that allergy-based bullying has emerged as a significant concern for children with food allergies.<sup>62</sup> Studies indicate that about one third of school-aged children with food allergies are bullied because of their allergies<sup>63</sup> and that allergic children are twice as likely as their peers to be bullied.<sup>64</sup> In one study, 34% of bullied children reported being mistreated more than twice per month, and 69% were bullied for at least a year.<sup>65</sup> Though the phenomenon has been studied for only about a decade,<sup>66</sup> it is apparent that as more children are developing food allergies,

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[discrimination.html](#) (debra, 1/17/19: “Disease du jour: peanut allergy . . . I’m looking forward to the day when this bit of hysteria passes and these kids have magically ‘outgrown’ their allergies.”); (White Wolf, 1/17/19: “So because your kid has an allergy every other kid must live a life without the substance your kid is allergic to, right? Unfair. Teach her to stay away from nuts. Be there all the time in case she disobeys. She’s yours, not mine. My kid would bring what I make her for lunch, PB&J.”); (Pw, 1/17/19: “If your child is too sickly to interact with other children keep them at home.”); (There, 1/17/19: “This is what you get when political correctness runs amok. . . . [T]hese children and adults bask in the attention of false victimhood . . . .”); (Geraldine, 1/16/17: “I fear that in today’s overly competitive environment of childhood achievement these parents may be reaching for the wrong thing to distinguish their child as ‘special.’”); (Nadia, 1/16/17: “Tell your kid not to eat peanut butter. . . . Problem solved.”).

<sup>62</sup> See Lieberman et al., *supra* note 8, at 282 (“Bullying, teasing, and harassment of children with food allergy seems to be common, frequent, and repetitive. These actions pose emotional and physical risks that should be addressed in food allergy management.”); U.S. Dep’t of Health & Human Servs., StopBullying.gov, *Bullying and Youth with Disabilities and Special Needs*, <https://www.stopbullying.gov/at-risk/groups/special-needs/index.html> (“Kids with special health needs, such as epilepsy or food allergies, also may be at a higher risk of being bullied. Bullying can include making fun of kids because of their allergies or exposing them to the things are allergic to. In these cases, bullying is not just serious, it can mean life or death.”).

<sup>63</sup> See *infra* note 8 and accompanying text; see also Rabin, *supra* note 1 (“[S]tudies have shown that close to one in three children with food allergies have been bullied specifically because of their allergy.”).

<sup>64</sup> See Lieberman et al., *supra* note 8, at 286; Quach & John, *supra* note 3, at 479.

<sup>65</sup> See Rachel A. Annunziato et al., *Longitudinal Evaluation of Food Allergy-Related Bullying*, J. OF ALLERGY & CLINICAL IMMUNOLOGY: IN PRACTICE, Sept./Oct. 2014, at 639.

<sup>66</sup> See Lieberman et al., *supra* note 8, at 282 (“To our knowledge, no study to date has assessed the scope of bullying regarding food allergy.”); *Bullying Rampant Among Allergic Children*, ALLERGIC LIVING, Sept. 29, 2010, <https://www.allergicliving.com/2010/09/29/allergic-children-being-bullied/> (characterizing the Lieberman et al. study as “the first-ever study to assess the social impact of food allergies in children”).

food allergy bullying is also on the rise.<sup>67</sup>

Allergic kids are particularly vulnerable to bullying. To be protected in school, food allergies must be disclosed.<sup>68</sup> Whether because they sit at nut-free cafeteria tables, wear medical identification, carry bulky emergency medicine, or bring special snacks to class, everyone soon knows which kids have food allergies.<sup>69</sup> “Bullies target children with food allergies in school because the child manages diet and medicine, which is a daily visible struggle.”<sup>70</sup>

Allergic children suffer typical bullying tactics, such as name-calling, exclusion, teasing, and taunting.<sup>71</sup> Bullies may simply zero in on these

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<sup>67</sup> See Janice Chang, *Parents, Schools Step Up Efforts to Combat Food-Allergy Bullying*, NPR, June 5, 2018, <https://www.npr.org/sections/thesalt/2018/06/05/613933607/parents-schools-step-up-efforts-to-combat-food-allergy-bullying>; Marwa Eltagouri, *Three Teens Charged with Knowingly Exposing Allergic Classmate to Pineapple. She was Hospitalized*, WASH. POST., Jan. 27, 2018, <https://www.washingtonpost.com/news/education/wp/2018/01/26/3-teens-charged-with-knowingly-exposing-allergic-classmate-to-pineapple-she-was-hospitalized/>; Chloe Mullarkey, *Food Allergy and Bullying: The Implications for Parents of Children with Food Allergies*, NYU Steinhardt Dep’t of Applied Psychology, Fall 2012, <https://steinhardt.nyu.edu/appsych/opus/issues/2012/fall/food>.

<sup>68</sup> See McQuaid & Jandasek, *supra* note 50 (commenting that allergic children “cannot ‘fly under the radar’” because “their food allergy is usually apparent to others” due to, for example, of “the different food choices children with food allergies have to make or by designated lunchtime seating arrangements”). Indeed, federal health information privacy laws generally do not apply in elementary and secondary schools. See U.S. Dep’t of Health & Human Servs., HHS.gov, Health Information Privacy, *Does the HIPAA Privacy Rule Apply to and Elementary or Secondary School?*, <https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html>.

<sup>69</sup> See Caroline Connell, *Food Allergy Bullying on the Rise*, ALLERGIC LIVING, Fall 2011, <https://www.allergicliving.com/2012/09/17/food-allergy-bullying-on-the-rise/> (“A food allergy certainly makes a child different, and the difference is emphasized by the necessary routine precautions, like carrying an auto-injector and reading food labels, which are part of these kids’ lives.”); Mullarkey, *supra* note 67 (describing the stigma food allergy children face, due in part “to children receiving special treatment” in school, including “sitting at a designated table, carrying and self[-]administering medicine during the day, and increased attention from teachers or faculty”); Catherine Saint Louis, *In Bullies’ Hands, Nuts or Milk May Be a Weapon*, N.Y. TIMES, June 17, 2013, <https://well.blogs.nytimes.com/2013/06/17/in-bullies-hands-nuts-or-milk-may-be-a-weapon/> (“[A] severe food allergy is a unique vulnerability. It takes only one lunch or cupcake birthday party for other children to know which classmates cannot eat nuts, eggs, milk or even a trace of wheat.”).

<sup>70</sup> Mullarkey, *supra* note 67.

<sup>71</sup> See Lieberman et al., *supra* note 8, at 283 (stating that 64.7% of those bullied based on food allergies were teased or taunted); Quach & John, *supra* note 3, at 479 (“They may be intentionally excluded from their peers, endure teasing and name-calling, and are targets



children because of their vulnerability, but some bullying may also stem from hostility about the impacts of food allergy policies, such as cupcakes being banned from the classroom.<sup>72</sup>

What sets food allergy bullying apart from more typical bullying is the physical component. Allergic children frequently are bullied directly with the food they are allergic to, with one study reporting 57% of bullying incidents involving the actual dangerous food.<sup>73</sup> Stories abound of bullies threatening allergic children with their allergen,<sup>74</sup> shoving or waving it in their face,<sup>75</sup> slipping it into their food,<sup>76</sup> or using it to contaminate their school

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of rumors.”); Saint Louis, *supra* note 69 (“[A] classmate held a Kit Kat candy wrapper near his face and kept chanting, ‘You can’t eat this!’”); Shemesh et al., *supra* note 8, at e14 (collecting data regarding bullying by being teased, criticized, and excluded, rumors being spread, and belongings being damaged).

<sup>72</sup> See Eve Becker, *Food Allergy Bullying*, LIVING WITHOUT MAG., Jan. 2013, [https://www.foodallergyawareness.org/media/education/Bullying-Food%20Allergy%20Bullying\\_DecJan2013\\_Living%20Without%20Magazine.pdf](https://www.foodallergyawareness.org/media/education/Bullying-Food%20Allergy%20Bullying_DecJan2013_Living%20Without%20Magazine.pdf) (“A food allergy can be a stigmatizing factor that marks a child as different and exposes him or her to bullying.”); Levingston, *supra* note 1 (teachers may invite bullying by singling a child out as the reason a food or activity will be missed); McQuaid & Jandasek, *supra* note 50 (“Given the prevalence of food allergies and higher levels of awareness of which children are affected through implementation of special accommodations, children with food allergies may be at risk for negative peer interactions and bullying.”).

<sup>73</sup> Lieberman et al., *supra* note 8, at 282; see also Shemesh et al., *supra* note 8, at e10 (reporting that allergic children are frequently threatened with food).

<sup>74</sup> See Connell, *supra* note 56 (relaying story of students running up to allergic classmate and saying, “‘We ate peanuts! We ate peanut M&M’s. And we’re going to breathe on you!’”); Erika Dacunha, *A Teen’s Story of Allergy Bullying—and Bravery*, ALLERGIC LIVING, July 16, 2013, <https://www.allergicliving.com/2013/07/16/a-teens-story-of-allergy-bullying-and-bravery/> (recounting experience where “[s]ome kids would chase me around with their hands up chanting, ‘I ate peanut butter!’”); Ishani Nath, *Food Allergy Bullying: What You Can Do*, ALLERGIC LIVING, Nov. 21, 2014, <https://www.allergicliving.com/2014/11/21/food-allergy-bullying-what-you-can-do/> (telling story of children in an argument when one “pulled out a peanut butter sandwich and waved it around taunting us and saying, ‘What are you gonna do about it now?’”).

<sup>75</sup> See Chang, *supra* note 67 (teammate “shoved the mayonnaise-laden sandwich” in the face of egg-allergic boy); Lieberman et al., *supra* note 8 (43.5% of bullied children had allergen waved in their face); Rabin, *supra* note 1 (peanuts and other food waved in allergic children’s faces).

<sup>76</sup> See Lieberman et al., *supra* note 8, at 285 (discussing incidents of food intentionally being contaminated with allergen); Rabin, *supra* note 1 (“The most dangerous incidents occur when bullies surreptitiously contaminate the child’s own food with a food allergen . . . .”); Saint Louis, *supra* note 69 (classmates may plot to switch a peer’s lunch to see if he gets sick); Charlotte Jude Schwartz, *Food Allergy Bullying: The Stakes Are High*, ALLERGIC LIVING, Jan. 9, 2014, <https://www.allergicliving.com/2014/01/09/food-allergy-bullying-the-stakes-are-high/> (peanut butter cookie crumbled into peanut-allergic child’s lunchbox).

supplies or work area.<sup>77</sup> Some bullies try to force-feed their targets<sup>78</sup> or otherwise physically touch them with the allergen.<sup>79</sup> Last year, a middle-school girl intentionally rubbed pineapple on her hand and then high-fived a girl she knew had a severe pineapple allergy. That sent the victim to the hospital.<sup>80</sup> In 2017 in London, a bully intentionally touched a dairy-allergic boy with cheese. He died.<sup>81</sup>

Bullying of any type harms children—that is well established.<sup>82</sup> But food allergy bullying poses unique additional risks. In an effort to avoid standing out, allergic teens may eat food they should not eat or refuse to carry emergency medicine, exponentially increasing their risk of dying from anaphylaxis.<sup>83</sup> The stress from being bullied, moreover, can make an allergic

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<sup>77</sup> See Connell, *supra* note 69 (bully licked allergic child's pencils and erasers after eating allergen); Dacunha, *supra* note 74 (desk filled with pistachios and nuts hidden in classroom); Mondello, *supra* note 46 (peanut butter rubbed on locker).

<sup>78</sup> See Landau, *supra* note 47 (kindergarten child came home crying because a boy told him he was going to force him to eat a peanut he had); Saint Louis, *supra* note 69 (food allergy program director stated that “[e]very few months, a child recounts being force-fed an allergen”).

<sup>79</sup> See Becker, *supra* note 72 (bully wiped peanut butter on allergic child's neck); Eltagouri, *supra* note 67 (girls intentionally exposed allergic classmate to pineapple); Landau, *supra* note 47 (boy touched allergic girl's face with peanut butter); Lieberman et al., *supra* note 8, at 282 (discussing reports of children being smeared or sprayed with their allergen); Levingston, *supra* note 1 (boys threw peanuts at allergic child); Rabin, *supra* note 1 (nacho cheese rubbed on boy's face, milk poured on children, and cake thrown); Saint Louis, *supra* note 69 (child's face touched with peanut butter).

<sup>80</sup> See Eltagouri, *supra* note 67; Rabin, *supra* note 1; see also Bradbury, *supra* note 32 (three seventh-grade students rubbed banana on the doorknob of teacher they knew had severe banana allergy and threw bananas at her, sending her to the hospital for anaphylactic shock).

<sup>81</sup> See Gwen Smith, *Allergic Teen's Eczema May Have Played a Role in Allergic Teen's Cheese-Related Tragedy*, ALLERGIC LIVING, May 3, 2019, <https://www.allergicliving.com/2019/05/03/eczema-may-have-had-role-in-allergic-teens-cheese-related-tragedy/>.

<sup>82</sup> See Connell, *supra* note 69 (sadness, depression, humiliation, embarrassment, low self-esteem, societal withdrawal, fear to go to school); U.S. Dep't of Health & Human Servs., StopBullying.gov, *Effects of Bullying*, <https://www.stopbullying.gov/at-risk/effects/index.html> (substance abuse, violence, suicide, depression, anxiety, sadness, loneliness, health problems, and declining academic performance); see also Becker, *supra* note 72 (eight year old boy bullied because of food allergy became angry and combative, his grades dropped, and he stated repeatedly that he wanted to hurt himself or die). Though beyond the scope of this article, bullying is, unfortunately, not limited to children, and it harms adults as well. See generally David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Environment Protection*, 88 GEO. L.J. 475 (2000).

<sup>83</sup> See Connell, *supra* note 69 (noting concern that “older kids who are targeted may try to hide their allergies” by not carrying their emergency medicine); Food Allergy &

reaction more severe.<sup>84</sup> Most frighteningly, being bullied with the allergen is literally life threatening in some instances because ingestion of a small amount of food can cause anaphylaxis.<sup>85</sup>

Many bullies might not recognize the grave danger that their conduct poses,<sup>86</sup> but some clearly do, such as the one who taunted: “I could kill you with this sandwich.”<sup>87</sup>

The overwhelming majority of food allergy bullies are school classmates.<sup>88</sup> But what part do the bully’s parents play? Should parents be liable in tort for their child’s bullying? When parents fail to stop food allergy bullying when they could do so or engage in other behavior that tacitly encourages or enables their child’s food allergy bullying, they should be liable.

#### V. THE CASE FOR PARENTAL LIABILITY FOR FOOD ALLERGY BULLYING

The legal system has long recognized that parents uniquely shape the lives of their children, with many judicial decisions upholding the

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Anaphylaxis Connection Team, *Bullying*, <https://www.foodallergyawareness.org/education/bullying/> (hereinafter *FAACT Bullying*) (stating that “[b]ullying has been shown to increase risky behavior among children with food allergies,” including not carrying emergency medicine and purposefully eating potentially unsafe foods, and that “[f]atalities among adolescents with food allergies are more common due to risk-taking behaviors”); see also Janet French, *Food Allergy Bullying: How to Spot if Your Child is a Target and Actions to Take*, ALLERGIC LIVING, May 15, 2018, <https://www.allergicliving.com/2018/05/15/food-allergy-bullying-how-to-spot-if-your-child-is-a-target-and-actions-to-take/> (“Surveys also have revealed that children receiving unwanted attention about their allergies had more trouble managing the allergy, and were less likely to wear medical identification.”).

<sup>84</sup> *CDC Voluntary Guidelines*, *supra* note 18, at 39 (“Bullying, teasing, and harassment can lead to psychological distress for children with food allergies which could lead to a more severe reaction when the allergen is present.”).

<sup>85</sup> See Connell, *supra* note 69 (“All bullying is serious, but when an anaphylactic child is targeted, of course, the results can be life-threatening.”); Eltagouri, *supra* note 67 (quoting allergy doctor, “putting a little bit of peanut butter on the keyboard to hurt somebody is a potentially deadly thing”); Lieberman et al., *supra* note 8, at 286 (“These actions pose a risk of psychological harm in all people, but unique to this population is that bullying, teasing, or harassment can also pose a direct physical threat when the allergen is involved.”); Rabin, *supra* note 1 (quoting mother of food-allergic child that bullying with the allergen “is like assault with a deadly weapon”).

<sup>86</sup> See Levingston, *supra* note 1.

<sup>87</sup> Kuzemchak, *supra* note 1; see also *supra* note 1 and accompanying text.

<sup>88</sup> See Lieberman et al., *supra* note 8, at 283 (79.8% of food allergy bullies were classmates). Shockingly, 21.4% of these children reported being bullied by a teacher or other school personnel. *Id.* at 285.

fundamental right of parents in childrearing.<sup>89</sup> To a large extent, the legal system has traditionally shielded parents from liability for their children's tortious behavior.<sup>90</sup> But at least when it comes to food allergy bullying, that protection is too strong. When parents use their tremendous influence to condone or promote food allergy bullying rather than stamping it out, parents should be made to answer for doing so.

#### A. Why Focus on Parents?

Food allergy bullying victims have many potential avenues of legal redress for their injuries. They can sue the bully directly, and in some situations, bullies have been criminally charged. Victims can also sue the school or school-related individuals or entities. Many jurisdictions have anti-bullying statutes. So why focus on tort liability for the bully's parents? Obstacles and limitations to other forms of responsibility and parents' particular ability to control and mold their children's behavior make parental liability worth critical examination.

Minors can be sued for their own torts.<sup>91</sup> Assault, battery, and intentional infliction of emotional distress are likely candidates for potential bullying liability,<sup>92</sup> though even these suits might not be successful.<sup>93</sup> Even so, most

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<sup>89</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the Due Process right "to direct the education and upbringing of one's children"); *Wisconsin v. Yoder*, 46 U.S. 205, 232 (1972) ("This history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); see also David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885, 891 (2019) (stating that "the right to parent" is "a fundamental liberty interest protected by the U.S. Constitution").

<sup>90</sup> See Part V.B. *infra*.

<sup>91</sup> See Shaundra K. Lewis, *The Cost of Raising a Killer: Parental Liability for the Parents of Adult Mass Murderers*, 61 VILL. L. REV. 1, 4 (2016); W. Page Keeton, PROSSER & KEETON ON TORTS, § 123 at 913 (5th ed. 1984) (hereinafter PROSSER & KEETON ON TORTS).

<sup>92</sup> See Jessica Brookshire, Comment, *Civil Liability for Bullying: How Federal Statutes and State Tort Law Can Protect Our Children*, 45 CUMB. L. REV. 351, 364 (2015); Benjamin Walther, Comment, *Cyberbullying: Holding Grownups Liable for Negligent Entrustment*, 49 HOUS. L. REV. 531, 542, 546 (2012); see also *Boston v. Athearn*, 764 S.E.2d 582, 583 (Ga. Ct. App. 2014) (bullying victim sued minor bully for defamation and intentional infliction of emotional distress).

<sup>93</sup> In the workplace bullying context, intentional infliction claims are typically

minors are judgment proof,<sup>94</sup> and assuming they are generally covered on their parents' homeowner's insurance, intentional conduct is typically excluded from coverage,<sup>95</sup> meaning suing the bully would be pointless in all but the most unusual of cases.

In severe circumstances, food allergy bullies have been charged with crimes. The middle-school girls involved in the pineapple bullying incident were charged with conspiracy, and the girl who actually performed the high-five was charged with felony aggravated assault.<sup>96</sup> A college hazing incident involving peanut butter being rubbed on an intoxicated student's face led to the perpetrator pleading guilty to criminal assault and battery charges.<sup>97</sup> Pursuing criminal law remedies in these cases is appropriate and should continue, but criminal law will not cover less serious—but still very dangerous and emotionally harmful—acts of bullying and does not provide any compensation for the victim.

Given the prevalence of bullying of all types in school,<sup>98</sup> victims have taken to the courts to hold school districts and personnel, including teachers, liable.<sup>99</sup> These suits, however, are largely unsuccessful, plagued by

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unsuccessful, with courts finding that the conduct is not extreme and outrageous. *See* Yamada, *supra* note 82, at 493-509. Whether the same result would play out in the food allergy bullying context with children remains to be seen.

<sup>94</sup> *See* Lewis, *supra* note 91, at 4; PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 913.

<sup>95</sup> *See* Scott D. Camassar, *Cyberbullying and the Law: An Overview of Civil Remedies*, 22 ALB. L. J. SCI. & TECH. 567, 581 (2012) (discussing difficulty in suing bullies for intentional infliction of emotional distress because such intentional conduct “will not be covered by liability insurance”); Rina Carmel et al., *Will Cyberbullying Claims be Covered under Homeowners' Policies*, Sept. 14, 2017, <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2012/novdec2012-cyberbullying-homeowner-policies/> (noting that “traditional bullying has long presented coverage issues (such as whether there was an occurrence)”); *see also* Shane Kimzey, Note, *The Role of Insurance in Fraternity Litigation*, 16 REV. OF LITIG. 459, 480-83 (1997) (analyzing insurance coverage for intentional conduct in litigation regarding fraternities concerning activities such as sexual assault, alcohol abuse, and hazing).

<sup>96</sup> Eltagouri, *supra* note 67; *see also supra* note 80 and accompanying text; Bradbury, *supra* note 32 (three middle-school students charged with assault after rubbing banana on teacher's doorknob and throwing bananas at her, knowing she was allergic to them).

<sup>97</sup> Rabin, *supra* note 1.

<sup>98</sup> *See* Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 650-52 (2004); U.S. Dep't of Health & Human Servs., StopBullying.gov, *Facts About Bullying*, <https://www.stopbullying.gov/media/facts/index.html> (hereinafter *StopBullying Facts About Bullying*).

<sup>99</sup> *See* Camassar, *supra* note 95, at 570; Natalie DiBlasio, *More Bullying Cases Have*

procedural problems such as immunity defenses.<sup>100</sup>

Legislative remedies are similarly lacking. No federal anti-bullying statutes exist.<sup>101</sup> All states have enacted anti-bullying legislation,<sup>102</sup> but the laws vary widely in scope and depth.<sup>103</sup> None provide a private right of action or victim compensation.<sup>104</sup> Many are little more than window dressing, requiring school districts to adopt anti-bullying policies but not much else.<sup>105</sup> And most do not even require the bully's parents to be notified, thereby ignoring parents' function in combatting bullying.<sup>106</sup>

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*Parents Turning to Courts*, USA TODAY, Sept. 11, 2011, <https://usatoday30.usatoday.com/news/education/story/2011-09-11/bullying-lawsuits-parents-self-defense-courts/50363256/1>; S.L. Wykes, *Parents Settle Suit for Alleged Bullying by Their Children*, HOUSTON CHRON., Oct. 16, 2005, <https://www.chron.com/news/nation-world/article/Parents-settle-suit-for-alleged-bullying-by-their-1580253.php>.

<sup>100</sup> See Camassar, *supra* note 95, at 577-79; Adele Kimmel, Public Justice, *Litigating Bullying Cases: Holding School Districts and Officials Accountable*, Fall 2017, at 26-27, <https://www.publicjustice.net/wp-content/uploads/2016/02/Bullying-Litigation-Primer-Fall-2017-Update-FINAL.pdf>; Weddle, *supra* note 98, at 682-87.

<sup>101</sup> See U.S. Dep't of Health & Human Servs., StopBullying.gov, *Federal Laws*, <https://www.stopbullying.gov/laws/federal/index.html>. Three times, Representative Matt Cartwright of Pennsylvania introduced a bill to require schools to enact policies to address food allergy bullying specifically. The latest attempt was June 2018. These bills died in committee. See H.R. 6196, 115th Cong. (2018); H.R. 4691, 114th Cong. (2016); H.R. 3660, 113th Cong. (2013); H.R. 6196 (115th): ALLERGY Act, <https://www.govtrack.us/congress/bills/115/hr6196>.

<sup>102</sup> See U.S. Dep't of Health & Human Servs., StopBullying.gov, *Laws, Policies & Regulations*, <https://www.stopbullying.gov/laws/index.html> (hereinafter *StopBullying Law Summary*) (collecting information about all state anti-bullying statutes).

<sup>103</sup> Denis Binder, *A Tort Perspective on Cyberbullying*, 19 CHAP. L. REV. 359, 362 (2016).

<sup>104</sup> See Camassar, *supra* note 95, at 87; Kimmel, *supra* note 100, at 1, 25.

<sup>105</sup> See Weddle, *supra* note 98, at 678 (stating that with state anti-bullying statutes, “[o]ften the only real requirement is that a written policy be developed that spells out consequences for bullying and retaliation”); see also *StopBullying Law Summary*, *supra* note 100 (documenting that all state bullying laws have district policy requirements).

<sup>106</sup> Only twenty-two state anti-bullying laws require the bully's parents to be notified of the bully's conduct. See CONN. GEN. STAT. § 10-222d(b)(4); DEL. CODE ANN. tit. 14, § 4164(b)(2)(j); FLA. STAT. § 1006.147(4)(i); GA. CODE ANN. § 20-2-751.4(b)(3); 105 ILL. COMP. STAT. 5/27.23.7(b)(4); IND. CODE § 20-33-8-13.5(a)(2)(B)(iii); LA. STAT. ANN. § 17:416.13(D)(3)(d); MASS. GEN. LAWS ch. 603, § 49.05(1); MICH. COMP. LAWS § 380.1310b(5)(f); MINN. STAT. § 121A.031 subdiv. 4(a)(4); MISS. CODE ANN. § 37-11-69(1)(c); MONT. CODE ANN. § 10.55.719(5)(e); NEV. REV. STAT. § 388.1351(3)(a); N.H. REV. STAT. ANN. § 193-F:4(II)(h); OHIO REV. CODE ANN. § 3313.666(B)(5); OKLA. STAT. tit. 70, § 24-100.4(A)(6); 200 R.I. GEN. LAWS § 30-10-2(2.6)(D); TEX. EDUC. CODE ANN. § 7.0832(c)(3)(B); UTAH CODE ANN. § 53G-9-604(1)(b); VA. CODE ANN. § 22.1-279.3:1(C); W. VA. CODE § 18-2C-3(b)(5); WIS. STAT. § 118.46(1)(a)(5).

Parents can both foster and prevent food allergy bullying, in many different ways.

By virtue of their very status, parents have some ability to control their children's behavior, especially younger children.<sup>107</sup> When parents know their child is bullying allergic children but fail to take appropriate actions to stop it, they allow the bullying to continue and tacitly encourage it.<sup>108</sup>

Parental actions influence children's mindset and conduct.<sup>109</sup> Children mimic adults, especially their parents,<sup>110</sup> and can absorb negative attitudes

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<sup>107</sup> See *Bieker v. Owens*, 350 S.W.2d 522, 524 (Ark. 1961) ("It is within reason and good logic to say that the parent has a responsibility to control minor children while they are in their formative years."); *Curry v. Super. Ct.*, 24 Cal. Rptr. 2d 495, 501 (Ct. App. 1993) ("[A] parent has the duty and opportunity to control, supervise, and train his or her child in the ways of responsible behavior."); *Wells v. Hickman*, 657 N.E.2d 172, 178 (Ind. Ct. App. 1995) ("Parents are in a unique position in society because they have a special power to observe and control the conduct of their minor children."); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 914-15 ("[T]he parent has a special power of control over the conduct of the child, which he is under a duty to exercise reasonably for the protection of others."); see also *infra* notes 173-177 and accompanying text.

<sup>108</sup> See, e.g., *Robertson v. Wentz*, 232 Cal. Rptr. 634, 638 (Ct. App. 1986) (noting that when parents know of a child's destructive tendencies and "fail to exercise reasonable measures to restrain or discipline the child," the parents thus "encourage[] or acquiesce[] in such misconduct on the part of the child" (internal quotation marks omitted)); accord *Ross v. Souter*, 464 P.2d 911, 913 (N.M. Ct. App. 1970); see also *infra* note 169 and accompanying text.

<sup>109</sup> See James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 47 (2001) ("There is, of course, no question that parenting influences children's behavior."); Machteld Hoeve et al., *The Relationship Between Parenting and Delinquency: A Meta-Analysis*, 37 J. ABNORMAL CHILD PSYCHOLOGY 749, 762-63 (Mar. 5, 2009) (analyzing studies showing relationship between parenting and juvenile delinquency); Sarah Swan, *Home Rules*, 64 DUKE L. J. 823, 890 (2015) (discussing the link between juvenile misconduct and poor parenting); see also Howard Davidson, *No Consequences—Re-Examining Parental Responsibility Laws*, 7 STANFORD L. & POLICY REV. 23, 23 (1996) ("Far too many courts, as well as family and youth services agencies, have either undervalued or ignored the role parents play in their children's severe misbehavior and what can and should be done about it.").

<sup>110</sup> See Alan Kazdin & Carlo Rotella, *I Spy Daddy Giving Someone the Finger*, SLATE, Jan. 27, 2009, <https://slate.com/human-interest/2009/01/your-kids-will-imitate-you-use-it-as-a-force-for-good.html> (stating that modeling "affects behavior far more than telling your children what to do" and can teach children how to interact with others); Leon F. Seltzer, *How Do Parents Model Exactly What They Don't Want*, PSYCHOLOGY TODAY, July 5, 2017, <https://www.psychologytoday.com/us/blog/evolution-the-self/201707/how-do-parents-model-exactly-what-they-don-t-want> ("[W]hat we tell our kids to do—and not to do—will have less influence on them than what we model for them."); Gisela Telis, *Kids Overimitate Adults, Regardless of Culture*, SCI. MAG., May 7, 2010, <https://www.sciencemag.org/news/2010/05/kids-overimitate-adults-regardless-culture> ("[O]verimitation—in which a child copies everything an adult does, even irrelevant or silly

from parents that in turn facilitate undesirable behavior, including bullying.<sup>111</sup> So when parents, for example, actively resist and protest classroom accommodations for allergic children, their actions send the wrong message. “[I]t’s not hard to see where some kids pick up the idea that singling out allergic classmates is OK.”<sup>112</sup>

Parents control what food young children bring to school. Most parents comply with school food policies, even if grudgingly at times. But some parents intentionally send prohibited food to school.<sup>113</sup> This endangers the allergic children, especially if their child weaponizes that food.<sup>114</sup>

Given the barriers to other forms of liability and the impact parents can have on food allergy bullying, parents that engage in these behaviors should be liable if they contribute to their child becoming a food allergy bully.

### B. The Legal Landscape of Parental Liability

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actions—is a universal human trait . . .”).

<sup>111</sup> See StopBullying.gov, *Understanding the Roles of Parents and Caregivers in Community-Wide Bullying Prevention Efforts*, [https://www.stopbullying.gov/sites/default/files/2017-09/hrsa\\_guide\\_parents-and-caregivers\\_508v2.pdf](https://www.stopbullying.gov/sites/default/files/2017-09/hrsa_guide_parents-and-caregivers_508v2.pdf) (discussing bullying prevention and noting that “[c]hildren learn by example and will reflect the attitudes and behaviors of their parents/caregivers”); see also *StopBullying Facts About Bullying*, *supra* note 98 (“Studies also have shown that adults, including parents, can help prevent bullying by . . . modeling kindness and respect . . .”); Rebecca Wenrich Wheeler, Poe Center for Health Educ., *Bullying Prevention: Changing Our Language, Modeling Empathy*, Oct. 15, 2018, <https://www.poehealth.org/bullying-prevention-changing-our-language-modeling-empathy/> (“Parents also play a role in preventing bullying behavior by modeling empathy, respect, and kindness toward others.”).

<sup>112</sup> See Connell, *supra* note 69 (citing bullying expert’s opinion about adult responsibility for bullying and discussing parent protest of food allergy classroom measures in Florida school); *FAACT Bullying*, *supra* note 83 (noting children’s modeling of adult behaviors, including shunning food-allergic children after a teacher excludes that child from a class activity); Hartmann, *supra* note 60 (“Parents should be teaching their kids that it’s important to help their classmate, but instead [by protesting to remove peanut-allergic girl from the classroom rather than accommodating her allergy] they’re sending the message that it’s okay to ostracize and harass people with disabilities.”); see also *CDC Voluntary Guidelines*, *supra* note 18 (“Food allergy awareness is reinforced when staff members model behaviors and attitudes that comply with rules that reduce exposure to food allergens.”); Wheeler, *supra* note 112 (“Children watch adults’ behavior closely . . . . [I]f our interactions are critical, demeaning, or aggressive, how can we expect the children around us to behave any better?”).

<sup>113</sup> See *supra* note 58 and accompanying text (discussing parents who deliberately defy school food restriction rules).

<sup>114</sup> See Connell, *supra* note 69 (relaying story of child who “ate peanut butter (which he wasn’t supposed to have) then ran over to breathe on [a boy], who was sitting at the allergen-free table”).



The legal system has long struggled with how to handle minors' torts.<sup>115</sup> Under common law principles, parents are not vicariously liable for their children's torts; no liability flows by simple virtue of the parent/child relationship.<sup>116</sup> Children are viewed as independent legal entities responsible for their own torts.<sup>117</sup> As discussed above, suing children is often a dead end,<sup>118</sup> which can create an injustice if a child's tortious conduct causes severe injury.<sup>119</sup>

To provide relief to victims and encourage parents to control their children,<sup>120</sup> courts and legislatures have developed ways to hold parents liable in limited circumstances, both under statutory schemes and via tort common law. Though both routes can help some victims, they each have significant limitations.

Every state has enacted legislation that holds parents strictly liable for some conduct of their children.<sup>121</sup> These statutes, though better than nothing, only marginally improve the common law because many are limited to property crimes (like vandalism)<sup>122</sup>—thus excluding serious personal

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<sup>115</sup> See Lisa Gentile, *Parental Civil Liability for the Torts of Minors*, 16 J. CONTEMP. LEGAL ISSUES 125, 125 (2005); Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 535 (2013).

<sup>116</sup> See Rhonda V. Magee Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims' Voices in the Debate Over Expanded Parental Liability*, 75 TEMP. L. REV. 375, 388 (2002); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 913; see also *Williamson v. Daniels*, 748 So. 2d 754, 758 (Miss. 1999) (“Mississippi has long adhered to the general rule that a parent will not be held liable for the tortious acts of its minor child on the mere ground of the parental relationship.”); *Moore v. Crumpton*, 295 S.E.2d 436, 439 (N.C. 1982) (“In North Carolina and in all other jurisdictions applying common law principles, it is a well-established doctrine that the mere fact of parenthood does not make individuals liable for the wrongful acts of their unemancipated minor children.”).

<sup>117</sup> See *Sanders v. Herold*, 217 S.W.3d 11, 15 (Tex. App.—Houston [1st Dist.] 2006, no pet.); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 913; see also Lewis, *supra* note 91, at 4.

<sup>118</sup> See *supra* notes 91-95 and accompanying text.

<sup>119</sup> See PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 913.

<sup>120</sup> See Gentile, *supra* note 115, at 127; Ashley Wellman et al., *Parental Blame Frame: An Empirical Examination of the Media's Portrayal of Parents and Their Delinquent Juveniles*, 16 WHITTIER J. CHILD & FAM. ADVOC. 87, 97 (2017).

<sup>121</sup> See Wellman, *supra* note 120, at 89; see also Gentile, *supra* note 115, at 127 (listing statutes).

<sup>122</sup> See, e.g., ALA. CODE § 6-5-380(a); MICH. COMP. LAWS § 600.2913; TEX. FAM. CODE § 41.001; see also Andrews, *supra* note 116, at 377-78 (“Presently, the parents of a minor child are vastly more likely to be held responsible if their child shatters the window of his high school than if the child shatters the skull of his high school teacher. This is because civil liability statutes in most jurisdictions hold parents responsible on a strict liability basis for

injury—and often cap victim recovery at the hundreds to low thousands of dollars.<sup>123</sup>

In addition to statutes, many states allow common law parental liability based not on vicarious liability but on the parent’s own conduct.<sup>124</sup> Plaintiffs’ most frequent strategy is negligence-based, seeking to hold a parent liable for failing to supervise or exercise sufficient control over the child to prevent the child’s tortious misbehavior.<sup>125</sup> Thus, parental liability is based on the parent’s independent negligent supervision, not the mere existence of the parent/child relationship.<sup>126</sup>

Section 316 of the Restatement (Second) of Torts, which many states have adopted, sets forth parental liability based on negligent supervision.<sup>127</sup> Section 316 provides:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to

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property damages, but much less so for personal injury.”).

<sup>123</sup> See, e.g., ME. STAT. tit. 14, § 304 (\$800); MICH. COMP. LAWS § 600.2913 (\$2,500); NEV. REV. STAT. § 41.470(2) (\$10,000); TEX. FAM. CODE § 41.001 (\$25,000); see also Andrews, *supra* note 116, at 398 (noting that most parental liability statutes “limit the amount of the total possible liability to dollar amounts in the low thousands”); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 913 (discussing low damages caps in parental liability statutes).

<sup>124</sup> Lewis, *supra* note 91, at 6; see also *Boston v. Athearn*, 764 S.E.2d 582, 585 (Ga. Ct. App. 2014) (“Parents may be held directly liable, however, for their own negligence in failing to supervise or control their children with regard to conduct which poses an unreasonable risk of harming others.”); *Williamson v. Daniels*, 748 So. 2d 754, 759 (Miss. 1999) (“Under common law, parents can be liable for their children’s acts where the parents[’] own negligence has made it possible for the child to cause the injury complained of and probable that the child would do so.” (alterations and internal quotation marks omitted)).

<sup>125</sup> See Gentile, *supra* note 115, at 125; Lewis, *supra* note 91, at 6; see also PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 915 (stating that “the parent who has notice of a child’s dangerous tendency or proclivity must exercise reasonable care to control the child for the safety of others”).

<sup>126</sup> See Gentile, *supra* note 115, at 125; PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 914; see also *Crisafulli v. Bass*, 38 P.3d 842, 846 (Mont. 2001) (emphasizing parental liability is not “for the acts of a child but for that parent’s own failure to exercise reasonable care”); *Moore v. Crumpton*, 295 S.E.2d 436, 440 (N.C. 1982) (“The liability of a parent for failure to exercise reasonable control over an unemancipated child arises from the *independent negligence of the parent* and not from the imputed negligence of the child.” (emphasis in original)).

<sup>127</sup> See Lewis, *supra* note 91, at 6.

control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.<sup>128</sup>

Though at first glance section 316 might seem to significantly expand the common law, in reality, it does not.

First, by its very terms, section 316 allows parental liability only when the plaintiff can establish very specific knowledge-based requirements.<sup>129</sup> Typical negligence liability, on the other hand, is conditioned on the duty to exercise reasonable care in the circumstances.<sup>130</sup> Thus, the limited duty in section 316 is a far cry from the basic negligence standard applied in most circumstances.<sup>131</sup>

Second, courts have been reluctant to use this limited-duty provision to expose parents to liability for their children's conduct.<sup>132</sup> Judges, rather than juries, determine, as a matter of law, whether duty exists in any particular case.<sup>133</sup> Negligent supervision lawsuits rarely make it past the dispositive motions stage.<sup>134</sup> Courts routinely dismiss negligent supervision suits after

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<sup>128</sup> RESTATEMENT (SECOND) OF TORTS § 316 (AM. LAW INST. 1965).

<sup>129</sup> See Andrews, *supra* note 116, at 391.

<sup>130</sup> See Dan B. Dobbs et al., HORNBOOK ON TORTS, 213 (2d ed. 2016) (hereinafter DOBBS ON TORTS) (“In negligence law, when a duty is owed, the standard of conduct to which the defendant must conform is typically the standard of a reasonable person under the circumstances to avoid physical harm to others.”).

<sup>131</sup> See Andrews, *supra* note 116, at 392 (“Compared with the traditional common law approach of parental immunity for their minor children’s torts, section 316 arguably represents an attempted expansion of liability . . . . But when compared to the baseline of the general duty of care . . . , section 316 is seen as consistent with the effort to maintain limits on the potential liability of parents for their own negligent conduct as related to their minor children’s torts.”); DOBBS ON TORTS, *supra* note 130, June 2019 update, § 209 n.1 (characterizing the propensity rule for parental liability as “a heightened foreseeability standard”).

<sup>132</sup> See Andrews, *supra* note 116, at 393 (“[E]ven courts in those jurisdictions that adopt the limited-duty approach codified in the Restatement often narrowly construe that rule in an effort to limit the potential liability of parents for their minors’ torts.”); DOBBS ON TORTS, *supra* note 130, at 652 (noting courts’ hesitance to impose parental liability for children’s torts); Porter, *supra* note 115, at 554 (discussing the “longstanding judicial reluctance to allow juries to evaluate” parental liability).

<sup>133</sup> See DOBBS ON TORTS, *supra* note 130, at 198; PROSSER & KEETON ON TORTS, *supra* note 91, § 37 at 236.

<sup>134</sup> See Porter, *supra* note 115, at 535 (describing common law courts’ resistance to exposing parents to liability, stating, “it remains the rare case that survives summary judgment or a motion to strike”); see also *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 981 & n.13 (Alaska 1999) (analyzing section 316 cases and summaries and concluding that “the most common conclusion” in these cases is a finding in favor of parents); Andrews, *supra* note 116, at 396 (“[P]laintiffs asserting parental liability claims have a difficult time

determining the parents had no duty as a matter of law.<sup>135</sup>

In particular, these courts have focused on foreseeability, traditionally an aspect of duty.<sup>136</sup> As one commentator put it, “[f]oreseeability has provided the primary mechanism for determining (and narrowing) the contours of parental duty for negligent supervision.”<sup>137</sup> Most courts have taken the already limited duty in section 316 and narrowed it even further by equating parents’ knowledge of the “necessity . . . for exercising” control over their child with knowledge of a child’s propensity for dangerous or otherwise inappropriate conduct.<sup>138</sup> Thus, no matter how egregious a child’s behavior or whether the parent could have prevented or minimized it, if a child has never previously acted out, these courts will find no duty because the conduct was unforeseeable under this specific foreseeability standard (even if it might have been otherwise foreseeable).<sup>139</sup>

What is more, some courts further circumscribe this already onerous

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establishing a case at common law.”).

<sup>135</sup> See Andrews, *supra* note 116, at 389 (noting that duty “often poses the most difficulty” in negligent parental supervision cases); Porter, *supra* note 115, at 535-36, 559 (discussing reasons for judicial reluctance to impose parental liability and the “steady stream of judicial no-duty determinations”).

<sup>136</sup> See W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 740 (2005); Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 231-22 (2012).

<sup>137</sup> Porter, *supra* note 115, at 558-59; see also Andrews, *supra* note 116, at 393 (noting courts’ narrow interpretation of section 316); *Nielsen v. Spencer*, 704 N.W.2d 390, 395 (Wis. Ct. App. 2005) (same).

<sup>138</sup> See Porter, *supra* note 115, at 558-59; see also DOBBS ON TORTS, *supra* note 130, at 652 (explaining that courts have expressed their resistance to negligent supervision liability through mechanisms such as concluding that parents could not reasonably foresee, as a matter of law, the specific harm); *Williamson v. Daniels*, 748 So. 2d 754, 760 (Miss. 1999) (“[T]he parent must have knowledge of prior malicious acts similar enough to the specific act complained of to put the parent on notice of the necessity to control the child.”).

<sup>139</sup> See DOBBS ON TORTS, *supra* note 130, at 652 (“Courts have been reluctant to impose liability upon parents for the torts of their children, even when the parents know that their child is dangerous and could take steps to prevent the harm.”); see also *Dinsmore-Poff*, 972 P.2d at 981 (“Courts resolve most cases in the parents’ favor upon finding no such past misconduct or, at least, no parental knowledge thereof.”); *Stephens v. Miller*, 970 So. 2d 225, 227 (Miss. Ct. App. 2007) (stating parental liability depends in part on a showing of “a criminal act or intentional tort the child has previously performed”); *Ross v. Wendel*, 97 N.E.3d 722, 726 (Ohio Ct. App. 2017) (“Parents cannot be held liable for negligent supervision of their children when the parents do not know of the children’s propensity to engage in the sort of conduct that caused the plaintiff’s injury.” (alteration and internal quotation marks omitted)); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 915 (discussing parental duties “once specific dangerous tendencies have been manifested”).

element, demanding that parents have notice not only of the child's dangerous propensity but also of the particular misconduct at issue in the case.<sup>140</sup> In other words, according to these courts, the child must have committed the near-identical act previously for parents to be on notice of their child's dangerous propensity. Absurd results abound. Case in point: the mother of a child who threw pocket knives into a wall was deemed unable to foresee that her child might throw a different type of knife—a butcher knife—near another child.<sup>141</sup> In another case, parents who knew their child had a “propensity to be rough with smaller children by pushing or hitting them” could not be liable for their child hurting a younger, smaller child with a croquet mallet because this was the first time he had used a croquet mallet specifically to do the job.<sup>142</sup> Not every court views the law so narrowly,<sup>143</sup> but enough do to present a significant barrier to parental liability.

With these limitations on parental liability, how can the tort system hold parents responsible for food allergy bullying?

### C. When Parents Should Be Liable for Food Allergy Bullying

Food allergy bullying has not seen much, if any, civil litigation to date.

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<sup>140</sup> See Porter, *supra* note 115, at 558-59 (“Many courts have interpreted this sentence literally, holding that a child’s misconduct is not foreseeable—and therefore parents have no duty to supervise as a matter of law—until a child has displayed a ‘dangerous propensity’ for that particular type of misconduct.”); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 915 (stating that “there is no liability upon the parent unless he has notice of a specific type of harmful conduct”).

<sup>141</sup> See *Saenz v. Andrus*, 393 S.E.2d 724, 725-26 (Ga. Ct. App. 1990).

<sup>142</sup> *Snow v. Nelson*, 475 So. 2d 225, 226 (Fla. 1985); see also *Wells v. Hickman*, 657 N.E.2d 172, 178 (Ind. Ct. App. 1995) (holding it was not foreseeable that child who beat his pet dog to death, killed his pet hamster, had a fight at school, talked about committing suicide, and had explosive anger issues would beat another boy to death); *Stephens*, 970 So. 2d at 227 (holding that mother’s notice that child liked to close the van door did not amount to notice that the child might close the door intentionally on someone and cause injury); *Ross v. Wendel*, 97 N.E.3d 722, 726-27 (Ohio Ct. App. 2017) (concluding teen’s specific act of burning of neighbor’s truck was not foreseeable, even though parents knew that teen and neighbor had ongoing conflict over neighbor reporting teen for poaching, leading to his arrest, neighbor continued to harass teen, and teen bought a rifle at a flea market for protection against the neighbor); see also Porter, *supra* note 115, at 559-60 (collecting cases).

<sup>143</sup> See, e.g., *Ridgell v. McDermott*, 427 S.W.3d 310, 313-14 (Mo. Ct. App. 2014) (reversing dismissal of teacher’s suit against parents of child who attacked her, concluding parents had sufficient notice of his violent tendencies based on his prior similar violent attacks against her and others); *Linder v. Bidner*, 270 N.Y.S.2d 427, 428, 430 (N.Y. Sup. Ct. 1966) (refusing to dismiss negligent supervision complaint against parents of boy who beat another child based on general allegations that they knew their son had a “vicious and malignant disposition” and a “habit of mauling, pummeling, assaulting, and mistreating smaller children”).

Lawsuits involving more traditional forms of bullying are on the rise, though most of these are against school districts and personnel.<sup>144</sup> Rarely are bullying lawsuits brought against parents,<sup>145</sup> and most that are not dismissed appear to settle.<sup>146</sup> Thus, drawing on basic parental negligence principles provides the best predictor as to how suits against food allergy bully parents will fare.

Even with its restrictions, basic negligence law lays a foundation for parental liability in certain food allergy bullying cases. But that is not enough. Courts should forego the unnecessary common law restrictions and expand the contours of parental duty to cover other situations where parents' own conduct makes imposing liability for their child's food allergy bullying fair and appropriate. Parental liability in these instances would compensate bullying victims and send the message that parents will be held responsible for the potentially deadly consequences of their parenting decisions regarding food allergies.

#### 1. Use Existing Parental Liability Negligence Law to Hold Parents Liable

Traditional parental liability negligence law can provide the basis for parental liability in some food allergy bullying cases. As previously established, the most restrictive courts would require parents to know in advance of their child's propensity for food allergy bullying and for the child to have engaged in such behavior before.<sup>147</sup> Thus, parental notice is the lynchpin of negligence liability in these courts. In the twenty-two states with bullying statutes that require schools to notify the bully's parents of all incidents,<sup>148</sup> these parents should receive the required notice automatically. Presumably, many schools in other states would also notify the bully's parents, even without a statutory mandate.

Through whatever notice mechanism, if a child bullies and the parents are notified, the parents must take reasonable actions to prevent future

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<sup>144</sup> See *supra* note 99 and accompanying text.

<sup>145</sup> See Beth Greenfield, *Parents Slap Daughter's Cyberbullies with Rare Lawsuit*, YAHOO, Jan. 24, 2014, <https://www.yahoo.com/entertainment/bp/parents-slap-daughter-s-cyberbullies-with-rare-lawsuit-200330554.html>; Sykes, *supra* note 99.

<sup>146</sup> See PUBLIC JUSTICE, *Jury Verdicts and Settlements in Bullying Cases*, Apr. 2019, <https://www.publicjustice.net/wp-content/uploads/2019/04/2019.04.22-Spring-2019-Edition-Bullying-Verdicts-and-Settlements-Final-1.pdf> (reporting settlements and favorable jury verdicts in 178 bullying cases between 1996 and April 2019, with only five suits against parents, and all five settled).

<sup>147</sup> See *supra* notes 132-142 and accompanying text.

<sup>148</sup> See *supra* note 106.

bullying.<sup>149</sup> If they do not, they are subject to negligence liability if their child bullies again, even in the most restrictive common law jurisdictions, assuming of course that all other negligence elements are met. For example, in *Boston v. Athearn*, the court found a fact issue regarding potential parental liability for a son's continued use of fake Facebook account to harass a classmate because the parents failed to take steps to stop his behavior after they learned of it.<sup>150</sup> Similarly, if a parent learns of a food allergy bullying incident and does nothing to discipline the child or prevent the child from bullying again, the parent should be liable for future bullying.

Negligence liability in such instances—when parents know their child has engaged in food allergy bullying but take no reasonable measures to prevent its recurrence—is an important initial step, but it leaves much uncovered. For example, parents can openly mock allergic children, fight against school policies to protect them, and defy food bans. Sadly, some adults actually behave this way, with potentially severe consequences if their children use this conduct as a springboard for bullying. Tort law should address this parental behavior too.

## 2. Adopt a General Parental Duty of Reasonable Care in Food Allergy Bullying Cases

Courts applying negligence law in parental liability cases have overly limited parents' duties, imposing no liability when parents could have taken actions to stop their child from hurting someone. In the food allergy bullying context, courts could fix this problem by removing the limits on parents' duties under existing tort law so that parents—like everyone else—owe a duty of reasonable care in the case of this particularly dangerous form of bullying.

Traditionally, judges determine whether a duty exists in a particular case, and they have mostly used this power in parental liability cases to strictly interpret notions of foreseeability and find no duty as a matter of law.<sup>151</sup> They

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<sup>149</sup> See *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 982 (Alaska 1999) (discussing cases where parents were found not liable because they made “reasonable effort[s] to prevent recurrence” of son's behavior); *Costa v. Hicks*, 470 N.Y.S.2d 627, 630 (App. Div. 1983) (reversing jury verdict in favor of parent who failed to place additional restrictions on son's use of a motorcycle after he knew son violated prior restrictions); *Moore v. Crumpton*, 295 S.E.2d 436, 442 (N.C. 1982) (finding that parents who sought professional help for teen's behavioral and substance abuse issues could not have done more, “short of physically restraining his movements and placing him under twenty-four hour a day observation”).

<sup>150</sup> See *Boston v. Athearn*, 764 S.E.2d 582, 584, 587 (Ga. Ct. App. 2014).

<sup>151</sup> See *supra* notes 132-135 and accompanying text.

do so, in part, by requiring parental notice of a child's dangerous propensities and that the child have misbehaved in virtually the identical manner before.<sup>152</sup> This limited duty approach has led to outrageous results and rewards imaginative bullying.<sup>153</sup> Food allergy bullying is too serious—it can kill—to let an inventive bully operate with impunity to the bully's parents if they know about or encourage the behavior. A “child's creativity in developing new ways to bring about injury should not absolve parents from the duty to attend to and discipline the child.”<sup>154</sup>

But it does not have to be this way. Duty is essentially a public policy decision based on societal values.<sup>155</sup> Though some torts scholars have argued that duty and policy should be decoupled,<sup>156</sup> most courts view duty as a function of various policy considerations,<sup>157</sup> following Dean Prosser's statement that duty “is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”<sup>158</sup> Negligence duties are flexible, adapting to changing community norms and societal needs.<sup>159</sup> Courts can and should alter duties

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<sup>152</sup> See *supra* notes 136-140 and accompanying text.

<sup>153</sup> See *supra* notes 141-142 and accompanying text.

<sup>154</sup> *Snow v. Nelson*, 475 So. 2d 225, 227 (Fla. 1985) (Ehrlich, J., specially concurring).

<sup>155</sup> See *Cardi*, *supra* note 136, at 753 (noting that most courts agree that “community consensus regarding day-to-day obligations is an important consideration in the duty analysis”); DOBBS ON TORTS, *supra* note 130, at 208-09 (stating that duty is based on policy considerations that reflect opinion and value judgments); PROSSER & KEETON ON TORTS, *supra* note 91, § 1 at 6 (explaining that a key guiding principle of tort law is that “liability must be based upon conduct which is socially unreasonable”).

<sup>156</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 UNIV. OF PA. L. REV. 1733, 1846 (1998) (challenging the “dogma among torts scholars that, as Prosser put it, duty is merely shorthand for a laundry list of policy factors bearing on whether liability should be permitted or barred in some class of cases”).

<sup>157</sup> See *Andrews*, *supra* note 116, at 403 (“Within the law of torts, perhaps more so than in any other area of law, courts have explicitly recognized the role of public policy in influencing courts' decisions.”); Goldberg & Zipursky, *supra* note 156, at 1772-73 (“[C]ourts in a majority of the states have at one time or another cited or quoted the Prosserian mantra that duty is . . . an expression of the sum total considerations of policy.”); PROSSER & KEETON ON TORTS, *supra* note 91, § 3 at 15 (commenting on courts' open consideration of policy in judicial decisions); Tory A. Weigand, *Duty, Causation and Palsgraf: Massachusetts and the Restatement (Third) of Torts*, 96 MASS. L. REV. 55, 58 (“[M]ost states employ some version of a multi-factored policy approach to duty determinations.”); see also, e.g., *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992) (explicitly considering public policy in duty determination); *Crisafulli v. Bass*, 38 P.3d 842, 846 (Mont. 2001) (same); *Gritzner v. Michael R.*, 611 N.W.2d 906, 913 (Wis. 2000) (same).

<sup>158</sup> PROSSER & KEETON ON TORTS, *supra* note 91, § 54 at 358; see also DOBBS ON TORTS, *supra* note 130, at 204 (explaining that discussions of duty should always begin with Dean Prosser's observations on duty as policy).

<sup>159</sup> See *Andrews*, *supra* note 116, at 438 (stating that “[d]uty has traditionally been



when the circumstances so warrant.<sup>160</sup>

The scope, severity, and risks of food allergy bullying justify a change in how courts treat duty in these cases. Millions of children are bullied because of their food allergies. Millions more allergic children are vulnerable, and that number is rapidly increasing. Bullying is bad enough, but food allergy bullying is even worse because it can be deadly in the moment. More should be done to protect these children, and expanding duty is one step in the right direction.

Courts should abandon propensity—as demonstrated through prior similar conduct—as the sole standard for foreseeability in parental negligence cases based on food allergy bullying. Instead, parents in these cases should be held to the same standard that exists in general negligence law—the duty to act reasonably under the circumstances.<sup>161</sup> Failing to act to curb a known propensity for food allergy bullying could certainly be used to show parental negligence, but so could other actions.

Comparisons to other areas of negligence law depending on foreseeability to establish duty illustrate that foreseeability and demonstrated propensity need not be so closely linked. In dog bite cases, for instance, a negligence claim against the dog's owner can be based proving the owner knew of the dog's dangerous propensities because of a previous bite, but the plaintiff can also generally show the owner knew or should have known the dog was probably dangerous, due to other circumstances.<sup>162</sup> Similarly, negligent

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considered a malleable and flexible concept, its boundaries subject to revision over time”).

<sup>160</sup> See PROSSER & KEETON ON TORTS, *supra* note 91, § 54 at 359 (“Changing social conditions lead constantly to the recognition of new duties.”); see also DOBBS ON TORTS, *supra* note 130, at 208 (“With respect to [duties], courts may either deny, limit, create, or expand the duty based on articulated principle or policy factors.”).

<sup>161</sup> See Porter, *supra* note 115, at 538 (“Parental liability, like parenting itself, is legitimately frightening. Nevertheless, parenthood entails responsibility as well as rights, and parents, like all other tortfeasors, should be held to a standard of reasonable care.”); see also *supra* notes 130-131 and accompanying text.

<sup>162</sup> See 13 AM. JUR. PROOF OF FACTS 2d *Knowledge of Animal's Vicious Propensities* § 473 (June 2019 update) (discussing notice required of animal owner, stating that “the authorities are generally agreed that a dog is not entitled to ‘one bite,’ and that actual notice of the vicious or mischievous propensities of the animal are [sic] not necessary. It is sufficient if he knew or should have known that the animal was a probable source of harm.”); 3B C.J.S. *Animals* § 369 (June 2019 update) (“Knowledge of a previous attack or bite may be sufficient but is not required, and most authorities reject the ‘one bite rule’ that every dog is entitled to one free bite . . . .” (footnotes omitted)); DOBBS ON TORTS, *supra* note 130, at 781 (“The plaintiff may of course establish negligence by showing that the keeper of an animal knew of its abnormally dangerous propensities, but negligence might be shown in other ways as well.” (footnotes omitted)).

entrustment law is based on the defendant improperly entrusting property to someone who uses it to cause a foreseeable injury.<sup>163</sup> A plaintiff can show foreseeability by proving the owner knew the user had misused such property in the past, but factors such as the user's age, experience, and physical or mental limitations can also demonstrate foreseeability of the risk of harm.<sup>164</sup> Likewise, tavern owners are liable for foreseeable injuries to their patrons caused by other patrons.<sup>165</sup> Knowledge that a particular patron has fought before can establish danger that from that patron is foreseeable, but negligence can also be shown, for example, by an owner's failure to stop a fight soon enough or allowing other unruly behavior to continue.<sup>166</sup>

Under a basic duty standard, such as is applied in dog bite, negligent entrustment, and tavern-owner cases—not the limited duty courts have so long used in parental liability cases—judges would dismiss far fewer suits on duty grounds.<sup>167</sup> This would allow juries to decide, for example, if parents sending banned food to school or picketing to lift protections for allergic kids is reasonable behavior if it contributes to those parents' children becoming food allergy bullies.

Creative plaintiffs could argue these parental behaviors create liability not only for negligent supervision in food allergy bullying cases but under other tort theories as well. For example, a parent who intentionally packs banned peanut butter in her child's lunch, having reason to know her child might use that food to bully a peanut-allergic child, might be liable for negligently entrusting her child with that dangerous food.<sup>168</sup> Apart from negligence

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<sup>163</sup> See DOBBS ON TORTS, *supra* note 130, at 653; PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 914.

<sup>164</sup> See DOBBS ON TORTS, *supra* note 130, at 653-54.

<sup>165</sup> See Joan Teshima, Annotation, *Tavernkeeper's Liability to Patron for Third Person's Assault*, 43 A.L.R.4th 281, § 2[a] (1986) (“[A] tavernkeeper, while not an insurer of his guest's safety, owes them a duty of reasonable care to protect them from reasonably foreseeable injury at the hands of other patrons.”).

<sup>166</sup> See 7 AM. JUR. PROOF OF FACTS 2d 635 *Tavern Keeper's Liability for Injury Inflicted by Patron* § 2 (June 2019 update); see also *Stevens v. Jefferson*, 436 So. 2d 33, 34 (Fla. 1983) (“But specific knowledge of a dangerous individual is not the exclusive method of proving foreseeability. It can be shown by proving that a proprietor knew or should have known of a dangerous condition on his premises that was likely to cause harm to a patron.”).

<sup>167</sup> See Andrews, *supra* note 116, at 437 (“[T]he common law of duty should be interpreted to permit a greater number of parental liability claims to proceed beyond the inevitable motion to dismiss. At a minimum, such claims should presumptively be viewed as posing fact questions for juries regarding the adequacy of parental response to evidence of behavior on the part of their children that poses a risk of harm to others.”).

<sup>168</sup> See DOBBS ON TORTS, *supra* note 130, at 653-54; see also PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 914 (discussing negligent entrustment liability based on entrusting a child with “a thing dangerous in the hands of that particular child because of his

theories, parents who actively and openly undermine school allergy protection policies or who fail to discipline their children or otherwise undertake measures to stop bullying activity could be said to encourage, ratify, or endorse their child's behavior, which can provide an independent basis for liability.<sup>169</sup>

Parents owe society a duty to raise reasonable children and should be held responsible for the consequences of their parenting choices.<sup>170</sup> Parenting comes in many styles, and some fear that expanding parental liability will unduly interfere with parents' rights to raise their children as they see fit.<sup>171</sup>

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. . . propensity to misuse it"); *Stronger ex rel. Stronger v. Riggs*, 21 S.W.3d 18, 22-23 (Mo. Ct. App. 2000) ("Even if an instrument is not inherently dangerous, the dangerous instrumentality exception applies in those situations in which a parent entrusts to a child an instrumentality capable of becoming a source of danger to others when . . . the parent knows that the child is likely to put it to a dangerous use." (citation and emphasis omitted)); *S. Am. Fire Ins. Co. v. Maxwell*, 274 So. 2d 579, 581 (Fla. Dist. Ct. App. 1973) (concluding jury should consider whether parents negligently entrusted bicycle without training wheels to five-year-old child); *Mayer v. Self*, 341 S.E.2d 924, 925 (Ga. Ct. App. 1986) (finding a jury question existed on whether parents negligently entrusted child with a golf club when child had previously hurt someone with a golf club).

<sup>169</sup> PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 914 (stating that "[a] parent may be liable for the tortious act of the child if the parent has directed it or encouraged it"); *Langford v. Shu*, 128 S.E.2d 210, 212-13 (N.C. 1962) ("Apart from the parent's own negligence, liability exists . . . where the [child's tortious] act is consented to or ratified by the parent. . . . Failure to restrain the child, it is said, amounts to a sanction of or consent to his acts by the parent."); *Robertson v. Wentz*, 232 Cal. Rptr. 634, 638 (Ct. App. 1986) (stating that parents will be liable for their children's torts "if, knowing of the child's vicious or destructive tendencies or acts, he fails to exercise reasonable measures to restrain or discipline the child and thus encourages or acquiesces in such misconduct on the part of the child" (internal quotation marks omitted)); *see also Ivan v. Cty. of Middlesex*, 595 F. Supp. 2d 425, 462-64 (D.N.J. 2009) (finding fact issue as to whether supervisor who received clear notice of employee's harassing behavior assisted or encouraged it by not punishing employee); *Vinson v. McManus*, 316 S.E.2d 98, 99 (N.C. Ct. App. 1984) (finding plaintiff stated a valid claim against a father by alleging he "ratified and consented to the tortious acts of his son by ignoring the plaintiff's pleas for help and failing to take any action to stop the son" from assaulting the plaintiff).

<sup>170</sup> *See Wells v. Hickman*, 657 N.E.2d 172, 178-79 (Ind. Ct. App. 1995) (stating that parents have a duty to reasonably exercise their power to control their children); *Nolechek v. Gesuale*, 385 N.E.2d 1268, 1272 (N.Y. App. Div. 1978) (justifying parental liability, "not because parents are obligated to raise their children in any particular way" but because "however the children are raised, there must be respect for the hazards created for third parties"); *Andrews*, *supra* note 116, at 436 ("[P]arents have some responsibility for the character of the children they raise."); *Porter*, *supra* note 115, at 538 ("[P]arenthood entails responsibility as well as rights . . ."); PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 914-15 ("The parent has a special power of control over the conduct of the child, which he is under a duty to exercise reasonably for the protection of others.").

<sup>171</sup> *See DOBBS ON TORTS*, *supra* note 130, at 652 (stating that because teens need experience with freedom and control, courts should not interfere with parenting except in

Overregulation of parenting is a real concern, but expanding parental duties relating to food allergy bullying does not unreasonably intrude into parental decision making. Parents can still raise their children however they choose, but if those choices promote food allergy bullying, parents should be made to answer for that harm.<sup>172</sup> Choices have consequences.

Critics argue that parental liability measures in general are unfair because parents cannot completely control their children.<sup>173</sup> That is, of course, true to some extent, especially with older teens.<sup>174</sup> Factors other than parents, including peers, impact a child's behavior.<sup>175</sup> Some children may bully for these reasons or other reasons that may never be known. Some children are just bad seeds.

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“clear cases”); *see also* Andrews, *supra* note 116, at 439 (discussing concern that increased parental liability will interfere with parenting decisions); Porter, *supra* note 115, at 577-79 (same).

<sup>172</sup> *See* Andrews, *supra* note 116, at 439 (“[M]any would decry any extension of parental liability as a usurpation of parents’ rights to raise their children with maximum freedom. That freedom, however, should not be viewed as absolute, and should come with corresponding duties to the rest of society.”); *see also* *Vanthournout v. Burge*, 387 N.E.2d 341, 344 (Ill. App. Ct. 1979) (“With the right to bear and raise children comes the responsibility to see that one’s children are properly raised so that the rights of other people are protected.” (internal quotation marks omitted)); *Nolechek v. Gesuale*, 385 N.E.2d 1268, 1272 (NY. App. Div. 1978) (explaining that parents’ rights to make decisions regarding their children does not absolve them from liability when their decisions are unreasonable and cause harm).

<sup>173</sup> *See* Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 625 (1997) (describing other factors that eclipse action or inaction by parents as the primary cause of juvenile delinquency); DiFonzo, *supra* note 109, at 42-47 (discussing the debate over how much control parents have over their children’s behavior); Min Kang, *Parents as Scapegoats*, 16 J. CONTEMP. LEGAL ISSUES 15, 19 (2005) (“[I]n many families, parents may no longer be capable of influencing the behavior of their children.”); Swan, *supra* note 109, at 855 (“In reality, parents have quite limited means to actually control the behavior of their children, and even parents who ‘do everything right’ may nevertheless have children who engage in misconduct.”).

<sup>174</sup> *See* DOBBS ON TORTS, *supra* note 130, at 652 (noting that older children are more difficult to control); Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, But What Kind and to Whom?*, 2006 UTAH L. REV. 5, 30 (2006) (“[E]ven the most determined parent can only do so much to control a teenager.”).

<sup>175</sup> *See* Chapin, *supra* note 173, at 626 (“[W]e should not ignore the multiplicity of factors which may contribute to juvenile delinquency and focus myopically on parental responsibility.”); Kang, *supra* note 173, at 19-21 (discussing many “powerful forces” other than parents that influence teen behavior); Swan, *supra* note 109, at 890-91 (noting the “other powerful predictors that do not involve parenting” in influencing juvenile misconduct, including “high cost of living, poor standards of education, inadequate recreation, and slums, as well as peer groups” (internal quotation marks omitted)).

Lack of complete control in some cases does not mean the control that parents do have should be ignored. Parents are typically the most influential adults in a child's life.<sup>176</sup> That is the entire point of the right to raise children without undue governmental interference.<sup>177</sup> That other influences exist does not negate parents' influence. This is not to say, of course, that parents should be strictly liable for their child's misdeeds. Parents should not, without more, be liable for a child's "general incorrigibility" or "nasty disposition."<sup>178</sup> But when parents take actions that ignore or foster their child's food allergy bullying, they should be subject to liability.

Moreover, juries can be trusted to recognize situations where parents have acted reasonably, but unsuccessfully, to control their children.<sup>179</sup> Juries can differentiate between parents who did all they could to control their children as opposed to parents who, perhaps along with other influences, contributed to their child's food allergy bullying and hold only the latter group of parents liable. And in situations where parents and something else caused the bullying, juries will take that into account. Indeed, the tort system is quite adept at dealing with multiple causes of tortious behavior.<sup>180</sup>

Expanding parental liability for food allergy bullying promotes the functions of the tort system. Tort law serves, among other things, to compensate victims and reinforce societal standards of behavior.<sup>181</sup> Victims of food allergy bullying currently have very little civil recourse and almost no ability to obtain compensation for their injuries.<sup>182</sup> Allowing civil liability against the bully's parents would provide a means to compensate victims while sending a strong statement that parents should be held accountable for raising food allergy bullies when their own action, or inaction, contributed to the this especially dangerous form of bullying.<sup>183</sup> Though using the tort

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<sup>176</sup> See Lewis, *supra* note 91, at 44 (stating that it takes a village to raise a child, "and the most important villager is a parent"); see also *supra* notes 107-112 and accompanying text. Even parental liability critics acknowledge parents' influence on their children's behavior. See, e.g., DiFonzo, *supra* note 109, at 47; Swan, *supra* note 109, at 890.

<sup>177</sup> See Porter, *supra* note 115, at 553, 572-73; see also *supra* note 89 and accompanying text.

<sup>178</sup> PROSSER & KEETON ON TORTS, *supra* note 91, § 123 at 915.

<sup>179</sup> See Andrews, *supra* note 116, at 439; Porter, *supra* note 115, at 572-73.

<sup>180</sup> See Andrews, *supra* note 116, at 437, 441.

<sup>181</sup> See DOBBS ON TORTS, *supra* note 130, at 15-16, 31; PROSSER & KEETON ON TORTS, *supra* note 91, § 1 at 5-7.

<sup>182</sup> See *supra* Part V.A.

<sup>183</sup> See Andrews, *supra* note 116, at 436 ("However much we might agree that parents do not have complete control over the conduct of their children, few would argue that the manifestation of antisocial behavior in children occurs randomly. Instead, most would agree that parents have some responsibility for the character of the children they raise. . . . [I]t

system to protect food allergy bullying victims might increase litigation, this is why the tort system exists, and the threat of liability could decrease litigation in the long run by discouraging inappropriate parental behavior and encouraging parents to better control their children.<sup>184</sup>

#### D. Looking Ahead: The Restatement (Third) of Torts

In 2010, the American Law Institute finalized the Restatement (Third) of Torts: Physical and Emotional Harm.<sup>185</sup> This new Restatement does not simply summarize or restate existing law but would, if followed, fundamentally alter most courts' negligence jurisprudence.<sup>186</sup> To date, at least nine states have adopted portions of the Third Restatement or cited it favorably for points that could significantly impact parental liability.<sup>187</sup>

Two changes are particularly relevant to parental liability. First, the Third Restatement establishes a general duty of reasonable care that presumptively applies in all negligence actions; duty is no longer part of the plaintiff's prima

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seems fairer to impose liability on the parents of the tortfeasor than to impose liability on the child's victim via a rule of . . . limited liability.”).

<sup>184</sup> See Yamada, *supra* note 82, at 533 (“If . . . legislatures or judges create rights because public policy deems them important and the marketplace cannot adequately address the underlying ills, then the courts . . . exist in part to vindicate those rights. It follows that if the threat of liability is the best way to discourage certain behavior, general concerns about an overly litigious society should not be allowed to defeat the creation of new rights.”); Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1109-10 (2002) (“[D]amages awards have an important symbolic role in expressing social disapproval. Social disapproval of harassment is crucial to taking harassment seriously and stopping it.” (footnote omitted)).

<sup>185</sup> See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM (AM. LAW INST. 2010) (hereinafter THIRD RESTATEMENT).

<sup>186</sup> See W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 671 (2008) (noting that the Third Restatement “has received stinging criticism for failing to restate the law”); Porter, *supra* note 115, at 565 (noting that the Third Restatement’s drafters have used its provisions “in an attempt to influence or alter common law norms”); Weigand, *supra* note 157, at 75 (“[T]he Third Restatement is not truly a ‘restatement’ of law, and swims against a tide of nationwide precedent and practice.” (footnotes omitted)); see also THIRD RESTATEMENT § 7 cmt. j (“Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice . . .”).

<sup>187</sup> See *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007); *Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1185 & n.19 (Conn. 2017); *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-35 (Iowa 2009); *Rafferty v. Merck & Co.*, 92 N.E.3d 1205, 1214 (Mass. 2018); *A.W. v. Lancaster Cty. Sch. Dist.*, 784 N.W.2d 907, 917 (Neb. 2010); *Rodriguez v. Del Sol Shopping Ctr. Assoc.*, 326 P.3d 465, 468 (N.M. 2014); *Mower v. Baird*, 422 P.3d 837, 843 (Utah 2018); *LeClair v. LeClair*, 169 A.3d 743, 747 (Vt. 2017); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 575 (Wis. 2009).

facie case of negligence.<sup>188</sup> Second, when judges make duty determinations, they can only do so based on certain enumerated criteria that would apply narrowly across an entire class of cases as opposed to only the particular case at issue.<sup>189</sup> Foreseeability is specifically excluded from the judicial duty calculus.<sup>190</sup> Thus, foreseeability-based decisions would be reserved for determining breach and would be the sole province of the jury.<sup>191</sup>

Jurisdictions that adopt these provisions of the Third Restatement will be ripe for expansion of parental negligence liability. The limited common law duty in the Second Restatement's section 316—which courts narrow even further by their strict interpretation of the propensity test for foreseeability—has been the primary mechanism for insulating parents from most liability for their children's torts.<sup>192</sup> In the Third Restatement's framework, these limits would no longer have a place, leaving advocates fertile ground for exploring broader parental liability in food allergy bullying cases and beyond.<sup>193</sup>

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<sup>188</sup> See THIRD RESTATEMENT § 7 & cmt. a, b; see also DOBBS ON TORTS, *supra* note 130, at 210 (“[T]he default rule, to be applied in all but the most exceptional cases of physical harm, is that everyone owes a duty of care not to create unreasonable risks to others.”); Weigand, *supra* note 157, at 58-59 (stating that the Third Restatement “creates a presumption of a duty of care on all actors” and that “[d]uty remains a legal question but it no longer is the plaintiff’s burden to prove as part of the prima facie case”).

<sup>189</sup> See THIRD RESTATEMENT § 7 cmt. a; see also Cardi, *supra* note 136, at 770 (stating that “no-duty cases are narrow categorical exceptions to the general duty rule”); Porter, *supra* note 115, at 566 (“The combined effect of these provisions—as the Reporters acknowledge—is to drastically restrict the role of a court in making duty determinations based on fact-specific grounds.”); Weigand, *supra* note 157, at 59 (“No-duty, or modification of the general default duty determination, is asserted to be limited to ‘categorical’ matters.”).

<sup>190</sup> See THIRD RESTATEMENT § 7 cmt. j; see also DOBBS ON TORTS, *supra* note 130, at 210 (explaining that under the Third Restatement, “foreseeability of harm is not a factor to be considered on the duty issue”); Cardi, *supra* note 136, at 790 (explaining that exceptions to the duty of reasonable care should be “exceptional” or “special” and that “[I]lack of foreseeability is not ‘exceptional’ or ‘special,’ but rather a run-of-the-mill argument made by defendants in many negligence cases”); Weigand, *supra* note 157, at 60 (The Third Restatement “makes express the elimination of foreseeability from the duty determination.”).

<sup>191</sup> See THIRD RESTATEMENT § 7 cmt. j; see also Cardi, *supra* note 136, at 794 (explaining that the Third Restatement’s “casting foreseeability out of duty” means “foreseeability as a limitation on negligence liability is no longer a presumed matter for the judge, but a presumed matter for the jury”); Weigand, *supra* note 157, at 56 (“[F]oreseeability is otherwise relegated to the issue of breach and the work of fact finders.”).

<sup>192</sup> See *supra* notes 129-142 and accompanying text.

<sup>193</sup> See Porter, *supra* note 115, at 567-68 (discussing the impact on parental negligence liability of the Third Restatement’s rejection of foreseeability in the duty analysis, stating, “In negligent supervision suits, courts have used foreseeability in duty to narrow parents’ duties to supervise their children. Removing foreseeability from the duty analysis will result in more suits surviving dispositive motions . . . .”); *id.* at 570 (“Eliminating foreseeability would represent a substantial shift in the framework of negligent supervision liability.”); see also Lewis, *supra* note 91, at 30-31 (concluding that in jurisdictions adopting the Third

## VI. CONCLUSION

Parental liability for food allergy bullying is not a panacea. Schools—where children spend a significant amount of time and where most food allergy bullying occurs—clearly have a crucial role to play in stopping food allergy bullying and protecting allergic children. Further, raising awareness is critically important, both for parents and students. For those many who do not understand the seriousness of food allergies, a little education can go a long way in turning around bad behavior.<sup>194</sup>

Human behavior is complex, and many children likely bully for reasons having little if anything to do with their parents. But in situations where parents have a significant influence—such as where they know of their child’s bullying and do not try to stop it, intentionally violate school food policies, or signal to their children that mistreating those with food allergies is acceptable—they should be held accountable for their conduct.

The legal system should not cocoon parents of food allergy bullies in the protection of a limited duty standard. Especially with food allergies becoming increasingly prevalent, it should not take an epidemic of children being gravely injured or dying at school from food allergy bullying for courts to hold parents accountable for their conduct in facilitating this behavior or not doing what they can do control their children. This measure will not eliminate food allergy bullying or compensate all victims, but it is a step in the right direction to protect children with food allergies and provide them the educational environment all children deserve.

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Restatement, “foreseeability will not even be a factor, much less a bar, to the recognition of a duty” for parental liability for the parents of adult mass murders).

<sup>194</sup> See *CDC Voluntary Guidelines*, *supra* note 18, at 39 (“Among adolescents, food allergy education and awareness can be an effective strategy to improve social interactions, reduce peer pressure, and decrease risk-taking behaviors that expose them to food allergens.”); Claire Gagné, *Bullying Case Grabs Attention*, ALLERGIC LIVING, July 2, 2010, <https://www.allergicliving.com/2010/07/02/food-allergy-bullying-case/> (discussing teen’s food allergy bullying experience, explaining that after she reported the incident and the school and her parents explained the seriousness of her allergies to the bullies, they stopped their behavior, are nice to her now, and asked questions to learn about her allergies).