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Morally and Legally:
A Parent's Duty to Prevent the Abuse of a Child as Defined by
*Lane v. Commonwealth*

BY RACHEL S. ZAHNISER**

INTRODUCTION

In Kentucky, 40,470 reports of child abuse, neglect, and dependency were made in 1995, and 16,962 of those reports were substantiated.1 In the same year, 63,313 Kentucky children were reported as abused and/or neglected.2 Since 1988, these numbers have steadily increased,3 and still the statistics do not reflect the many instances of abuse that go unreported.4

For example, a girl tells her mother that her stepfather is "'messing'" with her and begs her mother to make him stop.5 The mother does not actively participate in the abuse; however, she does nothing to prevent the

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* Thanks to William Fortune, Edward T. Breathitt Professor of Law, University of Kentucky, for his help in selecting this topic and to Karen Shuff Maurer, Assistant Public Advocate, Department of Public Advocacy, for her insights into *Lane v. Commonwealth.*

** J.D. expected 1999, University of Kentucky.


2 See id. at 3. This figure is higher because it refers to individual children, whereas the 40,470 figure refers to reports that may include more than one child.

3 See id. at 2-3.

4 "[A]ccording to national studies, for every reported instance of child abuse, two to three more cases are kept quiet." Holly Holland, More Children Being Abused, THE COURIER-JOURNAL (Louisville, Ky.), Apr. 7, 1994, at A1.

5 This hypothetical is based on the facts of Knox v. Commonwealth, 735 S.W.2d 711 (Ky. 1987) (quoting trial transcript), overruled by Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997), cert. denied, 118 S. Ct. 1067 (1998).
sexual abuse of her daughter, nor does she report the abuse. Should this mother be convicted of complicity to commit rape?

Suppose a social worker notices bruises on a child’s face. The child is presently in his parents’ custody, but has been removed from the home before because of suspected abuse. The social worker does not report the bruises to the court or take any action to protect the child. When the child is killed by his father, should this social worker be convicted of complicity to commit murder?

Section 502.020(l)(c) of the Kentucky Revised Statutes, the complicity statute, provides that “[a] person is guilty of an offense committed by another” when that person has “a legal duty to prevent the commission of the offense, [and] fails to make a proper effort to do so.” The Kentucky Supreme Court addressed the issue of whether a parent has a legal duty to prevent the abuse of his or her child in Knox v. Commonwealth, on which the first hypothetical is based. In Knox, the court found no legal duty to prevent the abuse of the child.

Ten years later, the Kentucky Supreme Court returned to this issue in Lane v. Commonwealth. By a 3-2-2 vote, the court held that a parent does have a legal duty to prevent the abuse of his or her child. Three justices ruled that a legal duty arises from Chapter 620 of the Kentucky Revised Statutes. Two justices found a legal duty to act imposed by the common law and statutory recognition of a “special relationship” between parent and child. These justices stated that this “unique legal duty which a parent

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6 See id. at 711.

7 This hypothetical is based on the facts of four cases involving the acquittal of Wayne County, Kentucky, social workers who had been charged with complicity to commit murder. The records of these cases have been expunged by the Wayne County Circuit Court. See infra notes 228-37 and accompanying text.

8 KY. REV. STAT. ANN. [hereinafter K.R.S.] § 502.020(1)(c) (Michie 1990). The relevant portion of the complicity statute provides: “(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: . . . (c) [has] a legal duty to prevent the commission of the offense, [and] fails to make a proper effort to do so.”


10 See id. at 712.


12 See id. at 875-76.

13 See id. at 875.

14 See id. at 879 (Cooper, J., concurring).
has to protect his child from harm arises from the ‘special relationship’ which exists between any custodian and the person in his custody.”

Reasserting the court’s position in Knox, the dissent maintained that while a parent has a moral duty to protect his or her child, this duty is not a legal one.

Part I of this Note examines Kentucky law regarding the criminal liability of a passive parent before the Lane case. Part II analyzes the three different opinions in Lane. Part III of this Note discusses the potential impact of the Lane decision. Finally, this Note concludes that the Lane decision leaves the legal duty issue unsettled due to the court’s divided opinion, that the legislature intended this type of conduct to fall under the criminal abuse statutes, and that the opinion as it stands inappropriately expands the scope of complicity liability.

I. KENTUCKY LAW BEFORE LANE V. COMMONWEALTH:
KNOX V. COMMONWEALTH

The Kentucky Supreme Court first addressed the issue of whether a passive parent could be held criminally liable for the abuse of his or her child in Knox v. Commonwealth. At trial, Charles Knox was convicted of first degree rape, and his wife, Mary Knox, was found guilty of complicity to commit first degree rape. The victim was Mary’s daughter. According to the evidence presented, Mary knew about the sexual relationship between her husband Charles and her daughter. Her daughter testified “that she told Mary that Charles was ‘messing’ with her and pleaded with her mother to make him stop.” Mary Knox did not take any action to stop the abuse.

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15 See id. at 877 (Cooper, J., concurring).
16 See id. at 882-83 (Stumbo, J., dissenting).
17 See infra notes 21-50 and accompanying text.
18 See infra notes 51-202 and accompanying text.
19 See infra notes 203-46 and accompanying text.
20 See infra notes 247-50 and accompanying text.
22 See id. at 711.
23 See id.
24 Id. (quoting trial transcript).
25 See id.
The main issue examined by the Knox court was whether Mary Knox "had a legal duty to make an effort to prevent the rape by Charles Knox." The Commonwealth charged Mary Knox under Kentucky's complicity statute. The trial court held that Mary Knox had a legal duty to take action to protect her child and "to make an effort to prevent the commission of the rape." In reversing the complicity conviction of Mary Knox, the Kentucky Supreme Court found that neither statutory nor common law imposed a legal duty upon her to prevent the rape of her daughter: "We know of no higher moral duty than that of preventing such a crime, and, indeed, a failure to do so is most 'reprehensible.' However, 'a moral duty to take affirmative action is not enough to impose a legal duty to do so.'"

The Commonwealth in Knox urged the court to find a duty under the Kentucky statutes addressing child abuse, "particularly KRS 199.335." The Commonwealth argued that this provision, which was the reporting statute at that time, imposed a legal duty to stop abuse. The reporting statute required "any physician, osteopathic physician, nurse, teacher, school personnel . . ., social worker, coroner, medical examiner, child caring personnel, resident, intern, chiropractor, dentist, optometrist, health professional, peace officer, mental health professional or other person" to report suspected abuse or neglect of a child. The Commonwealth further asserted that sections 508.100 through 508.120, 530.040, and 530.050 placed a legal duty on Mary Knox to prevent the rape of her daughter by her husband. Sections 508.100 through 508.120, the criminal abuse statutes, impose criminal liability on someone who abuses or allows the abuse of a person of whom he or she has custody. However, as the Knox court noted, the criminal abuse statutes were not applicable to the case.

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26 Id.
27 See supra note 8 and accompanying text.
28 Knox, 735 S.W.2d at 711.
29 Id. at 712 (citations omitted) (quoting Elmendorf v. Commonwealth, 188 S.W. 483, 489 (Ky. 1916)); see also 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.3, at 284 (1986).
30 See id.
31 Id.
32 See id.
34 See Knox, 735 S.W.2d at 712.
35 See id. at 713.
36 See K.R.S. §§ 508.100-.120 (Michie 1990).
because they became effective after the offenses occurred. Under sections 530.040 and 530.050, a parent is criminally liable for deserting his or her child "in any place under circumstances endangering his life or health and with intent to abandon him [or her]" and for failing to provide support for his or her child, respectively. The Knox court found that these statutes and the reporting statute "fall far short of the legal duty the Commonwealth seeks to impose."

Foreshadowing his plurality opinion in Lane v. Commonwealth, Justice Wintersheimer maintained, in his dissent, that several Kentucky statutes imposed a legal duty on Mary Knox to prevent the rape of her child by her husband. The dissent pointed to the reporting statute, section 199.335(2), which provided that all persons, implicitly including parents, have a duty to report child abuse. Justice Wintersheimer further noted that section 199.335 had been repealed, effective July 1, 1987, and replaced by Chapter 620, the section on dependency, neglect, and abuse. The legislative purpose of Chapter 620 is described in section 620.010, which states that "[c]hildren have certain fundamental rights which must be protected and preserved, including . . . the right to be free from physical, sexual or emotional injury or exploitation." Looking at the recently repealed reporting statute and the new section on dependency, neglect, and abuse, the dissent stated, "It is absolutely illogical to legislate a duty to report and prevent child abuse for many other named professions who are in 'loco parentis' and hold in this opinion that the parent has no duty whatsoever to prevent abuse. It defies common sense."

In arguing that a legal duty should be imposed on Mary Knox, Justice Wintersheimer also referred to the criminal abuse statutes, sections 508.100 through 508.120,

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37 See Knox, 735 S.W.2d at 712.
38 K.R.S. § 530.040.
39 See id. § 530.050.
40 Knox, 735 S.W.2d at 712.
42 See Knox, 735 S.W.2d at 712 (Wintersheimer, J., dissenting).
43 See id. (Wintersheimer, J., dissenting).
44 See id. at 713 (Wintersheimer, J., dissenting). According to K.R.S. Chapter 620, dependency occurs when "any child, other than an abused or neglected child . . . is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child." K.R.S. § 600.020(13) (Michie Supp. 1996).
46 Knox, 735 S.W.2d at 713 (Wintersheimer, J., dissenting).
which make it a criminal offense for a person to allow another person of
whom he or she has custody to be abused.\textsuperscript{47} The dissent asserted, "There is
no call for a parent to be a hero but only to take reasonable measures to
prevent the abuse of their [sic] child."\textsuperscript{48} The dissent further noted that the
Kentucky courts have found that "any person neglecting to discharge his
duty by withholding food or clothing or medical care for a child can be
found guilty of involuntary manslaughter."\textsuperscript{49} Justice Wintersheimer
concluded that Mary Knox's conviction for complicity to commit first
degree rape should have been affirmed.\textsuperscript{50}

II. THE IMPOSITION OF A LEGAL DUTY:

\textit{LACEY v. COMMONWEALTH}

A. The Facts of Lane

In 	extit{Lane v. Commonwealth},\textsuperscript{51} the state charged Kimberly Lane with
complicity to commit assault in the first degree and charged her boyfriend,
Bryan Tubbs, with assault in the first degree for injuries sustained by
Lane's two-year-old daughter, Tiffany.\textsuperscript{52} The indictment read that Lane
"aided, counseled, or attempted to aid Bryan Tubbs in the offense of
assault in the first degree when he intentionally caused serious physical
injury to the child" with a dangerous instrument, manifesting extreme
indifference to the value of human life.\textsuperscript{53}

The Commonwealth offered evidence that Lane had started a new job
and left Tiffany with Tubbs. When she returned home from work, Lane
found Tiffany injured and took her to the hospital.\textsuperscript{54} The "child's skull and

\textsuperscript{47} See id. (Wintersheimer, J., dissenting). The dissent considered the criminal
abuse statutes even though, as the majority opinion made clear, they were
inapplicable to the Knox case because they were not in effect at the time the
offenses were committed.

\textsuperscript{48} Id. (Wintersheimer, J., dissenting).

\textsuperscript{49} Id. (Wintersheimer, J., dissenting) (citing Westrup v. Commonwealth, 93
S.W. 646 (Ky. 1906), JAMES M. ROBERSON, KENTUCKY CRIMINAL LAW AND
PROCEDURE § 204 (1899)).

\textsuperscript{50} See Knox, 735 S.W.2d at 713 (Wintersheimer, J., dissenting).

\textsuperscript{51} Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997), cert. denied, 118 S. Ct.

\textsuperscript{52} See id. at 874.

\textsuperscript{53} Id. (quoting indictment).

\textsuperscript{54} See Brief for Appellant at 4, Lane v. Commonwealth, 956 S.W.2d 874 (Ky.
arm were fractured. Lane and Tubbs claimed that the child sustained the injuries when she fell down a flight of stairs. At trial, three doctors who had treated Tiffany at an emergency room and at a Louisville hospital testified that the injuries, which included the skull and arm fractures as well as bruises, abrasions, and contusions, were inconsistent with such a fall. The injuries were linear in nature and appeared to be the result of the child being struck with a linear object. The doctors further testified that the injuries were inflicted, not accidental. According to Barren County Commonwealth Attorney Phillip Patton, Tubbs had repeatedly beaten Tiffany with his fists and a coat hanger.

The jury found Lane guilty of complicity to commit assault in the first degree and Tubbs guilty of assault in the first degree. The trial judge set aside Lane's complicity conviction, relying on Knox v. Commonwealth in finding that Lane did not have a legal duty to avert her boyfriend's abuse of her daughter. The Court of Appeals of Kentucky reinstated Lane's complicity conviction and held that "'parents have an "affirmative duty" to prevent crimes against their children and are not just morally bound.' The Kentucky Supreme Court granted discretionary review to determine "whether the trial judge committed reversible error when he found that there was no legal duty imposed on [Lane] to prevent the abuse of her child." The court affirmed the judgment of the Court of Appeals and reinstated Lane's conviction. The plurality opinion, written by Justice


56 See Lane, 956 S.W.2d at 875.

57 See id. at 874-75.

58 "Linear" means "pertaining to or resembling a line." THOMAS LATHROP STEDMAN, STEDMAN'S MEDICAL DICTIONARY 882 (25th ed. 1990). This description is consistent with the Barren County Commonwealth Attorney's claim that Tiffany had been beaten with a coat hanger. See Wolfe, supra note 55, at B3.

59 See Lane, 956 S.W.2d at 875.

60 See Wolfe, supra note 55, at B3.

61 See id.; see also Lane, 956 S.W.2d at 874.

62 See Wolfe, supra note 55, at B3; see also Lane, 956 S.W.2d at 874.


64 See Lane, 956 S.W.2d at 875.

65 Wolfe, supra note 55, at B3 (quoting unpublished court of appeals opinion).

66 Lane, 956 S.W.2d at 875.

67 See id. at 876.
Wintersheimer and joined by Justices Graves and Lambert, found that a legal duty was imposed by Chapter 620 of the Kentucky Revised Statutes. According to Justice Cooper’s concurring opinion, in which Justice Johnstone joined, a parent’s legal duty to protect a child from abuse arises from the common law and the statutory recognition of a “special relationship” between parent and child. The dissent, written by Justice Stumbo and joined by Chief Justice Stephens, reasserted the position taken in Knox that a parent does not have a legal duty to prevent the abuse of his or her child.

B. The Plurality: A Statutory Duty

Lane was convicted under the complicity statute, section 502.020. Subsection (1) of this statute provides that “[a] person is guilty of an offense committed by another” when that person has a “legal duty to prevent the commission of the offense” and does not do so. The plurality held that the trial judge erred in setting aside the complicity conviction of Lane and that the Kentucky statutes impose a legal duty on a parent to prevent the abuse of his or her child.

Chapter 620 of the Kentucky Revised Statutes addresses dependency, neglect, and abuse. In 1986, this chapter replaced section 199.335, which was the law in effect at the time of the offenses in the Knox case. In setting forth the legislative purpose of the chapter, section 620.010 provides that “[c]hildren have certain fundamental rights which must be protected and preserved, including . . . the right to be free from physical, sexual or emotional injury or exploitation.” Section 620.030 imposes a duty to report on any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused.

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68 See id.
69 See id. at 880-81 (Cooper, J., concurring).
71 See Lane, 956 S.W.2d at 882-83 (Stumbo, J., dissenting).
72 See id. at 874.
75 See id. at 875.
76 K.R.S. § 620.010.
77 See id. § 620.030.
Section 405.020 provides that parents shall "nurture" their children under the age of eighteen. While this statute was not a basis for the court's decision, the plurality "observe[d] that a secondary meaning to the commonly understood 'nurture' means the act of taking care of children and certainly does not involve the tolerance of physical injury." The court also referred to the criminal abuse statutes, sections 508.100 through 508.120, but did not hold that an affirmative duty to prevent child abuse arises from those statutes. The criminal abuse statutes provide criminal liability for abusing a child or for permitting a child of whom he or she has custody to be abused.

The plurality held that in light of the legislative intent of Chapter 620, "K.R.S. § 620.010 creates an affirmative duty for the parent of a child to prevent such physical injury which would result in an assault on that child," a duty Lane violated. In finding that Lane had a legal duty to prevent her boyfriend's assault on her child, the court overruled Knox and in doing so, the court attempted to explain its change in reasoning since the Knox decision. Section 199.335, the law in effect at the time of the Knox offenses, was repealed and replaced by Chapter 620. The court noted that there is "little if any significant difference" between section 199.335 and the new section on dependency, neglect, and abuse, except that Chapter 620 imposes a legal duty to prevent physical injury to children.

In view of the natural relationship between parent and guardian, KRS 620.010 creates an affirmative duty for parents and guardians to prevent physical injury which results in an assault on the child. . . . It must be remembered that conduct based on the failure to act where there is a legal duty to act is still punishable pursuant to KRS 502.020(1)(c). The

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78 See id. § 405.020(1) (Michie 1996).
79 Lane, 956 S.W.2d at 875.
80 See id.
81 See K.R.S. §§ 508.100-.120 (Michie 1990).
82 Lane, 956 S.W.2d at 875.
83 See id. at 876.
84 See id. at 875.
85 Id.
86 "Wintersheimer says there is little difference between the old and new statute, yet this makes a big difference in the law." Telephone Interview with Karen Shuff Maurer, Assistant Public Advocate, Department of Public Advocacy (Nov. 23, 1997).
legislature has clearly expressed their intent to punish those who through
passive conduct allow physical injury to children.\textsuperscript{87}

The court also held that prosecution for failing to prevent child abuse
where there is a legal duty to do so can fall under the assault statutes\textsuperscript{88} or
the abuse statutes.\textsuperscript{89} Criminal abuse is not a lesser-included offense of
assault; criminal abuse and assault are parallel crimes.\textsuperscript{90} The prosecutor can
choose to charge the passive parent with assault or abuse.\textsuperscript{91}

\textbf{C. The Concurrence: The "Special Relationship"}

The concurring justices agreed with the plurality that Kimberly Lane
had a legal duty to protect her two-year-old daughter Tiffany from abuse
by her boyfriend Bryan Tubbs, but differed with the plurality regarding the
origin of this duty. While the plurality found an affirmative duty to act to
prevent the abuse of a child was placed upon a parent by Chapter 620 of the
Kentucky Revised Statutes, the concurring justices stated that this duty
arises from the "special relationship" between a custodial parent and his or
her child\textsuperscript{92} that is recognized by the common law and by the Kentucky
nurturing and criminal statutes.\textsuperscript{93}

\textbf{1. Rejection of the Statutory Duty}

The concurrence rejected the plurality's position that a legal duty to
prevent abuse emanates from the language of Chapter 620.\textsuperscript{94} The statute
recognizes that a child may have to be removed from his or her parents\textsuperscript{95}
in order to achieve the statute's stated purpose of protecting and preserving
children's "fundamental right[ ] . . . to be free from . . . injury or exploita-

\begin{itemize}
\item \textsuperscript{87} \textit{Lane}, 956 S.W.2d at 876.
\item \textsuperscript{88} See K.R.S. §§ 620.010, .030 (Michie 1990).
\item \textsuperscript{89} See id. §§ 508.100-.120
\item \textsuperscript{90} See \textit{Lane}, 956 S.W.2d at 876 (citing Commonwealth v. Chandler, 722 S.W.2d
899, 900-01 (Ky. 1987)).
\item \textsuperscript{91} See id.
\item \textsuperscript{92} See id. at 876-77 (Cooper, J., concurring). The "special relationship" theory
was not raised by the parties in their briefs or in oral arguments. Interview with
Karen Shuff Maurer, \textit{supra} note 86.
\item \textsuperscript{93} See K.R.S. §§ 405.020, 508.100-.120.
\item \textsuperscript{94} See \textit{Lane}, 956 S.W.2d at 876 (Cooper, J., concurring).
\item \textsuperscript{95} See K.R.S. § 620.010.
\end{itemize}
tion." As the concurrence noted, "the purpose of this statute is not to establish a new and unique parental duty to protect a child from forces outside the parent-child relationship, but to establish the basis for removing a neglected or abused child from the custody of his abusive parents."97

The plurality also relied on the reporting statute, section 620.030, to find a legal duty.98 The concurring opinion pointed out that subsection (2) of that statute specifies almost twenty groups of persons that have a duty to report known or suspected abuse,99 however, "parents" are not expressly mentioned. Parents would merely fall under the catch-all phrase "‘all persons.’"100 The concurrence stated, "Clearly, this statute is designed to protect a child not so much from outside forces, as from abuse or neglect perpetrated, as here, by someone within the child’s own family environment."101

The concurrence also criticized the plurality for subjecting the state’s professionals to complicity liability by basing a legal duty to prevent abuse on the reporting statute.102 Since a legal duty to prevent child abuse comes from the reporting statute, those persons named in the statute, including doctors, social workers, teachers, and others, who fail to report known or suspected child abuse could be charged as an accomplice to that abuse. Such wide-sweeping criminal liability is hardly what the legislature intended in enacting the reporting statute.103

96 Id.
97 Lane, 956 S.W.2d at 877 (Cooper, J., concurring).
98 See id. at 876.
99 See id. at 877 (Cooper, J., concurring); see also K.R.S. § 620.030(2). The reporting statute places a duty to report abuse on:
Any person, including but not limited to a physician, osteopathic physician, nurse, teacher, school personnel, social worker, coroner, medical examiner, child-caring personnel, resident, intern, chiropractor, dentist, optometrist, emergency medical technician, paramedic, health professional, mental health professional, peace officer or any organization or agency for any of the above, who knows or has reasonable cause to believe that a child is dependent, neglected or abused, regardless of whether the person believed to have caused the dependency, neglect or abuse is a parent, guardian, person exercising custodial control or supervision or another person, or who has attended such child as a part of his professional duties . . .

Id.
100 Lane, 956 S.W.2d at 877 (Cooper, J., concurring) (quoting K.R.S. § 620.030(2)).
101 Id. (Cooper, J., concurring).
102 See id. (Cooper, J., concurring).
103 See id. (Cooper, J., concurring).
2. Civil Liability and the "Special Relationship"

The concurrence in *Lane* further stated that the legal duty a parent has to prevent the abuse of his or her child emanates from the "special relationship" found "between any custodian and the person in his [or her] custody." The Kentucky courts in imposing civil liability have identified a "special relationship" between the state and a person in the state’s custody. This "special relationship" creates a duty for the state to protect those in its custody.

The Kentucky cases recognizing the "special relationship" between the state and someone in the state’s custody rely on *DeShaney v. Winnebago County Department of Social Services*. In *DeShaney*, the Department of Social Services received reports that Joshua DeShaney was being abused by his father, Randy DeShaney, but did not remove the child from his father’s custody. At the age of four years, Joshua fell into a coma after being severely beaten by his father. Joshua suffered brain damage, and his father was convicted of child abuse. Joshua and his mother brought an action under 42 U.S.C. § 1983 against the social services department.

Rejecting the argument that a "special relationship" existed between the state and Joshua, the United States Supreme Court held that the state did not owe a duty to Joshua. When the state takes a person into its custody and that person is no longer able to care for himself or herself, the

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104 Id. (Cooper, J., concurring) (quoting Fryman v. Harrison, 896 S.W.2d 908, 910 (Ky. 1995); Ashby v. City of Louisville, 841 S.W.2d 184, 189 (Ky. Ct. App. 1992)).
105 See *Lane*, 956 S.W.2d at 877 (Cooper, J., concurring) (citing Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995); Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. Ct. App. 1992)).
108 See id. at 192-93.
109 See id. at 193.
110 See id. at 203.
111 *DeShaney*, 489 U.S. at 192-93.
112 See id. at 203.
United States Constitution\(^{113}\) requires the state to provide for that person’s needs and assume responsibility for that person’s safety and well-being.\(^{114}\) “[This] affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”\(^{115}\) The Supreme Court held that the state did not have a constitutional duty to protect Joshua, because Joshua was injured while in the custody of his father, not the state. Although the state may have known about the abuse of Joshua, the state did not cause the situation nor did the state make Joshua more susceptible to the abuse.\(^{116}\)

The concurring opinion in *Lane* pointed out that the United States Supreme Court has held that a state has a legal duty to protect a person who has been involuntarily institutionalized.\(^{117}\) In addition, several federal courts of appeals have held that a state may be liable under the Due Process Clause\(^{118}\) if a foster child is abused by his or her foster parents.\(^{119}\) Further, some state courts have recognized a “special relationship” between a state and a person in its custody. From this “special relationship” comes the state’s duty to prevent harm to those in its custody.\(^{120}\)

An affirmative duty to act arising from a “special relationship” has been found in relationships that do not include a governmental body.\(^{121}\) For example, the Missouri court of appeals, in *Reed v. Hercules Construction*
recognized that the "duty to protect against the intentional criminal conduct of a third person . . . arises only where there is a 'special relationship.'" The Reed court further stated that "[a] 'special relationship' exists when one entrusts himself to the protection of another and reasonably relies on the other to provide a place of safety," such as when a guest relies on an innkeeper. The duty arising from a "special relationship" has also been described in the following terms:

"[W]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The "Special Relationship" in the Criminal Context: Persuasive Authority

After examining the recognition of a legal duty arising from a "special relationship" in the civil context, the concurring opinion in Lane then turned to the issue of whether criminal liability can be based on a violation of such a duty. The concurrence quoted a noted criminal law treatise:

“One has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself.” The common law imposes affirmative duties upon persons standing in certain personal relationships to other persons—upon parents to aid small children, upon husbands to aid their wives, upon ship captains to aid their crews, upon masters to aid their servants. Thus a parent may be guilty of criminal homicide for failure to call a doctor for his sick child, a mother for failure to prevent the fatal beating of her baby by her lover, a husband for failure to aid his imperiled wife, a ship captain for failure to pick up a seaman or passenger fallen overboard, and an employer for failure to aid

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123 Id. at 282.
124 Id.
125 Tarasoff v. Regents of the University of California, 551 P.2d 334, 342 (Cal. 1976) (quoting Heaven v. Pender, 11 Q.B.D. 503, 509 (1883)).
his endangered employee. Action may be required to...[protect against] threatened acts by third persons.127

The concurring opinion then proceeded to review the decisions of other states that have recognized a legal duty of a parent arising from the “special relationship” between parent and child.128 The first case to find a duty imposed on a parent to prevent the abuse of his or her child was Palmer v. State.129 The Maryland Court of Appeals upheld a mother’s conviction for involuntary manslaughter.130 Although Palmer had not abused her twenty-month-old daughter Terry, she did nothing to stop the severe and violent beatings her boyfriend, Edward P. McCue, inflicted on the baby, which resulted in the child’s death.131 The court found that under the Maryland nurturing statute, Palmer was responsible for the “‘support, care, nurture, welfare and education’” of her child.132 This statute created a legal duty requiring Palmer to provide for her daughter’s welfare and care. The court held that “where the defendant owed to a deceased person a specific legal duty, but failed to perform the same, and death resulted to the deceased because of the nonperformance of the duty, ... the defendant is guilty of involuntary manslaughter.”133 The Palmer court found that the duty created by the nurturing statute was “not a perfunctory one, to be performed only at the voluntary pleasure or whimsical desire of the parent.”134 Maintaining that Palmer had acted with “‘a wanton or reckless disregard for human life,’” the court stated that her behavior “in permitting and, in fact, compelling this poor little defenseless urchin to remain in an environment where she was subjected to merciless, inhumane and inordinate brutality of a protracted nature, manifested a recklessness of justice and the rights and feelings of the tiny infant” and was “outrageous.”135

In North Carolina v. Walden,136 the court addressed the issue of “whether a mother may be found guilty of assault on a theory of aiding and

127 Id. (quoting 1 LAFAVE & SCOTT, supra note 28, § 3.3, at 284-85).
128 See id. at 878-79 (Cooper, J., concurring).
130 See id. at 474.
131 See id. at 468-72.
132 Id. at 468 (quoting MD. ANN. CODE art. 72A, § 1 (1957)) (alteration in original).
133 Id. at 468-69.
134 Id. at 473.
135 Id. (quoting Craig v. State, 155 A.2d 684, 688 (1959)).
abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault.” In this case, Aileen Estes Walden was found guilty of assault with a deadly weapon and inflicting serious bodily injury upon her son Lamont. After a neighbor reported that he heard a child’s screams and a “popping sound” for one to one-and-one-half hours coming from the Walden apartment, a police officer arrived and found Walden’s five small children with cuts and bruises on their bodies. One of the children, Lamont, was in diapers and had red marks on his chest, a swollen lip, and bruises on his legs and back. At trial, three of Walden’s children testified that “Bishop” George Hoskins had beaten one-year-old Lamont with a belt and that their mother had been in the same room while the beating occurred and did not do or say anything to stop the beating of her young son.

The Walden court found that the common law had recognized affirmative duties to act arising out of a relationship, such as the one between a parent and child, and that a person could be held criminally liable for failing to act where such a duty is present. The court also pointed out that the state, through statutory and case law, imposes on parents a legal duty to protect and provide for their children. In deciding that Walden could be convicted of assault with a deadly weapon because she was present at her son’s beating and took no action to prevent it, the court held that requiring a parent to take action to prevent the abuse of his or her child “imposes a reasonable duty upon the parent.” Adopting passive parent liability, the Walden court stated: “We believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute.” Parents are not required to put themselves in danger, “[b]ut parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.”

137 Id. at 782.
138 See id.
139 See id. at 782.
140 See id. at 783.
141 See id. at 785.
142 See id.
143 Id. at 786.
144 Id.
145 Id.
In Michael v. Alaska, a father was held criminally liable for his wife’s abuse of their daughter. Steven and Loreli Michael brought their two-month-old daughter to the hospital because of her red and swollen leg. X-rays showed that the infant had many broken bones in different stages of recovery. The upper and lower bones of both arms and both legs and at least nine ribs were fractured. The Michaels were each charged with thirteen counts of assault in the first degree.

The trial judge found Steven Michael guilty of two counts of second-degree assault and held that Michael had a statutory and common law duty under Alaska law to “aid and assist his child if she was under the threat or risk of physical damage or assault – from any person, including his wife.” The judge also found that Steven Michael failed to act when his wife abused their daughter, and that this was a knowing failure. In affirming the father’s conviction, the Alaska Court of Appeals stated that under the common law a person has no duty to help another, but that an exception to this general rule has been carved out when dealing with a parent-child relationship. The court also noted the trend of recognizing a parent’s legal duty to protect his or her child and of imposing criminal liability where a parent fails to prevent the abuse of his or her child. The court looked to Alaska’s statutory law to find a legal duty to protect. Under one provision, a parent can be charged with a misdemeanor for failing to provide support for a child. Pursuant to another Alaska statute, a person commits a criminal offense if he or she has custody of a child aged ten or younger, and then “intentionally deserts the child in any place under circumstances creating a substantial risk of physical injury to the child.” Based on these statutes and the common law, the Alaska Court of Appeals

147 See id. at 203.
148 See id. at 196.
149 See id.
150 See id. at 195.
151 Id. at 197 (quoting the trial court).
152 See id.
153 See id. at 198-99.
154 See id. (citing State v. Walden, 293 S.E.2d 780 (N.C. 1982), Palmer v. State, 164 A.2d 467 (Md. 1960), and other cases where a passive parent has been held criminally liable for failing to prevent the abuse of his or her child).
155 See id. at 198.
156 See ALASKA STAT. § 11.51.120 (Michie 1996).
157 Id. § 11.51.100(a).
found that Steven Michael had a duty to protect his daughter from his
wife’s abuse and that he could be criminally liable for violating this duty.158

Similarly, in P.S. v. State,159 a mother was convicted of “willful abuse,
cruel beating or otherwise willful maltreatment of a child under the age of
[eighteen]” when she failed to “protect the child from physical assault by
a third party.”160 The evidence at trial demonstrated that the mother’s live-
in boyfriend abused her two-year-old daughter.161 Asserting that her duty
to protect her daughter would arise only if she knew of the abuse, the
mother claimed she was not aware that her boyfriend was harming her
child.162 In affirming the mother’s conviction, the court identified knowl-
edge as an element of the crime and held that “there was sufficient
evidence from which the jury could lawfully infer that the appellant knew
that her child was being abused by [the boyfriend], and she was also trying
to conceal this fact from others.”163

In People v. Peters,164 Barbara Peters was convicted of the murder of
her twenty-month-old son Bobby, based on a theory of accountability.165
Bobby died from “bilateral subdural hematomas which resulted from blunt
head trauma” inflicted by Barbara Peters’ boyfriend, Kenneth Jacobsen.166
The Peters court noted the parent-child exception to the general common
law no-duty rule,167 and held that a “parent who knowingly fails to protect
its child from abuse may be prosecuted under the accountability statute
and, thereby, become[s] legally accountable for the conduct of the
abuser.”168 Intent is a requirement of the accountability statute and can be

158 See Michael, 767 P.2d at 198-99.
160 See id. at 1210.
161 See id. at 1210-11.
162 See id. at 1211.
163 Id. at 1212.
165 See id. at 470. Peters was also convicted of battery, cruelty to a child, and
endangerment. See id.
166 Id.
167 See id. at 476.
168 Id. The accountability statute provides, in relevant part:
A person is legally accountable for the conduct of another when:
(c) Either before or during the commission of an offense, and with the intent
to promote or facilitate such commission, he solicits, aids, abets, agrees or
attempts to aid, such other person in the planning or commission of the offense.
inferred from knowledge.\textsuperscript{169} The court found that Peters intended to facilitate the abuse of her child because she knew that her child was in a dangerous situation and failed to remove Bobby from this abusive environment.\textsuperscript{170} The court stated: "The defendant aided Jacobsen, who continued to abuse and, ultimately murder her son by failing to protect him during the many occasions when it was reasonably possible for her to do so."\textsuperscript{171} The court found that the intent element was satisfied even though Peters was not present when her boyfriend inflicted the fatal beating.\textsuperscript{172}

After reviewing these cases imposing a duty on the passive parent to prevent abuse, the concurring opinion in \textit{Lane} stated:

\begin{quote}
[N]o conceptual distinction is perceived between imposing a legal duty upon the state to protect a person in its custody from harm and imposing the same legal duty upon a custodial parent to protect a child in his custody from harm inflicted by a person whom the parent has invited into the custodial environment.\textsuperscript{173}
\end{quote}

While the \textit{Knox} court had rejected the argument that a common law duty was imposed on parents to protect their children from harm, the \textit{Lane} concurrence found that such a duty does exist, and that it arises from "the common law concept of the 'special relationship' which exists between a custodian and the person in his custody."\textsuperscript{174} The concurrence noted that this relationship had only been recognized in Kentucky after the court's decision in \textit{Knox v. Commonwealth}.\textsuperscript{175}

\textit{4. Kentucky Statutes and the "Special Relationship"}

The concurring opinion in \textit{Lane} asserted that Kentucky statutory law also recognizes a parent’s duty to prevent the abuse of his or her child and

\textsuperscript{169} See Peters, 586 N.E.2d at 476.

\textsuperscript{170} See id.

\textsuperscript{171} Id.

\textsuperscript{172} See id. at 477.


\textsuperscript{174} Id. (Cooper, J., concurring).

\textsuperscript{175} See id. (Cooper, J., concurring). Two Kentucky civil cases, decided after \textit{Knox}, that recognized the common law "special relationship" concept were Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995), and Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. Ct. App. 1992).
that this duty arises from the "special relationship" concept.\textsuperscript{176} Under section 405.020, parents are responsible for "the joint custody, nurture, and education of their children."\textsuperscript{177} The \textit{Lane} concurrence stated that "[n]urture" is defined as "to care for" and that "it requires no leap in logic to equate care with protection."\textsuperscript{178}

The concurrence also looked to the "penal statutes which criminalize certain conduct of parents directed toward their children" in order to find legislative identification of the "special relationship" concept.\textsuperscript{179} Under section 530.040, a parent can be charged with a Class D felony if the parent deserts his or her child "under circumstances endangering [the child's] life or health . . . with the intent to abandon."\textsuperscript{180} Section 530.060 provides that it is a Class A misdemeanor for a person who has custody of a child to fail or refuse "to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child."\textsuperscript{181} The criminal abuse statutes, sections 508.100 through 508.120, make it a crime for a person to abuse or allow the abuse of a child of whom he or she has custody.\textsuperscript{182} According to the concurrence, these statutes demonstrate legislative recognition of the "special relationship" between a parent and child.\textsuperscript{183} This relationship imposes an affirmative duty on a parent to prevent the abuse of his or her child according to the mandate of the complicity statute.\textsuperscript{184}

The concurring opinion in \textit{Lane} pointed out the difference between the two sections of the complicity statute. Section 502.020(1) refers to "complicity as to the criminal act," such as "the assault of the child," while section 502.020(2) pertains to "complicity as to the criminal result," or consequence of the assault.\textsuperscript{185} To charge and convict under section 502.020(2), the prosecution is not required to prove intent.\textsuperscript{186} The passive parent can also be convicted under section 502.020(2) if that parent acted "wantonly or recklessly with respect to a risk that harm will occur to the
child and fails to make a reasonable effort to prevent it.” A parent who witnesses the abuse of his or her child and “fails to make a reasonable effort” to prevent the abuse can be convicted under section 502.020(1), because such passive conduct can imply “actual intent to promote or facilitate the offense.”

D. The Dissent: “Legislating when We Should Be Adjudicating”

The dissenting justices in *Lane* criticized the court’s change of opinion from its position in *Knox*: “[T]he Court has twisted the words of the legislature and reshaped them into a form to its liking, in order to impose a legal duty that did not previously exist.” They believed the Commonwealth should have charged Kimberly Lane with criminal abuse in the first degree rather than complicity to commit first-degree assault and that the only reason for the complicity charge was disapproval of the lighter penalty for criminal abuse.

Both the dissent and concurrence were critical of the plurality opinion. The plurality found a legal duty of a parent to act imposed by Chapter 620 of the Kentucky Revised Statutes. The reporting statute, one of the statutes from which this duty arises, requires “[a]ny person,” including those specifically named in the statute, to report known or suspected child abuse. Justice Stumbo noted that the statute imposes a duty to report abuse, not a duty to prevent harm to children, and pointed out that basing a legal duty on the reporting statute subjects the professions specified in the statute to a risk of criminal liability, which surely was not the intent of the legislature. In addition, she relied on the precedent of *Knox*, in which the court refused to find a legal duty to prevent abuse imposed by statutory language.

The dissenting justices also disagreed with the concurring opinion’s interpretation of the “special relationship” concept. They asserted that the

187 Id. at 882 (Cooper, J., concurring).
188 Id. (Cooper, J., concurring).
189 Id. at 883 (Stumbo, J., dissenting).
190 Id. at 882 (Stumbo, J., dissenting).
191 See id. (Stumbo, J., dissenting).
192 See id. at 876 (Cooper, J., concurring); id. at 882 (Stumbo, J., dissenting).
193 See id. at 876.
195 See *Lane*, 956 S.W.2d at 882 (Stumbo, J., dissenting).
196 See id. at 883 (Stumbo, J., dissenting).
197 See id. at 882 (Stumbo, J., dissenting).
Kentucky cases to which the concurrence referred\textsuperscript{198} did not concern child abuse or a parent-child relationship, but rather "were limited to the foreseeable injury to a person by a person under the control of the state."\textsuperscript{199} They refused to interpret the cases that broadly:

The leap from the imposition of civil liability on the state for failure to prevent a foreseeable injury by one under its custody or control... to criminal sanction for the failure to perform a legal duty that must be deduced from the interpretation of three civil cases is one [we would] not make.\textsuperscript{200}

The dissent also pointed out that the Kentucky legislature, not the Kentucky Supreme Court, is responsible for setting forth and defining a legal duty.\textsuperscript{201} The dissent concluded:

With these opinions, we are putting the overburdened educators and medical personnel who have daily contact with our children at risk of criminal charges arising from things that perhaps should have been noticed, but in the course of hectic schedules, were not. The actions of this defendant were morally reprehensible and repugnant to any responsible, empathetic person, but it is the legislature that defines what behavior constitutes criminal conduct and sets forth the mechanism of punishment, not the judiciary. Here, we are, in effect, legislating when we should be adjudicating.\textsuperscript{202}

\section*{III. THE POTENTIAL IMPACT OF LANE}

\subsection*{A. The Benefits and Drawbacks of Imposing Criminal Liability for Failure to Protect}

When a state decides to impose criminal sanctions for an act, it is promoting a specific policy or set of goals.\textsuperscript{203} As one commentator has noted, "[t]he underlying rationales in holding people criminally liable for

\textsuperscript{198} See supra note 175 and accompanying text.

\textsuperscript{199} Lane, 956 S.W.2d at 882 (Stumbo, J., dissenting).

\textsuperscript{200} Id. at 883 (Stumbo, J., dissenting).

\textsuperscript{201} See id. (Stumbo, J., dissenting).

\textsuperscript{202} Id. (Stumbo, J., dissenting).

\textsuperscript{203} See generally Anne T. Johnson, Criminal Liability for Parents Who Fail to Protect, 5 LAW & INEQ. J. 359 (1987).
their actions are punishment, deterrence, and rehabilitation. Many feel that child abuse is a horrible, inexcusable crime and that someone who allows his or her child to be abused should be punished. If a mother knows the consequences for failing to protect her child, she might be compelled to remove her child from an abusive situation. Additionally, through the criminal justice system, the passive parent may have access to counseling to improve his or her parenting skills.

One drawback to imposing criminal liability for passive child abuse is that "the [passive parent's] obligation to remove [his or] her children from the [abusive parent's] control will at the very least disrupt any remaining shreds of family harmony and, very likely, will precipitate the dissolution of the family unit." If both parents are put in jail, this "may punish the children and destabilize their environment," and "[w]hile the children are doubtless safer without the abusive [parent], it is less clear that they are better off in foster care than in a single-parent home with their [passive parent]."

Yet another drawback is complicity liability's disproportionate impact on women. Throughout the concurring opinion in Lane, Justice Cooper used male pronouns to refer to the passive parent. This language creates an inaccurate picture, because the passive parent is usually the mother. Men are more likely to be the abuser and "women often cannot protect themselves or their children from a male partner's abuse." When the

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204 Id. at 376.
205 See id.
207 See id.
208 Id. at 684-85.
209 Id. at 685.
213 Id. at 68.
mother finds herself and her children in an abusive situation, "it is extremely unfair to subject her to criminal liability when she had no meaningful alternative to inaction." Reasons women fail to protect their children include: "(1) fear of retaliation by the abuser; (2) economic dependence on the male abuser; (3) emotional dependence on the male abuser, including the phenomenon of 'learned helplessness'; and (4) family or legal pressure, such as fear that children will be taken from them."

B. Criminal Abuse, Not Complicity Liability

The Lane dissent suggested that the Commonwealth made a mistake in prosecuting this as a complicity case and that Lane should have been charged with criminal abuse in the first degree. Assuming the existence of a legal duty, the elements of complicity to commit assault in the first degree and the elements of criminal abuse in the first degree are identical. The sole reason for the complicity charge was "dissatisfaction" with the lighter penalty for criminal abuse.

In enacting the criminal abuse statutes, sections 508.100 through 508.120, the legislature explicitly made it a criminal offense for a person to permit a child in his or her custody to be abused. These statutes demonstrate the legislature's intent to penalize the passive parent's conduct under the criminal abuse statutes. By punishing a parent under the complicity statute for failing to protect his or her child, the Lane plurality and concurrence ignore the legislature's intent and infringe upon the legislature's role in defining criminal conduct.

Holding that an affirmative duty to prevent abuse of children arises from Chapter 620 of the Kentucky Revised Statutes, the Lane plurality stated that a prosecutor can choose to charge the passive parent under assault or abuse. As a result, two parents who fail to protect their children from abuse may receive two very different sentences. Assault in the first degree

214 Tanck, supra note 206, at 685.
215 Panko, supra note 212, at 68-69.
217 See id.
218 Id.
219 See, e.g., K.R.S. § 508.100 (Michie 1990) ("A person is guilty of criminal abuse in the first degree when he . . . permits another person of whom he has actual custody to be abused . . ."); see also supra notes 182-84 and accompanying text.
220 See Lane, 956 S.W.2d at 876.
degree is a Class B felony,\textsuperscript{221} which carries a maximum sentence of twenty years and a minimum sentence of ten years.\textsuperscript{222} Criminal abuse in the first degree is a Class C felony.\textsuperscript{223} The maximum time a person can be sentenced to prison for criminal abuse in the first degree is ten years, and the minimum is five years.\textsuperscript{224} One prosecutor may choose to charge a passive parent with criminal abuse in the first degree, and that parent may receive a five-year sentence. Another prosecutor may choose to prosecute a passive parent under the complicity statute, as the prosecutor did in the \textit{Lane} case,\textsuperscript{225} and that parent may be sentenced to prison for ten years. Accordingly, the \textit{Lane} decision will lead to inconsistent sentences for identical conduct.

\section*{C. The Expansion of Complicity Liability}

Both the concurring and dissenting opinions in \textit{Lane} criticized the plurality opinion for finding a legal duty of a parent to protect his or her child from harm arising from Kentucky’s reporting statute.\textsuperscript{226} By basing an affirmative duty to prevent child abuse on the reporting statute, those specifically named in the statute – doctors, teachers, social workers, and others – are placed in jeopardy of complicity liability.

The concern of the concurrence and dissent is not unrealistic. Civil liability has been imposed on public authorities for failing to remove abused or neglected children from their parents’ custody.\textsuperscript{227} In 1995, a jury in Wayne County, Kentucky, acquitted three state social workers and their supervisor of complicity to commit murder.\textsuperscript{228} The social workers, who worked for the Kentucky Department of Social Services, were indicted two months after 22-month-old Daniel Thomas Reynolds was beaten to death.

\begin{footnotes}
\item[221] See K.R.S. § 508.010(2).
\item[222] See id. § 532.060(2)(b) (Michie Supp. 1996).
\item[223] See id. § 508.100 (Michie 1990).
\item[224] See id. § 532.060(2)(c) (Michie Supp. 1996).
\item[225] See \textit{Lane}, 956 S.W.2d at 874.
\item[226] See \textit{supra} notes 192-97 and accompanying text.
\end{footnotes}
by his stepfather Robert Wayne Parker. Parker was convicted of murder. In June 1993, six months before Daniel’s death, the social workers had been contacted by a day-care worker, who reported bruises on Daniel’s buttocks and suspected cigarette burns on his feet. A week later, nurses at the local hospital where Daniel was being treated for bronchitis noticed a swelling in his leg. Daniel was diagnosed with a spiral leg fracture and sent to the University of Kentucky Medical Center. A staff social worker there reached the conclusion that Daniel had been intentionally injured and obtained a 72-hour protective hold on the boy. An emergency protective order was sought and Daniel was temporarily placed with his grandparents. Two months later, in August 1993, Daniel was returned to his parents’ custody by court order. The Wayne County social workers had sessions with the family in the last months of Daniel’s life, and during one of them in October, the social workers discovered bruises on the child. Two months later, in December, Daniel died of severe trauma to the head. Claiming that the social workers had a legal duty to prevent the beating death of Daniel, the prosecution argued that they had “overlooked obvious signs of abuse and that they should have asked that Daniel be removed from his home.” The jury deliberated less than 90 minutes in finding the social workers not guilty of complicity.

Justice Wintersheimer wrote for the Lane plurality: “In view of the natural relationship between parent and guardian, K.R.S. 620.010 creates an affirmative duty for parents and guardians to prevent physical injury which results in an assault on the child. Others covered by the statute have an obligation to report which is a different duty.” The plurality appeared to distinguish the duties created by Chapter 620 of the Kentucky Revised Statutes. According to the plurality, parents or guardians have a duty to

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229 See id.
230 See id.
231 See id.
233 See id.
234 See id.
236 Gerth, supra note 228, at A1.
237 See id.
To prevent abuse of their child, and violation of this duty can result in criminal liability. Those specified by the reporting statute have a duty to report. The plurality seemed to suggest that the duty to report is different from the duty to prevent abuse and is an insufficient ground on which to base complicity liability; however, the plurality opinion does not make this clear. This ambiguity will need to be addressed. Such expansive complicity liability is not likely to be what the legislature intended in enacting the reporting statute, nor is it likely that the plurality intended to impose complicity liability on doctors, teachers, and social workers.

Chapter 620 of the Kentucky Revised Statutes provides a penalty for a violation of the reporting statute. Under section 620.990, an intentional violation is a Class B misdemeanor, which carries a sentence of up to ninety days in jail and/or a fine not to exceed $250. The maximum time a person can be sentenced to prison for assault in the first degree, a Class B felony, is twenty years, and the minimum is ten years. This disparity between the penalty for a reporting statute violation and the penalty for assault in the first degree further demonstrates the legislature’s lack of intent to impose complicity liability on those listed in the reporting statute.

CONCLUSION

With such a divided court, the Lane decision did not fully resolve the issue of a parent’s legal duty to prevent the abuse of his or her child. While the plurality held that a parent does have a legal duty to prevent the assault of his or her child, the court split as to the origin of this legal duty. “Four justices found the duty does not exist in K.R.S. Chapter 620; five justices found it does not exist due to any ‘special relationship’ exhibited in the common law or in other caselaw.” The court’s close decision has left the future of this issue uncertain.

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239 See id. at 875.
241 See Lane, 956 S.W.2d at 875-76.
242 See K.R.S. § 620.990.
243 See id. § 532.090.
244 See id. § 534.040 (Michie Supp. 1996).
245 See id. § 508.010(2) (Michie 1990).
As the *Lane* dissent noted, the legislature defines what is criminal conduct and "sets forth the mechanism of punishment, not the judiciary." The plurality has overstepped its bounds by finding a legislative intent to create a legal duty in Chapter 620 of the Kentucky Revised Statutes. The criminal abuse statutes make it a criminal offense for a person to allow a child of whom he or she has custody to be abused. These statutes criminalizing the passive parent's conduct exhibit the legislature's intent to have this conduct fall under the criminal abuse statutes, and not under the complicity statute. Pursuant to the *Lane* decision, prosecutors may charge passive parents with either criminal abuse or complicity, which will result in inconsistent sentences for identical behavior.

Finally, by basing the legal duty to prevent abuse on the reporting statute, the *Lane* opinion subjects the professionals specified in the statute — doctors, teachers, social workers, and others — to criminal complicity charges for failing to report or otherwise prevent the abuse of a child. This expansive complicity liability is hardly what the legislature intended in enacting the reporting statute.

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248 *Lane*, 956 S.W.2d at 883 (Stumbo, J., dissenting).
249 K.R.S. §§ 508.100-.120 (Michie 1990).
250 *See Lane*, 956 S.W.2d at 876.