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The Nebraska Supreme Court Lets Its Probation Department Off the Hook in Bartunek v. State, 266 Neb. 454, 666 N.W.2d 435 (2003): "No Duty" as a Non-Response to Violence Against Women and Identifiable Victims

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* Gretchen S. Obrist, B.S. 1999, University of Nebraska–Lincoln; J.D. expected May 2005, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Editor-in-Chief, 2004). Thank you to my husband Jeff Petersen for his unending support. Thanks also to Professor Susan Poser, Erin O'Gara, and Cyndi Lamm for their guidance and excellent feedback on this Note.
More than one in every eight women in Nebraska—or over 84,000 women—have been the victim of at least one rape in their lifetimes. National numbers indicate that more than 60% of women raped since age eighteen were raped by a current or former intimate partner. DaNell Bartunek is one of these women. Due to the negligent supervision of one of its habitually violent intensive supervision probationers, the State of Nebraska allowed Bartunek to become the victim of a violent, knife-wielding attempted rape by her former boyfriend, who was also the perpetrator of previous rapes and other intimate partner violence against Bartunek. This violent sexual assault by Nebraska’s probationer followed a pattern of abuse and stalking directed at Bartunek, which the State knew about and had the ability to end by adequately controlling its probationer. However, the State did not intervene before the attack. The Nebraska Supreme Court has now decided that the State will not be held accountable for its lack of supervision and that DaNell Bartunek must bear the full cost of her preventable and foreseeable injuries.

In Bartunek v. State, the Nebraska Supreme Court missed an opportunity to impose a narrowly defined yet workable duty on the state probation system to act with reasonable care while supervising violent felons on intensive supervision probation (“ISP”). This Note argues...
that the Nebraska Supreme Court’s rejection of any such duty to DaNell Bartunek was incorrect. There is legal support for imposing a duty in this case based on a special relationship between Bartunek and the State and/or a special relationship between the State and Bartunek’s attacker George Andrew Piper. The basis for these special relationships is found in section 315 of the Restatement (Second) of Torts and caselaw interpreting that section. In addition to legal duties grounded in the Restatement and caselaw from Nebraska and elsewhere, there are compelling policy reasons to find a duty in cases like Bartunek.

Part II sets forth the factual background of the Bartunek case. Although many of the facts in the background section were not included in the statement of facts of the Nebraska Supreme Court’s opinion, they are nevertheless highly relevant to the legal issues presented by Bartunek and are particularly important to this analysis of the holdings in Bartunek. All facts presented in this Note were readily available to the Nebraska Supreme Court and are part of the official

The Legislature finds and declares that intensive supervision probation programs are an effective and desirable alternative to imprisonment. It is the Legislature’s intent to encourage the establishment of programs for the intensive supervision of selected probationers. It is further the intent of the Legislature that such programs be formulated to protect the safety and welfare of the public in the community where the programs are operating and throughout the State of Nebraska.

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NEB. REV. STAT. § 29-2262.02 (Reissue 1995). See also Bill of Exceptions, E12 (Nebraska Adult Intensive Supervision Probation manual) (outlining ISP as the “highest level of supervision provided to probationers,” the characteristics of which include highly restricted activities, frequent contact between the probationer and the officer, electronically monitored “curfew,” home visitation, employment visitation and employment monitoring, and drug and alcohol screening). Electronic monitoring, a characteristic of ISP, involves an ankle bracelet system that sends a signal each minute to track whether the probationer is at home as ordered. Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, 87:16.

In addition to extensive monitoring of all activities, probation officers are expected to arrest and detain probationers if needed and to submit alleged violations to the court. Bill of Exceptions, E21 (Intensive Supervision Probation Officer document outlining the job description of an ISP officer). The statute provides that following an arrest by a probation officer for a violation of probation, the county attorney should be notified of the arrest. NEB. REV. STAT. § 29-2266(5) (Reissue 1995 & Supp. 2003) (While section 29-2266 has been renumbered and reorganized since the Bartunek case occurred, its substance has remained substantially the same following the 2003 revisions.). The county attorney may then “file with the sentencing court a motion or information to revoke the probation.” Id. § 29-2266(5)(b). Moreover, no arrest is necessary for the county attorney to file for revocation—filing can be done on a report from the probation officer that a violation of probation has occurred. Id. § 29-2266(6).

5. These additional facts cite the Bill of Exceptions, which is available in the Schmid Law Library at the University of Nebraska College of Law (All testimony is in a text-only electronic file; exhibits and selected pages of testimony are in hard copy.). Full page and line number citations were unavailable for material taken
In addition to outlining the factual background of Bartunek, Part II summarizes the disposition of the case in the district court and in the Nebraska Supreme Court.

Part III analyzes the Nebraska Supreme Court’s opinion from social and legal perspectives. Section III.A discusses the social context in which Bartunek occurred. The social reality of pervasive violence against women provides a compelling policy reason for finding a duty. Imposing a duty in cases like Bartunek would demonstrate a policy commitment, not only to providing remedies to victims of the State’s negligent supervision of its probationers, but also to curtailing preventable and foreseeable violence against women, particularly intimate partner violence. Moreover, any thorough legal analysis of duty must proceed with the reality of this violence in mind.

Section III.B analyzes opportunities for imposing a duty in Bartunek. This Note presents four constructions of a legal duty to DaNell Bartunek, two of which the Nebraska Supreme Court rejected and two of which it failed to discuss. The Bartunek court rejected any duty based on a special relationship between the State and its probationer under section 315(a). It also overlooked a section 315(a) “identifiable victim” duty grounded in Tarasoff v. Regents of the University of California7 and its progeny. In addition, the Bartunek court rejected any duty based on a special relationship between the State and the victim, and in doing so, the court narrowly interpreted detrimental reliance under section 315(b). The court also overlooked a duty grounded in Brandon v. County of Richardson,8 based on Bartunek’s aid to the State in reporting violations of probation committed against her.

This Note concludes, in Part IV, by suggesting that in a case like Bartunek, there are several sensible options for imposing a narrowly-defined legal duty. Such a duty would take account of victim safety issues associated with violent offenders on probation who are also perpetrators of intimate partner violence and whose criminal history and behavior while on probation indicate a propensity for further violence. Because no duty was found in Bartunek, probation officers can continue to act negligently as they supervise high-risk probationers. There is no remedy for victims of this negligent conduct, nor any incentive for probation officers to act reasonably. Finding “no duty” denies that the dynamics of domestic violence, sexual assault, and stalking are not only pervasive cultural problems, but also crimes and predictable elements of the behavior of certain probationers. The re-
sulting public policy allows for the reckless, unnecessary endangerment of victims of ISP probationers, and is contrary to the intent of the Nebraska Legislature in curtailing state immunity.

II. BACKGROUND OF BARTUNEK v. STATE

A. Factual Background

DaNell Bartunek was brutally attacked by her former boyfriend George Andrew Piper on August 15, 1997. After breaking into her home, Piper appeared in Bartunek’s bedroom doorway naked except for his socks, wielding a butcher knife. He proceeded to attack and attempt to rape Bartunek at knifepoint. Bartunek believed Piper was going to kill her, and it appears that he tried. During the attack, Piper plunged the knife toward Bartunek’s body three to four times as he had her pinned to her waterbed, striking the bed each time because Bartunek was able to divert the knife from herself by pushing on Piper’s hand and the knife he held. During the attack, Piper also punched Bartunek in the head and face at least six or seven times and bit her repeatedly. Piper ripped off Bartunek’s shorts and underwear and was about to rape her when the McCook, Nebraska police broke through the door of her home. Bartunek had been able...

10. Id.
11. Id.
12. Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, —:
   (“Q: What is he saying? A: He was going to do to me like he’s done to—he did that to me before. Q: What does that mean to you? A: I took it as that he wanted to have sex. Q: That he has this knife this time? A: Yes. Q: And what are you thinking is going to happen with—he’s got that knife? A: That he was going to kill me or try to. Q: What did you do? A: He lunged at me with the knife and held me down, and I grabbed ahold [sic] of the end of the knife underneath of his hand.”).
13. Id. ("Q: What did you do when you saw the knife coming down? A: I moved my arm out farther, the hand that had the hold of it. I made it so it bypassed me. Q: And what did it hit? A: The waterbed. Q: How many times do you think that happened? A: It was three or four times."); see also Bill of Exceptions, Testimony of Sergeant Kevin Darling, Direct Examination 275, —: ("A: ... [W]hen we went back to work the scene for evidence, the water had dripped from the bed through the floor and was dripping in the basement.").
14. Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, —:
   ("Q: Then what? A: He was trying to get the knife out of my hand or trying to get me to let go of it from the top of his hand. And I wouldn’t let go, and he kept biting my hand, my arms, up here on this arm (indicating upper arm). Q: On your right arm he bit you up on the forearm, up at the top? A: Where the blade had cut my hand right here. He was biting my arm up on the forearm—the forearm here, trying to get me to let go of it, and I wouldn’t let go. And he kept punching me in the head. He was punching me in the face like six or seven times. I don’t know how many times it was. Q: Where on your face did he punch you? A: This whole side of my face.").
15. Id. at 365:10; Bill of Exceptions, Testimony of Sergeant Kevin Darling, Direct Examination 275, 299:21.
call 911 as she heard Piper breaking into the basement minutes before
the attack began, and when the police arrived, they could hear
"screaming for help" from outside the front door.¹⁶

This violent attack was the culmination of months of harassment
and escalating fear. Piper was a violent felon on ISP and under the
State’s supervision at the time of the attack.¹⁷ He was later convicted
of all charges related to the attack on Bartunek, including burglary,
attempted first-degree sexual assault, use of a deadly weapon to com-
mitt a felony, second-degree assault, felon in possession of a deadly
weapon, and resisting arrest.¹⁸ What follows is the story of Piper and
Bartunek before the August 15, 1997 attack.

Piper had an extensive criminal record, dating back to 1984 when
he was still a juvenile; he had been both in prison and on traditional
probation.¹⁹ He had also previously violated probation.²⁰ The McCook
Chief of Police described Piper as a “career criminal.”²¹ Piper
had “numerous theft convictions for burglary, escape, assault, crim-
nal mischief, criminal trespass and flight to avoid [arrest].”²² Piper
had been convicted of escape from prison.²³

When he attacked Bartunek, Piper was serving a sentence on ISP
for a January 1997 burglary, at which time he had both a gun and a
knife on his person.²⁴ He pleaded no contest to that burglary, and was
convicted of possession of burglary tools and criminal trespass.²⁵
Chief Probation Officer Raleigh Haas conducted the presentence in-
vestigation on Piper and recommended that he was not suitable for
any form of probation.²⁶ This recommendation was based on previous

¹⁶. Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319,
357:07; Bill of Exceptions, Testimony of Sergeant Kevin Darling, Direct Exami-
nation 275, 299:03.
¹⁸. Id. at 457, 666 N.W.2d at 439; Bill of Exceptions, E27 (Commitment of George
Andrew Piper).
¹⁹. Bill of Exceptions, Testimony of Chief Probation Officer Raleigh Haas, Direct Ex-
amination 198, 214:05; see also Brief of Appellee at 9, Bartunek (No. S-02-0710).
²⁰. See supra note 19.
²¹. Bill of Exceptions, Testimony of McCook Police Chief Isaac Brown, Direct Ex-
amination 224, —:– ("Q: What was your impression of Andy Piper at that time? How
would you describe him? A: I would describe Andy Piper as a career criminal.").
²². Bill of Exceptions, Testimony of Sergeant Kevin Darling, Direct Examination
275, —:–.
²³. Bill of Exceptions, Testimony of Probation Supervisor David Wegner, Cross Ex-
amination 438, —:– ("Q: He had an escape offense, right? A: Yes.").
²⁴. Bill of Exceptions, Testimony of Probation Supervisor Lonnie Folchert, Direct Ex-
amination 23, 48:08.
²⁶. Bill of Exceptions, Testimony of Chief Probation Officer Raleigh Haas, Direct Ex-
amination 198, —:– ("Q: Okay. Now, one of your duties as the chief probation
officer was to conduct P.S.I.s, presentence investigations, right? A: That’s cor-
rect. Q: One purpose of the presentence investigation is to be able to provide the
failures in traditional probation and Piper's extensive criminal history including violent offenses. Piper was sentenced to thirty-six months of ISP despite the recommendation against it.

Piper's Order of Probation required sixty days in jail, followed by ISP, the first 180 days of which would be on electronic monitoring. The order of probation specifically ordered Piper to refrain from "unlawful, disorderly, injurious or vicious acts" and to "work, faithfully, at suitable employment or show proof that employment is being sought and keep a diary of activities showing job-seeking." Piper's Order of Probation required sixty days in jail, followed by ISP, the first 180 days of which would be on electronic monitoring. The order specified that Piper was prohibited from possessing firearms, knives, or other dangerous weapons. The order also required that Piper "refrain from using alcohol" and "attend Alcoholics or Narcotics Anonymous meetings." Piper's signature on the Order of Probation acknowledged that he understood that "the violation by me of any of the above conditions is cause for revocation of probation and a possible sentence to confinement." In addition to the terms specified on the Order of Probation, Piper was obligated to follow direct orders from his probation officer. Piper's jail term ended on May 22, 1997, and he began his ISP. No action was taken by the probation department to plan for Piper's release in light of Piper's violent history and the recommendation against any form of probation.

Upon his release from jail, Piper moved in with Bartunek and her two children from a previous marriage, then ages four and almost

27. See supra note 26.
29. Id.
30. Id.
31. Id.
33. Bill of Exceptions, E22 (Order of Probation).
34. Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, —:- (“Q: You expected him to follow the orders that you, as his probation officer, give to him, right? A: Correct.”).
35. Bartunek, 266 Neb. at 456, 666 N.W.2d at 438.
two. Piper and Bartunek had started dating in 1996. Bartunek has a G.E.D. and had held several jobs in McCook; at the time of the attack, she was working at Casey's General Store. Piper began abusing Bartunek almost as soon as they began dating, and the abuse usually occurred when Piper wanted to have sex but Bartunek did not, at which point Piper would shove Bartunek up against walls and push her around as a means of coercion. Out of fear of Piper’s reaction, Bartunek did not report to the police any of the rapes or abuse that occurred during the course of the relationship.

Piper’s ISP officer was Fred Snowardt. Snowardt met with Piper and Bartunek to discuss the terms of the electronic monitoring that would be set up in Bartunek’s home. He also reviewed the terms of the probation, including a requirement that Piper bring in forty job applications per week until employed. Piper “began violating the terms of this probation almost immediately.” He did not comply with the job application requirement and did not regularly attend Alcoholics or Narcotics Anonymous meetings. Piper also failed to go “where he was supposed to go” when he was released from in-house curfew and lied about it to Snowardt, all in violation of Snowardt’s direct orders. More significantly, Piper violated his probation repeatedly in relation to Bartunek.

37. *Bartunek*, 266 Neb. at 455, 666 N.W.2d at 437; Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, __:__.
39. *Id.* at 321:10.
40. *Id.* at 328:06; see also Brief of Appellee at 10, *Bartunek* (No. S-02-0710).
41. *Id.* at 328:18; see also Brief of Appellee at 10, *Bartunek* (No. S-02-0710). Low reporting rates for rape are very common. It is estimated that only 16% of rapes are reported. CENTER FOR SEX OFFENDER MANAGEMENT, CENTER FOR EFFECTIVE PUBLIC POLICY & AMERICAN PROBATION AND PAROLE ASSOCIATION, RECIDIVISM OF SEX OFFENDERS 3 (2001) [hereinafter RECIDIVISM OF SEX OFFENDERS]. Victims “may fear that reporting will lead to . . . further victimization by the offender; other forms of retribution by the offender . . . ; arrest, prosecution, and incarceration of an offender . . . on whom the victim or others may depend; others finding out about the sexual assault . . . ; not being believed; and being traumatized by the criminal justice system.” *Id.*; see also infra note 124 and accompanying text.
43. *Bartunek*, 266 Neb. at 456-57, 666 N.W.2d at 437.
44. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (4/16/97).
45. Record at 9, *Bartunek* (No. CI-99-87) (District Court Journal Entry & J.) (Findings of Fact); see also *Bartunek*, 266 Neb. at 456, 666 N.W.2d at 438. See generally Brief of Appellee at 11-12, *Bartunek* (No. S-02-0710).
47. *Bartunek*, 266 Neb. at 456, 666 N.W.2d at 438; Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, __:__ ("Q: And you knew that [Piper] had
Violations of probation in the form of crimes and prohibited conduct toward Bartunek began with Bartunek's discovery of bruises on her youngest son, inflicted by Piper.48 Piper admitted this child abuse, and the incident resulted in a citation from the McCook Police Department issued to Piper, but for some unknown reason the matter was not prosecuted.49 Nevertheless, the detective who issued the citation found probable cause that Piper had committed a child abuse crime.50 Bartunek immediately ended her relationship with Piper and demanded that he move out, a decision which was based on the child abuse incident combined with the ongoing domestic abuse and prior sexual assaults she had endured from Piper.51

Piper contacted Snowardt to inform him that Piper had to move out of Bartunek's house because he had beaten the child.52 Snowardt's response was to ask if it "could wait until tomorrow," and Bartunek had to find somewhere else to stay.53 Snowardt did get Piper moved out that evening despite the inconvenience it evidently caused him.54 Bartunek then reported to Snowardt that her rent...
money was missing.\textsuperscript{55} This money had disappeared while Snowardt supervised Piper's move out of the house, but Snowardt did not do any further investigation or report the theft to the court.\textsuperscript{56} Nor did Snowardt report the child abuse citation to the court.\textsuperscript{57} Snowardt did no investigation or follow-up on the child abuse incident, even though he could have obtained an affidavit from the police and from Bartunek about it.\textsuperscript{58} Not only did Snowardt fail to report the child abuse to the sentencing court, he did not report it to his supervisors, did not speak with the county attorney or the detective who issued the citation, and did not ask to see the bruises on Bartunek's child.\textsuperscript{59}

After Piper was moved out of Bartunek's house, he began a campaign of harassment and threats against her. Piper repeatedly showed up at Bartunek's home, her place of work, and her child's daycare center, and he left her notes and engaged in phone harassment.\textsuperscript{60} He threatened suicide if Bartunek did not reconcile with him.\textsuperscript{61} On July 11, 1997, the McCook Police department contacted the probation office to notify them of a report Bartunek had made involving Piper calling her house sixteen times in one day.\textsuperscript{62} Bartunek was considering agreeing to charges of phone harassment against Piper.\textsuperscript{63} Although this criminal behavior was a serious violation of probation, the probation department conducted no follow-up.\textsuperscript{64} Nor did Snowardt

\textsuperscript{55} Bartunek, 266 Neb. at 457, 666 N.W.2d at 438 (2003).
\textsuperscript{56} Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, 338:16; see also Brief of Appellee at 13, Bartunek (No. S-02-0710).
\textsuperscript{57} Bartunek, 266 Neb. at 457, 666 N.W.2d at 438.
\textsuperscript{58} Bill of Exceptions, Testimony of McCook Police Chief Isaac Brown, Direct Examination 224, 245:23.
\textsuperscript{59} Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, 102:23, 102:17, 102:20; \textit{Id.} at 102:-- & 103:-- ("Q: In the process of [moving Piper out because of the child abuse], you did not obtain an affidavit from DaNell? A: No. Q: You didn't ask to see DaNell's child to look at the bruises? A: No. Q: You didn't consult with [your supervisor] about this? A: No. Q: Now, it's not necessary to obtain a conviction in order to seek revocation, is it? A: No."); see also Brief of Appellee at 13, Bartunek (No. S-02-0710).
\textsuperscript{60} Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (6/19/97) (showing up at place of employment and repeatedly calling), (7/21/97) (leaving notes on Bartunek's car at home), (7/25/97) (showing up at the daycare center and harassing Bartunek about turning over to Snowardt the note Piper had left on her car, plus threat of physical harm to be inflicted on Bartunek by Piper's sister), (8/12/97) (conducting more phone harassment); Bill of Exceptions, E24 (Chronological Notes of Don Douglas) (7/11/97) (making sixteen phone calls in one day, which Bartunek reported to the McCook Police Department with the option of a charge of phone harassment).
\textsuperscript{61} Bill of Exceptions, E25 (Note from Piper to Bartunek).
\textsuperscript{62} Bill of Exceptions, E24 (Chronological Notes of Don Douglas) (7/11/97).
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.} (7/11/97) (indicating no follow up with Bartunek by Don Douglas); Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, 120:19 (indicating Snowardt did nothing in response to the 7/11/97 report of sixteen phone calls in one day relayed to him by Don Douglas), 122:13 (indicating Snowardt did not
characterize the behavior as harassment at trial. Snowardt’s typical response to violations in the form of harassing and stalking Bartunek was to tell Piper to stop, without further investigation, without gathering information that could be taken to court, without reporting any violations to his supervisors, and without reporting any of it to the sentencing court.

The theft, child abuse, threats, and stalking Piper engaged in all violated the terms in the Order of Probation prohibiting “unlawful, disorderly, injurious or vicious acts.” The stalking and threats often additionally involved curfew violations when Piper violated direct orders by going out of his approved path to harass Bartunek at home, at work, or at her children’s daycare. Piper often lied about this behavior contact Bartunek or seek an affidavit from her about phone harassment, 120:24 (indicating Snowardt did not contact the McCook Police Department about the phone harassment that the police had reported to Snowardt), 122:11 & 122:02 (indicating Snowardt did not consult with his supervisor or the probation officer who had spoken with the police about the phone harassment), 122:15 (indicating Snowardt did not notify the court or address the phone harassment with Piper); see also Brief of Appellee at 15, Bartunek (No. S-02-0710).

65. See also Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, (reading from chronological notes) ‘8/15/97... Called the dispatcher at McCook Police Department and advised I wanted [Piper] picked up if they located him. Also, advised of his harassing his girlfriend. Gave address and requested officer check on her...’ Q: You advised the police that [Piper] had been harassing his girlfriend, right? A: That was the term that had been given to me by the police department over the phone calls. Q: By the police department? A: On Mr. Douglas’s notes. Q: Okay. And so as of the time of Mr. Douglas’s notes, which is 7/11/97, you were aware that what was going on was, in fact, harassment? A: That was their term, not mine. Q: The police regarded it as harassment, right? A: I didn’t take the phone call.”.

66. See generally Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt). In addition to the lack of response to the phone harassment outlined in note 64 supra, see Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, 107:25 (indicating Snowardt did not investigate Bartunek’s complaint of June 19, 1997 about Piper coming around her and calling), 111:16 (indicating Snowardt did not contact the court or his supervisor about the ongoing situation as reported on June 19, 1997), 108:20 (indicating Snowardt said there “wouldn’t be a need” to contact Bartunek about the harassment), 128:15 (indicating Snowardt did not follow up with Bartunek in response to the July 11, 1997 report of Piper leaving a disturbing note on Bartunek’s car and did not report the incident to the court), 132:22 (indicating Snowardt did not report the July 25, 1997 harassment at the daycare center to the court). See also Bartunek v. State, 266 Neb. 454, 457, 666 N.W.2d 435, 438 (2003); Brief of Appellee at 17, Bartunek (No. S-02-0710).

67. Bill of Exceptions, E22 (Order of Probation).
to Snowardt. While Snowardt did threaten Piper with revocation proceedings if he continued to lie about harassing Bartunek, Snowardt did not follow through by actually filing for revocation proceedings when Piper subsequently lied.\textsuperscript{68} On one occasion following an incident in which Piper broke curfew to go harass Bartunek, Snowardt actually gave Piper more free time.\textsuperscript{69} Not only was Piper in repeated violation of his probation, he was also the primary suspect in a knife investigation in McCook in the summer of 1997—another fact of which Snowardt had knowledge before Bartunek was attacked.\textsuperscript{70}

Bartunek repeatedly went to the probation department with information on Piper’s violations of probation against her, and received only additional and intensifying harassment from Piper. She even got her father involved in her communications to the State,\textsuperscript{71} a fact which the Nebraska Supreme Court focused on to deny the State owed her a duty.\textsuperscript{72} Despite Snowardt’s overall ineffectiveness in controlling Piper, he repeatedly led Bartunek to believe that he would actually do something to control Piper; in return, she continued her reporting of Piper’s behavior to Snowardt.\textsuperscript{73} Bartunek also went to the police for

\textsuperscript{68} See supra note 47.
\textsuperscript{69} Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (7/25/97).
\textsuperscript{70} Bill of Exceptions, Testimony of McCook Police Chief Isaac Brown, Direct Examination 224, 239:03, 250:07.
\textsuperscript{71} Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination, 319, —:—
("Q: At some point did you get your dad involved [in reporting incidents to Snowardt]? A: Yes. Q: Why? A: Because it wasn’t doing me any good to talk to [Snowardt] myself. Q: What did you think dad could do? A: Well, he has a worse temper than I do, and he might get farther than I did.”).
\textsuperscript{72} Bartunek, 266 Neb. at 456–57, 461, 666 N.W.2d at 438, 441.
\textsuperscript{73} Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 481, 481:08–12. ("Q: Did you trust that Fred Snowardt was going to try to help you? A: Yes.”). For other examples, see Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) ("6/16/97 . . . [Piper] paged to tell me he had to move because girlfriend was accusing him of spanking youngest child and leaving bruises. Asked him if he could wait till tomorrow. Then talked to girlfriend and then her father. She will go to Trenton and spend night. . . ."), ("6/19/97 . . . [Chief] Hass advised that [Piper]’s ex-significant other had called while I was on phone with someone else, said she did not want [Piper] coming around where she worked and not to be calling any more. Called [Piper] and he claims only time he called or went to Casey’s was for job aps [sic] or about furniture. Told him no more.”), ("7/21/97 . . . Rec’d call from [Bartunek]’s father (Dwight Bartunek) telling me that [Piper] was still trying to make contact with her. Said he had dropped note off at her car this morning. Said police said they could do nothing at this time. Told him to bring note to office and I would advise [Piper] to stay clear of her.”), ("7/21/97 . . . Told [Piper]—again, not to approach [Bartunek] in any way, shape or form.”), ("7/25/97 . . . Dwight Bartunek called to say [Piper] had came [sic] to Kidd[i]e Korral and hassled [Bartunek] about her giving me the note he had left in her car. Said he had been there again this morning. Said [Piper] had threatened them with statement that his sister (from Colo) was going to be there this morning to ‘straighten her out.’ Told [Bartunek’s father] I would contact [Piper] this morn.”); see also Bill of Exceptions, E25 (the note Piper left in Bar-
help, but was told that they could do little for her because Piper was Snowardt's responsibility.\textsuperscript{74} Not only was Bartunek proactive in trying to get someone employed by the State to deal with the situation, she was forced to take desperate measures to protect herself because of the State's inadequate response. For example, she nailed her window shut and put a bed over a trap door to her basement.\textsuperscript{75} Bartunek was terrorized in her own home by someone the State was supposed to be controlling. The State had both ample notice of the threat Piper posed to Bartunek and the power to control him, and yet did nothing in response.

On August 15, 1997, Piper showed up at Bartunek's house in the morning hours and "demanded a ride to a local store."\textsuperscript{76} Bartunek testified that Piper had been drinking, and she complied with his demand.\textsuperscript{77} Piper left Bartunek's residence after she took him to and from the store.\textsuperscript{78} Later that evening, Piper missed his curfew.\textsuperscript{79} Piper's electronic monitoring device notified Snowardt of the curfew violation, and Snowardt then called Bartunek and her father to see if they knew where Piper was.\textsuperscript{80} Bartunek's father asked Snowardt if he should come to McCook to protect Bartunek and wanted to know whether someone would be there to protect her.\textsuperscript{81} Snowardt said that he would send a police officer to Bartunek's house and that it was un-

\textsuperscript{74} Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, 349:21.
\textsuperscript{75} Bartunek, 266 Neb. at 457, 666 N.W.2d at 438.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, 352:13.
\textsuperscript{79} Bartunek, 266 Neb. at 457, 666 N.W.2d at 438.
\textsuperscript{80} Bill of Exceptions, Testimony of Dwight Bartunek, Direct Examination 416, 418:25, 419:03.
\textsuperscript{81} Id. at 419:21.
necessary for Mr. Bartunek to travel to McCook.82 Snowardt did send an officer to Bartunek's house; the officer helped her check around for Piper in the house and yard and secure the doors, but they found nothing.83

Around midnight, Bartunek heard a noise in the basement and called the police.84 Officers were dispatched to Bartunek's home.85 At that point, Piper appeared in Bartunek's bedroom doorway and the attack described supra ensued.86 The officers who responded to the 911 call subdued Piper as he yelled and threatened them and Bartunek that he would kill her and one of the police officer's family, and that since he had escaped from jail before, he could do it again.87 (He did in fact escape from jail following this arrest.)88 Following the attack, Snowardt failed to do any follow-up or investigation with Bartunek to see what had occurred.89 Snowardt admitted on the stand that the case notes he made after the attack questioning Bartunek's

82. Id. at 420:01.
83. Bartunek, 266 Neb. at 457, 666 N.W.2d at 438.
84. Id.
85. Id.
86. Id.
88. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) ("8/22/97... Advised by Raleigh [Haas] that [Piper] had escaped from Frontier Co Jail.... [Bartunek's father] was on way to McCook as no one seemed to know where [Bartunek] was."); see also Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 318, —:— ("Q: Was there a time where you heard that [Piper] had gotten out again? A: Yes. They said that they had—he'd escaped from jail.").

Upon learning of this escape, Bartunek was frightened such that she stayed at her father’s house until Piper was caught and had her uncle and a sheriff guarding her at work. Id. at —:— ("Q: When dad said, DaNell, I got some bad news. [Piper] is out. He got out of jail. What did that feel like to you? A: Go and hide. Q: Real scared? A: Yeah. Q: What did you think was going to happen? A: That he was going to come back and finish what he started. Q: So, what happened from there? A: I—I think I was still staying at my dad’s house at the time, and I was going to stay there until they actually put him somewhere where he couldn’t get loose. .... Q: What happened with going to work? A: They weren’t too excited about me going to work with black and blue eyes. My face was black and blue, and everybody was asking me what happened and all this stuff and— Q: You didn’t want to tell them? A: No, because every time I started to tell them, I’d probably start crying. Q: That was embarrassing? A: Yeah. Q: When [Piper] got out, how did they handle it at your workplace when you had to work? A: My uncle was there, Uncle Dennis, and he came down to where I worked and was staying there the whole time that I was working. And so—one of the sheriff guys from the sheriff’s department.").
89. Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, 144:13; see also Brief of Appellee at 20–21, Bartunek (No. S-02-0710).
fear of Piper and criticizing her and her father were made “to protect myself.”

B. Disposition of the Case

Bartunek sued the State of Nebraska under the State Tort Claims Act for negligent supervision of Piper. There was a three-day bench trial in the District Court of Red Willow County in December 2001. The district court found the State of Nebraska liable for DaNell Bartunek’s injuries, which included ongoing posttraumatic stress disorder due to the brutal sexual assault, which would require at least a year and a half of treatment. Bartunek was awarded $300,000 in damages. The district court emphasized that its finding of negligence by the State was premised on the “series of serious violations over a two (2) month period which were either ignored or dealt with incorrectly by the probation officer. The probation officer should have attempted to have Mr. Piper’s probation revoked because of his violent background and continued harassment of the Plaintiff.” Thus, the district court’s negligence analysis highlighted the fact that Bartunek was the identifiable victim of a known violent felon who was in repeated violation of his probation. The district court’s brief discus-

91. NEB. REV. STAT. §§ 81-8,209–8,235 (Reissue 1996 & Cum. Supp. 2002). Under the State Tort Claims Act, State immunity is waived in certain situations. Citizens may sue the State by making any claim against the State of Nebraska for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death. . . .
Id. § 81-8,210(4). Specific claims not allowed (where immunity is retained) are enumerated in the State Tort Claims Act. See id. § 81-8,219. For a discussion of specific immunities claimed by the State of Nebraska in Bartunek, see notes 98, 307, & 382 infra.
93. Record at 8, Bartunek (No. CI-99-87) (District Court Journal Entry & J.). State Tort Claims Act suits in Nebraska are heard before the district court without a jury. NEB. REV. STAT. § 81-8,214 (Reissue 1996).
94. Record at 11, Bartunek (No. CI-99-87) (District Court Journal Entry & J.) (Findings of Fact); id. at 11–13 (Conclusions of Law); id. at 15–16 (Damages). The Nebraska Supreme Court did not dispute the finding of posttraumatic stress disorder. Bartunek, 266 Neb. at 458, 666 N.W.2d at 439. See infra notes 149–51 and accompanying text for the definition and prevalence of posttraumatic stress disorder.
95. Bartunek, 266 Neb. at 455, 666 N.W.2d at 437.
96. Record at 12, Bartunek (No. CI-99-87) (District Court Journal Entry & J.) (emphasis added).
sion of duty focused on the nature and purpose of ISP to protect the public and reduce risk of injury or harm.97

While issues were raised at trial and on appeal regarding immunities the State claimed to have, and defenses were raised based on Bartunek's alleged contributory negligence and assumption of risk,98 the Nebraska Supreme Court focused its analysis of the Bartunek case solely on the issue of "whether a special relationship existed which gave rise to a specific duty on the part of the State to protect Bartunek from Piper."99 The court proceeded to analyze the issue of duty in two different ways. One section of the analysis focused on a possible special relationship between the State and the victim Bartunek under section 315(b) of the Restatement (Second) of Torts.100 The second section of the analysis focused on a possible special relationship between the State and the violent attacker Piper under sections 315(a) and 319 of the Restatement (Second) of Torts.101 Section 315 provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

97. Id.
98. The district court rejected the State's claims of judicial and quasi-judicial immunity. Record at 13–14, Bartunek (No. CI-99-87) (District Court Journal Entry & J.) (Judicial Immunity); id. at 14–15 (Sovereign Immunity Based on Discretionary Function); see also infra note 382. The district court found that the probation officer's functions were administrative and not judicial functions, so quasi-judicial immunity did not apply. Record at 14, Bartunek (No. CI-99-87) (District Court Journal Entry & J.). The court also found that the probation officer's decisions made in supervising or failing to adequately supervise Piper were not within any discretionary function exemption, because that exemption is reserved for policy decisions. Id. at 15. The State argued for the defenses of contributory negligence and assumption of risk in a motion for dismissal after presentation of the plaintiff's witnesses, arguing that Bartunek had knowledge of Mr. Piper's violent tendency. She knew before he was placed on probation; that he had shoved her violently against the wall. She knew that he had served time in jail. She knew that his offense for which he was serving time on probation was burglary, at which time he had both a knife and a gun. She knew during the time that he had moved away from her home, when he was on probation, that he had forced her to have sex, and she didn't report those events. He had broken into her house on at least one occasion, and she didn't report that.

Bill of Exceptions, Argument by Assistant Attorney General Melanie Whittemore-Mantzios 426–27. The district court flatly rejected the State's claims of assumption of risk, contributory negligence, and mitigation of damages, stating that "[t]hose defenses are based generally on the contention that since the Plaintiff had a relationship with [Piper] that she somehow facilitated or consented to the attack. Those defenses do not merit discussion and the Court finds the State has not met its burden as to any of those defenses." Record at 13, Bartunek (No. CI-99-87) (District Court Journal Entry & J.).
99. 266 Neb. at 459, 666 N.W.2d at 440.
100. Id. at 460–62, 666 N.W.2d at 440–41.
101. Id. at 462–64, 666 N.W.2d at 441–43.
(b) a special relation exists between the actor and the other which gives to
the other a right to protection.102

The court stated that it had previously "considered and applied" section 315(b) special relationships between the negligent party and the victim in Brandon v. County of Richardson,103 where it stated that the law recognizes two situations for exceptions to the general no-duty rule.104 These situations are (1) "where individuals who have aided law enforcement as informers or witnesses are to be protected," or (2) "where the police have expressly promised to protect specific individuals from precise harm."105 The first entails a benefit to the State, while the second involves reasonable detrimental reliance by the victim on a law enforcement officer's undertaking to protect.106 The Nebraska Supreme Court stated in Bartunek that the exception "for witnesses and informants is inapplicable in the instant case."107 It then considered and rejected the possibility of a special relationship between Bartunek and the State based on detrimental reliance.108 The court held that "Bartunek showed no special relationship between herself and the State that gave rise to a tort duty."109

The court then moved on to analyze the potential special relationship between the State and its probationer Piper under sections 315(a) and 319, an analytical task of first impression for the court.110 A comment to section 315 provides that the "relations between the actor and a third person which require the actor to control the third person's

102. Restatement (Second) of Torts § 315 (1965). This section defines the type of special relationships that can create a duty to control a third party's actions or to prevent the criminal conduct of a third party from harming another; subsection (a) refers to a relationship between the defendant and the dangerous person and subsection (b) refers to a relationship between the defendant and the victim. Id. Section 315 is "a special application of the general rule stated in § 314." Id. at cmt. c. Section 314 sets forth the general rule that there is no duty to act in aid or protection of another. Id. § 314.

103. 252 Neb. 839, 566 N.W.2d 776 (1997) [Brandon I].

104. Bartunek, 266 Neb. at 460, 666 N.W.2d at 440.

105. Id. (quoting Brandon I, 252 Neb. at 844, 566 N.W.2d at 780).

106. Id. at 460–61, 666 N.W.2d at 441. Undertakings to protect are distinguishable from promises to protect. An undertaking implies an act or omission and not a mere promise, although the act or omission in addition to a promise can create a duty. Hamilton v. City of Omaha, 243 Neb. 253, 263–64, 498 N.W.2d 555, 562–63 (1993). A duty to protect a particular individual beyond the existing general duty to protect the public is not created when a police officer promises to aid a citizen; some additional "undertaking" must occur to trigger a duty. Id. The Hamilton court declined to decide whether that additional undertaking must include some "action" or whether it could be an "assurance alone." Id. at 263, 498 N.W.2d at 562; see also infra note 312 and accompanying text.

107. 266 Neb. at 461, 666 N.W.2d at 441.

108. Id.

109. Id. at 461–62, 666 N.W.2d at 441.

110. Id. at 462, 666 N.W.2d at 441 ("This court has not previously analyzed Restatement (Second) of Torts § 315(a).").
conduct are stated in sections 316–319." The only one of those sections relevant in Bartunek is section 319, which provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." The court focused on the comments to section 319, interpreting them to modify 315(a) in a literal manner. Examples of "takes charge" situations in the comments include "homicidal maniacs" escaping from asylums and delirious smallpox patients escaping from hospitals. The court stated its intention to read sections 315(a) and 319 narrowly in regard to the "takes charge" element. Relying on caselaw from several other states, the court then held that a custodial situation was essential to a 315(a) special relationship. Indeed, the court demanded "round-the-clock visual supervision" before any duty could be imposed. That construction eliminated the possibility of a duty in any probation case. The court held that the district court erred in finding liability, because there was no special relationship between the State and Bartunek or between the State and Piper.

III. ANALYSIS OF BARTUNEK v. STATE

A. Duty as Essential to Addressing Violence Against Women

While the existence of a duty is a fact-dependent question of law for the court to decide, imposing or withholding a duty is also an expression of public policy. Moreover, public policy considerations must inform any thorough legal analysis of duty. Therefore, this Note presents the public policy framework implicated by the facts of Bartunek before analyzing its legal issues.

The realities of violence against women provide the social context from which the facts of the Bartunek case emerged—a context that neither Piper's probation officer nor the Nebraska Supreme Court addressed in their handling of the Bartunek case. However, this context provides strong public policy justification for imposition of a duty in Bartunek. It should also be a critical factor in the legal analysis of

111. RESTATEMENT (SECOND) OF TORTS § 315 cmt. c (1965).
112. Id. § 319; Bartunek, 266 Neb. at 462, 666 N.W.2d at 441.
113. RESTATEMENT (SECOND) OF TORTS § 319 (1965) (emphasis added).
114. Bartunek, 266 Neb. at 462, 666 N.W.2d at 441. The court stated that the illustrations to section 319 "make plain that the phrase 'takes charge' is intended to refer to a custodial relationship." Id.
115. Id.; see also RESTATEMENT (SECOND) OF TORTS § 319 cmt. a, illus. 1 & 2.
116. Bartunek, 266 Neb. at 462, 666 N.W.2d at 441.
117. Id. at 463, 666 N.W.2d at 442.
118. Id.
119. Id. at 464, 666 N.W.2d at 443.
duty, both in general and with respect to Bartunek's case in particular. Bartunek was a victim of intimate partner violence. The sexual and physical assaults, stalking, intimidation, and verbal abuse Piper perpetrated against her are typical manifestations of violence against women, particularly intimate partner violence. An overview of the general prevalence and interaction of these behaviors will demonstrate that these social and cultural phenomena were present within the facts of Bartunek, and that signs of future violence were readily available to Piper's probation officer.

Violence against women is pervasive throughout United States culture. Nebraska is no exception. According to the National Violence Against Women ("NVAW") Survey, one in six U.S. women has been the victim of a completed or attempted rape at some time in her life. According to the survey, an estimated 302,091 U.S. women had been raped in the previous year—and these women were raped an average of 2.9 times each in that year, amounting to an estimated 876,064 rapes against U.S. women annually. The National Women's Study reported that only 16%, or one in six rapes, were ever reported to police, and estimated that over twelve million U.S. women have survived a rape at least once in their lifetimes. According to

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120. See generally Rape in Nebraska Report, supra note 1.

121. The NVAW Survey was a "national telephone survey on women's experiences with violence, conducted from November 1995 to May 1996," sponsored by the Centers for Disease Control and Prevention (CDC) and the National Institute of Justice (NIJ) through a grant to the Center for Policy Research. Findings from the NVAW Survey, supra note 2, at 1. The NVAW Survey used a definition of rape that included forced vaginal, oral, and anal sex that was completed or attempted. Id. at 13, 25. The policy implications outlined in the NVAW Survey include the following: violence against women should be treated as a significant social problem; stalking is more widespread than previously thought; women are at greater risk of intimate partner violence than men; and violence against women is predominantly intimate partner violence. Id. at 59-61.

122. Id. at 13. One in thirty-three U.S. men has been a victim of a completed or attempted rape. Id.

123. Id.

124. Transforming a Rape Culture 8 (Emilie Buchwald et. al. eds., 1993) (citing National Victim Center & Crime Victims Research and Treatment Center, Medical Univ. of S.C., Rape in America: A Report to the Nation (1992)). Other studies have also indicated rape reporting rates as low as 16%. See Recidivism of Sex Offenders, supra note 41, at 3. In contrast, the Bureau of Justice Statistics estimates that 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police in 1992-2000. Callie Marie Rennison, U.S. Dept of Justice, NCJ 194530, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000, at 1 (2002). The reasons given for not reporting such assaults included that it was a personal matter (23.3%), that the victim feared reprisal by the offender (16.3%), and that the police were biased (5.8%). Id. at 3.
1993 data, rapes occurred most often in the victim’s home between the hours of 6:00 p.m. and midnight.\(^{125}\)

Based on NVAW Survey data, researchers have estimated that more than one in eight women in Nebraska have been forcibly raped in their lifetimes.\(^{126}\) The actual number is probably even higher, because “Nebraska has a higher percentage of extremely poor women than the nation at large” and rape is more prevalent among poor women.\(^{127}\) In addition, the Nebraska estimate did not include attempted rapes as the NVAW Survey did.\(^{128}\)

Physical assaults on U.S. women are even more prevalent than rapes and attempted rapes. Of surveyed women, over half said they were “physically assaulted by an adult caretaker as a child and/or by another adult as an adult.”\(^{129}\) This amounts to about 1.9 million women assaulted annually.\(^{130}\) Moreover, “rape is often accompanied by physical assault” in addition to the rape itself, with 41.4% of women who were raped since age eighteen reporting such assaults involving “slapping, hitting, kicking, biting, choking, hitting with an object, beatings, and the use of a gun or other weapon.”\(^{131}\)

Stalking is also pervasive in the United States, and was found by the NVAW Survey to be “much more prevalent than previously thought.”\(^{132}\) Based on a definition of stalking requiring the victim to feel a “high level of fear,” approximately one million women are stalked annually in the United States.\(^{133}\) A “less stringent definition of stalking” that requires victims to “feel somewhat frightened or a little frightened by their assailant’s behavior” yields much higher

\(^{125}\) Lawrence A. Greenfeld, U.S. Dep't of Justice, NCJ 163392, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault 5-6 (1997) [hereinafter Sex Offenses and Offenders]. Victims’ reports of times of rapes and sexual assaults were from 6:00 p.m. to midnight in 43.4% of cases, 6:00 a.m. to 6:00 p.m. in 33% of cases, and midnight to 6:00 a.m. in 23.6% of cases. Id. at 5 fig.2. Rapes and sexual assaults occurred in the victim’s home in 37.4% of the cases, at a friend’s, neighbor’s, or relative’s home in 19.2% of cases, on the street away from home in 10% of cases, in parking lots and garages 7.3% of the time, and in other locations 26.1% of the time. Id. at 6 fig.3.

\(^{126}\) Rape in Nebraska Report, supra note 1, at 10.

\(^{127}\) See id. at 8.

\(^{128}\) Id. at 11; see also supra note 121.

\(^{129}\) Findings from the NVAW Survey, supra note 2, at 16. Fifty-two percent of women reported such assaults; the percentage of men reporting such assaults was 66.4%. Id.

\(^{130}\) Id. at 17.

\(^{131}\) Id. at 17. The Survey found that 33.9% of men raped since age eighteen reported similar rape-related assaults. Id.

\(^{132}\) Id. at 18.

\(^{133}\) Id. Approximately 371,000 men are stalked annually under this definition of stalking. Id.
rates, with approximately 12.1 million women stalked some time in their lives and about six million women stalked annually.\(^{134}\)

A crucial aspect to all of this violence against women is the vast amount perpetrated by intimate partners. Characteristically, violence against women is predominately intimate partner violence, perpetrated almost entirely by men.\(^{135}\) In addition, "women were significantly more likely than men to report being victimized by an intimate partner, whether the time period covered was the individual's lifetime or the previous 12 months and whether the type of victimization considered was rape, physical assault, or stalking."\(^{136}\) It was reported that 7.7% of surveyed women were raped by a current or former intimate partner at some time in their lives, and an estimated 201,394 U.S. women are raped by an intimate partner annually.\(^{137}\) Moreover, 61.9% of the women raped since age 18 were raped by "a current or former spouse, cohabiting partner, boyfriend, or date."\(^{138}\) Twenty-two percent of women had been physically assaulted by an intimate partner in their lifetime, and an estimated 1.3 million women are physically assaulted by an intimate partner annually.\(^{139}\)

Stalking by intimate partners is prevalent in the United States and is linked to other forms of intimate partner violence. Over one-half of a million women are stalked by an intimate partner annually in the United States under the definition of stalking requiring a high level of fear.\(^{140}\) "[H]usbands or partners who stalk their partners are

\(^{134}\) Id. The broader definition of stalking yields estimates of 3.7 million men stalked in their lifetimes and 1.4 million stalked annually. Id. The crime of stalking is defined in Nebraska as follows: "Any person who willfully harasses another person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking." NEB. REV. STAT. § 28-311.03 (Reissue 1996 & Cum. Supp. 2002).

\(^{135}\) FINDINGS FROM THE NVAW SURVEY, supra note 2, at 46. According to the NVAW Survey, 64% "of the women who were raped, physically assaulted, and/or stalked since age 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date." Id. All women raped since age eighteen were raped by a male, 91.9% of women who were physically assaulted since age eighteen were assaulted by a male, and 97.2% of women who were stalked since age eighteen were stalked by a male. Id. Violence against men is also predominately male violence. Id. at 47.

\(^{136}\) Id. at 25.

\(^{137}\) Id. at 25. The numbers for men indicated that 0.3% of surveyed men were raped by a current or former intimate partner in their lifetimes. Id.

\(^{138}\) Id. at 43. "In comparison 21.3 percent were raped by an acquaintance, 16.7 were raped by a stranger, and 6.5 percent were raped by a relative." Id. These percentages, along with the 61.9% raped by current or former intimate partners, add up to more than 100% because some women had multiple assailants. Id. at 44 exhib.22.

\(^{139}\) Id. at 26. Men's responses indicated that 7.4% had been similarly assaulted, and 835,000 men are physically assaulted by an intimate partner annually. Id.

\(^{140}\) Id. at 27-28 (the number estimated is 503,485). The Survey estimated that 185,496 men are stalked annually by an intimate partner under the high-level-of-fear definition of stalking. Id. at 28.
four times more likely than husbands or partners in the general population to physically assault their partners, and they are six times more likely . . . to sexually assault their partners."141 Women victims of stalking reported that male stalkers followed them, spied on them, stood outside their homes or places of work, and made unsolicited phone calls at higher rates than what male victims reported.142 Of the women who were stalked by a current or former intimate partner, 31% were also sexually assaulted by that same partner, and 81% were physically assaulted by the partner who stalked them.143

The United States Department of Justice has found that "[i]n cases involving intimates, the strong link between stalking and other forms of violence between the victim and stalker suggests the need for comprehensive training of police officers, prosecutors, judges, parole and probation officers, and other criminal justice personnel on the specific safety needs of stalking victims."144 This link between stalking and other intimate partner violence is clearly demonstrated by the facts of Bartunek and supports a foreseeability finding in that case. Moreover, the link supports a policy decision to impose a duty as a means of addressing stalking and related intimate partner violence in cases like Bartunek, where the stalker is a state probationer.

In addition to the strong link between stalking and other violence, there is a nationwide deficiency in law enforcement's response to stalking in general:

[Many criminal justice agencies lack the capacity to provide the comprehensive protection needed by stalking victims, often due to a lack of . . . agency protocols addressing stalking. There is also a general lack of understanding about the seriousness of the issue. Gaps in responses . . . can result in increased danger for victims.]145

The Department of Justice encourages training those in the criminal justice system "about the complexity and potential risks involved in stalking cases and the efficacy of developing and implementing collaborative models to respond more effectively to domestic violence and stalking."146 The probation department's treatment of Bartunek's stalking victimization exhibited a lack of understanding, both about

141. VIOLENCE AGAINST WOMEN GRANTS OFFICE, U.S. DEP'T OF JUSTICE, NCJ 172204, STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 15 (1998) [hereinafter 1998 STALKING AND DOMESTIC VIOLENCE REPORT] (emphasis added). Stalking by intimate partners occurred after the relationship ended in 43% of cases, both before and after the relationship ended in 36% of cases, and before the relationship ended in 21% of cases. Id. at 10, 11 exhib.8.
142. Id. at 12, 13 exhib.11.
143. Id. at 14.
144. Id. at 59 (emphasis added).
146. 1998 STALKING AND DOMESTIC VIOLENCE REPORT, supra note 141, at 60.
the link between stalking and domestic violence and about the seriousness of stalking. The need for appropriate responses to stalking and domestic violence further supports imposing a duty on the State. A duty would provide an incentive for the State to assure that law enforcement officers are adequately trained on stalking and related intimate partner violence and that injury inflicted by state probationers is curtailed.

The toll of intimate partner violence and other violence against women is tremendous. Physical injuries accompany violence against women at high rates.147 Risk of physical injury for sexual assaults:

[I]ncreased for female rape victims if the perpetrator was a current or former intimate partner, if the rape occurred in the victim's or perpetrator's home, if the rape was completed, if the perpetrator threatened to harm or kill the victim or someone close to the victim, if the perpetrator used a weapon, and if the perpetrator used drugs and/or alcohol at the time of the rape.148

Physical injury is only one aspect of the harm of rape. The prevalence of posttraumatic stress disorder ("PTSD")149 "among victims of rape or other sexual violence" has been shown to be as high as 70%.150 One study found PTSD rates among rape victims to be 31%, and based on

147. FINDINGS FROM THE NVAW SURVEY, supra note 2, at 49.
148. Id. at 50.
149. According to the American Psychiatric Association's Diagnostic and Statistical Manual, Fourth Edition (DSM-IV),

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness, or horror . . . (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F).

Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.

this percentage, at least 26,000 of the estimated 84,000 Nebraska women who have been forcibly raped in their lifetimes have also developed PTSD at some time in their lives.\textsuperscript{151} In addition to her physical injuries, DaNell Bartunek suffered from PTSD after Piper sexually assaulted her at knifepoint.\textsuperscript{152}

Violence against women too often ends in homicide. In 1991, 28% "of all female murder victims in the United States were slain by their husbands or boyfriends and in fact, family violence kills as many [U.S.] women every five years as the total number of Americans who died in the Vietnam War."\textsuperscript{153} Recent figures indicate that 33% of female murder victims are killed by an intimate partner.\textsuperscript{154} Data from the National Crime Victimization Survey and the FBI's Uniform Crime Reporting Program show that, of the nearly 2,000 murders by intimate partners in 1996, almost three out of four involved a woman victim.\textsuperscript{155} One local study revealed that indicators and predictors in domestic violence homicides and serious injury cases from other jurisdictions were also present at high rates in Omaha, Nebraska.\textsuperscript{156} Further, many of the risk factors found to be prevalent in the Omaha domestic violence homicide cases were also present in Bartunek, including: multiple calls for assistance; stalking; prior domestic violence; escalating abuse; multiple domestic violence incidents reported to criminal justice authorities; the assailant's history of violent crimes including weapons, chronic or extensive criminal behavior, and probation violations; the victim trying to leave or separate; worried family members; a child being involved in violent incidents; and a

\begin{itemize}
  \item \textsuperscript{151} Rape in Nebraska Report, supra note 1, at 10.
  \item \textsuperscript{152} Bartunek, 266 Neb. at 458, 666 N.W.2d at 439.
  \item \textsuperscript{153} The PVS Disaster, supra note 150, at 56 (emphasis added).
  \item \textsuperscript{154} Callie Marie Rennison, U.S. Dept of Justice, NCJ 197838, Intimate Partner Violence, 1993–2001, at 1 (2003) (“1,247 women and 440 men were killed by an intimate partner in 2000. In recent years, an intimate killed about 33% of female murder victims and 4% of male murder victims.”); see also Nat’l Center for Injury Prevention & Control, Dept of Health & Human Servs., Costs of Intimate Partner Violence Against Women in the United States 3 (2003) [hereinafter Costs of Intimate Partner Violence] (“Nearly one-third of female homicide victims reported in police records are killed by an intimate partner.”).
  \item \textsuperscript{155} 1998 Stalking and Domestic Violence Report, supra note 141, at 21. Data from the FBI’s Uniform Crime Reports Supplementary Homicide Reports show that “1,252 women ages 18 and older were killed by an intimate partner in 1995.” Costs of Intimate Partner Violence, supra note 154, at 1.
  \item \textsuperscript{156} R.K. Piper & Kevin M. Fasana, Inst. for Soc. & Econ. Dev., The Evaluation of the Coordinated Response to Domestic Violence in Omaha (Phase II): High-Risk Case Review and Information Technology (2002) [hereinafter Omaha Case Review]. These indicators and predictors of serious injury and lethal domestic violence were analyzed in a study of fifteen domestic homicide and serious injury cases in Omaha, Nebraska. Id.
\end{itemize}
threat by the assailant to injure or kill himself.\textsuperscript{157} Thus, numerous risk indicators for further violence and intimate partner homicide were not only present in \textit{Bartunek}, but were also known to the State long before Piper’s attack. Moreover, in the United States from 1976 to 1994, the “most commonly used weapon in sexual assault murders was a knife.”\textsuperscript{158} Bartunek was able to escape death during the knife-wielding sexual assault by Piper, because she called 911 just before the attack and the police arrived in time to save her life.

In addition to the tremendous amount of injury and death resulting from violence against women, there are significant social and economic costs:

The costs of intimate partner rape, physical assault, and stalking exceed $5.8 billion each year, nearly $4.1 billion of which is for direct medical and mental health care services. The total costs of [intimate partner violence] also include nearly $0.9 billion in lost productivity from paid work and household chores for victims of nonfatal [intimate partner violence] and $0.9 billion in lifetime earnings lost by victims of [intimate partner] homicide.\textsuperscript{159}

Given these significant human, social, and economic costs of rape, sexual assault, stalking, domestic violence, and intimate partner homicide, the policy choice in \textit{Bartunek} is an unfortunate one. Properly addressing the violence against Bartunek by finding the State owed a duty to her would have benefited her individually. But the implications of such a decision reach far beyond her case. If a duty to victims like Bartunek were found, such a policy choice by the Nebraska Supreme Court would impact the State’s response to violence against women as a cultural problem. Finding a duty to Bartunek would have been a critical step toward dealing with this enormous problem. In particular, imposing a duty would address intimate partner violence when the State has knowledge of and the power to stop the violence, such as when the perpetrators are men under the State’s control in the probation system.

\textsuperscript{157} Multiple calls for assistance, stalking, prior domestic violence, and a history of violent crimes including weapons were present in over 80% of domestic violence homicide and serious injury cases in the study. \textit{Id.} at 15 tbl.II.2. The offender had a chronic or extensive criminal history and a history of probation or parole, and the victim tried to leave or separate and thought her- or himself to be in danger in over 73% of the cases reviewed in the study. \textit{Id.} at 16 tbl.II.2. Escalating abuse, multiple domestic violence incidents reported to criminal justice authorities, and worried family members were found in 60% of the reviewed cases. \textit{Id.} In 40% of the cases, the offender had probation or parole violations and a child was involved in violent incidents. \textit{Id.} A threat by the offender to injure or kill himself was present in 13.3% of the homicides reviewed. \textit{Id.} at 17 tbl.II.2.

\textsuperscript{158} \textit{SEX OFFENSES AND OFFENDERS}, \textit{supra} note 125, at 39. Among sexual assault murders, a knife was used in 28.5% of the cases, hands and feet were used in 20.2% of the cases, firearms were used in 17% of the cases, a blunt object was used in 12.6% of the cases, and 21.7% of the cases involved other methods of murder. \textit{Id.} at 39 fig.32.

\textsuperscript{159} \textit{COSTS OF INTIMATE PARTNER VIOLENCE}, \textit{supra} note 154, at 2.
Consideration of violence against women as a whole is important in analyzing *Bartunek*, because it sheds light on the particular facts of the case and supports a determination of foreseeability. A thorough foreseeability analysis in *Bartunek* must begin with an accounting for the general prevalence and patterns of intimate partner violence prior to addressing the specific violence against Bartunek. For instance, the sheer number of rapes in the U.S. and in Nebraska is significant to a preliminary consideration of the foreseeability of rape and its impact on finding a duty. As Professor Leslie Bender argues:

A woman is ten times more likely to be raped than to die in a car crash. In light of this factual data, it seems clearly offensive to say that any rape is "unforeseeable"—especially since tort law clearly understands car crashes to be foreseeable and requires caution to guard against them. Even women who do not know these statistics are trained from their girlhood to understand this intuitively. Women live their lives always conscious of the threat of rape and sexual violence. We watch for indicia of sexual danger at all times and govern many of our actions in relation to our degree of fear and caution. Men generally are oblivious to this fear. Tort law and foreseeability doctrine must deal with the concrete reality of women's vulnerability to sexual violence.

If there is one sure thing we can say about rape in our society, it is that rape is unfortunately very foreseeable in women's lives. As the statistics outlined supra indicate, rape is just one form of intimate partner violence. Professor Bender's analysis applies to other forms of violence in addition to rape—intimate partner violence of all forms is so prevalent that it is a predictable element of women's lives.

Of course, the general foreseeability of rape and intimate partner violence is not alone sufficient to support a duty owed by the State to any particular victim of this violence. Rather, the general foreseeability of violence against women is merely a starting point for analysis. It is a critical starting point, however, because it signals an approach to duty analysis that takes into account the realities of violence in women's lives. To support a legal duty, then, the general foreseeability and dynamics of intimate partner violence must be considered in the context of a concrete case. Additional case-specific foreseeability indicators are necessary to impose a duty on an entity that has knowledge of the risk of violence to a particular victim.

*Bartunek* involved a history of incidents of intimate partner violence perpetrated by Piper, much of which history the State knew about. Piper engaged in ongoing abuse, stalking, and threats against Bartunek while he was on probation and under the State's control. Thus, a fairly typical pattern of intimate partner violence was established long before Piper broke into Bartunek's house and sexually assaulted her at knifepoint. Most importantly, the established pattern

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was well known to Piper's probation officer. These facts, in combination with a general understanding of intimate partner violence, were enough to find that a more violent attack on Bartunek was foreseeable to the State prior to the sexual assault. The State failed to take intimate partner violence seriously in its handling of Piper and the risk he posed to Bartunek. Moreover, by failing to find that the State owed Bartunek a duty, the Nebraska Supreme Court affirmed this approach.

Not only was the attack foreseeable in light of the dynamics of intimate partner violence present in Bartunek, but the State of Nebraska was also the best cost avoider because of its knowledge of Piper's behavior and its control over him, its continuous interactions with an identifiable victim, and the foreseeability of the harm that occurred after months of escalating violence. In light of these factors, the State should have had a duty to act with reasonable care. Instead of requiring State accountability, however, the insolvent intervening criminal actor was construed as the only responsible party. Professor Mari Matsuda addresses the effects of "no duty" as follows:

In the law of torts, if a woman is raped, we look to the rapist for recourse. He is subject to the narrow criminal and civil sanctions of the law. Others in a position to predict and prevent rape—such as law enforcement officers, parole boards, landlords, hotel operators, and security firms—are typically absolved of responsibility. The law calls this "no duty." No duty means that even if there are reasonable things one could do to prevent rape, the law will not require the doing of those things. . . . "Look to the rapist," is the law's mythical remedy offered in response to women's trauma. It is a myth because rapists are rarely apprehended, and when apprehended, are rarely prosecuted effectively. When sued, the rapists are typically insolvent and unable to pay damages . . . . The United States Supreme Court, in nullifying the [civil remedy in the] Violence Against Women Act, has further extended the de facto immunity for rapists. Yet, we persist in telling women to seek redress from rapists, not from a system that creates and condones rape.161

Bartunek was decided as a duty case, but duty, scope of the risk, and causation are similar inquiries, especially where the alleged source of the duty is the foreseeability of harms caused by criminal actors.162 Piper's assault on Bartunek did not have to happen, and the State should be held responsible. As Professor Matsuda puts it:

162. The Restatement (Second) of Torts defines this principle in sections 448 and 449:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Restatement (Second) of Torts § 448 (1965) (emphasis added). Section 449 provides a broader statement of the principle:
"The presence of another potentially accountable person should not let everyone else who could have prevented the harm off the hook. Every effect has multiple causes, and in a responsible society we should identify as the responsible causes all those that could have made a difference." The State could have made a difference in Bartunek, and intervening in cases like Bartunek would reduce intimate partner violence as a whole. Public policy would be better served if state actors and the courts addressed violence against women in situations such as in Bartunek, where there is sufficient case-specific support for a legal duty. The analysis now turns to sources of such a legal duty.

B. Special Relationships: Duties Grounded in Restatement (Second) of Torts Section 315

Not only are public policy and the social context of appellate cases to be considered as end results of a duty analysis, they also form parts of the multifaceted legal analysis of whether a duty should exist. California Supreme Court Justice Tobriner stated in Dillon v. Legg and again in Tarasoff v. Regents of the University of California that duty "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." In Popple by Popple v. Rose, the Nebraska Supreme Court adopted the Tarasoff approach to duty analysis. The Popple court analyzed duty based on a special relationship between a negligent party and a dangerous person under section 315(a) of the Restatement (Second) of Torts in the context of a parent's duty to control a minor child with dangerous propensities. The Popple court stated:

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby. RESTATEMENT (SECOND) OF TORTS § 449 (1965).

Matsuda, supra note 161, at 2211.
164. 441 P.2d 912, 916 (Cal. 1968).
166. Id. (quoting PROSSER, LAW OF TORTS 332–33 (3d ed. 1964)).
167. 254 Neb. 1, 573 N.W.2d 765 (1998). Popple is the only Nebraska appellate case that cites Tarasoff in the majority opinion; the only non-majority citation to Tarasoff in Nebraska caselaw appears in Hamilton v. City of Omaha, 243 Neb. 253, 498 N.W.2d 555 (1993), in a dissent by Justice Lanphier. Coincidentally, Popple and Hamilton are also the only Nebraska cases that mention section 315 of the Restatement (Second) of Torts; see also infra note 179 and accompanying text.
168. 254 Neb. at 8, 573 N.W.2d at 770. The Popple court found that such a duty is cognizable in Nebraska, but it was not triggered in that particular case. Id. at 10, 573 N.W.2d at 771. The court declined to find a duty in Popple because the dangerous child's sexually abusive conduct was not a "known, habitual propensity,"
In analyzing whether a legal duty exists, we recognize that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."169

The Popple court went on to discuss the factors important to determining whether a duty exists under a "risk-utility balancing test."170 Under Nebraska law, these factors include "the magnitude of the risk, the public policy considerations, the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public policy interest in the proposed solution. Foreseeability is also an important factor in establishing a duty."171

Not only does Popple succinctly set forth the basic approach to duty under Nebraska law, it is also an example of the narrower class of negligence cases to which Bartunek belongs. The Popple analysis states Nebraska's approach to duty in the context of a negligence case that involves the acts of a third party criminal intervenor. Moreover, it is one of only two Nebraska cases that analyze the same section of the Restatement (Second) of Torts at issue in Bartunek.172

Employing the Popple factor analysis generally in the Bartunek case ought to have resulted in a finding of duty under Nebraska law. The "relationship of the parties" factor is the primary subject of the special relationship analyses in this section. The "opportunity and ability to exercise care" factor is informed by the significant powers that the probation department has over its probationers, especially when they are violating the terms of their probation. This factor is also strong in a pro-duty direction, given the knowledge the State had both of Piper's generally dangerous propensities and of the specific ongoing and escalating threat he posed to Bartunek.

While "foreseeability" is an ongoing thread throughout the analysis presented infra, it is particularly important with regard to Bartunek's status as an identifiable victim.173 Foreseeability is also critical in

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169. Id. at 6, 573 N.W.2d at 769 (citation omitted).
170. Id. at 7, 573 N.W.2d at 769.
171. Id. (citations omitted).
172. See supra note 167.
173. See infra subsection III.B.1.b. Foreseeability, as it relates to duty and proximate cause, respectively, has been defined by the Nebraska Supreme Court:

Foreseeability as it impacts duty determinations refers to "the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care." . . . Foreseeability that affects proximate cause, on the other hand, relates to "the question of whether the specific act or omission of the defendant
regard to the general nature of Piper's past crimes combined with his ongoing behavior directed at Bartunek, both of which presented risk factors for further violence against her as his former intimate partner. Given the prevalence of rape and other intimate partner violence, along with Piper's specific escalating violence, his attack on Bartunek was foreseeable to the State.

The "magnitude of the risk" and the "nature of the attendant risk" are collectively informed in part by Piper's violent criminal history, in part by his escalating threats and violence directed at Bartunek and her children, and in part by the nature of his past and ongoing criminal behavior as a risk indicator for sexual assault and intimate partner violence. Finally, "public policy considerations" and the "public policy interest in the proposed solution" are powerful pro-duty factors in light of the epidemic of violence against women in general and the predictability of the sexual assault against Bartunek in particular. This brief application of the duty-analysis factors identified in Popple to the facts of Bartunek indicates the need to look closely at Piper's known violent and abusive history as he proceeded to batter, stalk, sexually assault, and terrorize Bartunek and her family while under the State's control and often with its knowledge.

The policy reasons presented in section III.A supra and the general factor analysis of duty supra provide a starting point for a more specific legal analysis of Bartunek. The legal foundations for duty in Bartunek are found in the law of special relationships. Justice Tobriner noted in Tarasoff that expansion of the list of special relationships allows courts to circumvent the traditional "no duty" rule. It has already been argued supra that such an expansion is critical in cases like Bartunek in addressing violence against women on a policy level. However, imposing a narrow duty on a broader class of relationships would also exhibit sound legal analysis of special relationships. Reasonable expansion of the list of special relationships is exhibited by cases that go beyond the illustrations found in the Restatement to deal with current social issues and follow the intent of state legislatures in curtailing state immunity. Moreover, connections between the facts of cases like Bartunek and special relationships already recognized in Nebraska are necessary. Women's experiences with vio-

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174. See supra section III.A.
175. 551 P.2d 334, 343 n.5 (Cal. 1976).
176. See infra subsection III.B.1.
177. See infra subsection III.B.2.
lence should be part of the legal analysis itself, not just issues that noninclusive legal analysis happens to impact on a policy level. As Professor Leslie Bender argues, "[b]y incorporating knowledge about the pervasiveness of rape and violence against women in our society, courts would be compelled to find as a matter of law that there is a duty to act to prevent the unreasonable risk of rapes by third persons." ¹⁷⁸

1. Section 315(a): Toward a More Realistic Definition of "Takes Charge" and Recognition of the "Identifiable Victim"

The Nebraska Supreme Court analyzed section 315(a) of the Restatement (Second) of Torts for the first time in its discussion of duty in Bartunek v. State.¹⁷⁹ The court used a narrow construction of sections 315(a) and 319 to hold that the State of Nebraska’s probation department did not have a duty to use reasonable care to control Piper or protect Bartunek, because there was neither a custodial relationship nor "24-hour-per-day" or "round-the-clock visual supervision" of Piper, and thus no special relationship giving rise to a duty.¹⁸⁰ Focusing on the fact that electronic monitoring of an ISP probationer does not permit general monitoring of the probationer’s movements outside his home, the court did not find the nature of ISP to be sufficient to create a “takes charge” relationship as that term is used in section 319.¹⁸¹

The Nebraska Supreme Court’s analysis of special relationship duty under section 315(a) of the Restatement (Second) of Torts was unnecessarily limited in scope in two respects. First, the focus on the “take charge” relationship as necessarily custodial or involving 24-hour-per-day supervision was excessively narrow.¹⁸² In Bartunek, the court had the opportunity to explore important aspects of section 315(a) developed in the law of duty since the decision in Tarasoff.¹⁸³ Other courts have held that the definition of “takes charge” is not lim-

¹⁷⁸. Bender, supra note 160, at 328.
¹⁷⁹. 266 Neb. at 462, 666 N.W.2d at 441. The court stated that it had “not previously analyzed Restatement (Second) of Torts § 315(a) (1965), the parameters of which are further defined by id., § 319.” 266 Neb. at 462, 666 N.W.2d at 441. The only prior Nebraska appellate cases mentioning section 315 of the Restatement (Second) of Torts are Popple by Popple v. Rose, 254 Neb. 1, 7-8, 573 N.W.2d 765, 770 (1998) (analyzing section 315(a), but in conjunction with section 316 regarding parental duty to control a minor child), and Hamilton v. City of Omaha, 243 Neb. 253, 259, 498 N.W.2d 555, 560 (1993) (analyzing section 315(b) rather than section 315(a)). Hamilton is discussed in subsection III.B.2 infra. See also supra note 167.
¹⁸⁰. Bartunek, 266 Neb. at 463, 666 N.W.2d at 442.
¹⁸¹. Id. at 462-63, 666 N.W.2d at 441-42.
¹⁸². See infra subsection III.B.1.a; see also Brief in Support of Appellee’s Motion for Rehearing at 4-9, Bartunek (No. S-02-0710).
¹⁸³. 551 P.2d 334.
ited to strictly custodial or constant surveillance situations and that the identifiability of the victim is significant in post-Tarasoff special relationship duties. Second, the court's analysis of duty under section 315(a) did not even address the fact that this victim was not only foreseeable but also precisely identifiable.\textsuperscript{184} The “identifiable victim” element is an integral part of the development of the law of duty under section 315(a).\textsuperscript{185}

\textbf{a. “Takes Charge” Under Section 319 Should Not Require Physical Custody or Constant Visual Supervision}

Tarasoff was the turning point in the law of duty for situations covered under section 315(a), where the actor has a special relationship with the dangerous person.\textsuperscript{186} In October 1969, two months after Prosenjit Poddar had confided in a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley that he intended to kill Tatiana Tarasoff, he did so.\textsuperscript{187} The campus police had detained and then released Poddar at the request of the psychologist.\textsuperscript{188} No further action was taken, and no one warned Tarasoff or her parents of Poddar’s threat.\textsuperscript{189} Poddar was criminally prosecuted for murder, and Tarasoff’s parents filed suit against the University arguing negligent failure to warn and negligent failure to confine Poddar.\textsuperscript{190} The first decision in the Tarasoff case was rendered in 1974,\textsuperscript{191} but the California Supreme Court reheard the case and issued another opinion in 1976.\textsuperscript{192} In the 1976 opinion, there were four causes of action, but all were rejected except one—failure to warn Tarasoff or her parents.\textsuperscript{193} It was on that one cause of action that the Tarasoff court expanded the concept of duty under section 315(a) and found that the University could be held liable in Tarasoff’s death.\textsuperscript{194}

In his analysis of duty in Tarasoff, Justice Tobriner simply stated that there was a section 315(a) relationship between the University and Poddar, and he never mentioned section 319 and the “takes

\begin{itemize}
\item \textsuperscript{184} See infra subsection III.B.1.b.
\item \textsuperscript{185} See Thompson v. County of Alameda, 614 P.2d 728, 733–34 (Cal. 1980); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976); Peter F. Lake, Revisiting Tarasoff, 58 ALB. L. REV. 97, 125–35 (1994).
\item \textsuperscript{186} See Lake, supra note 185, at 130.
\item \textsuperscript{187} Tarasoff, 551 P.2d at 339.
\item \textsuperscript{188} Id. at 339–40.
\item \textsuperscript{189} Id. at 340.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974) [Tarasoff I].
\item \textsuperscript{192} Tarasoff, 551 P.2d 334.
\item \textsuperscript{193} Id. at 342.
\item \textsuperscript{194} Id. at 342, 353. For an extremely detailed account of the facts and procedural history of Tarasoff, see Fillmore Buckner & Marvin Firestone, “Where the Public Peril Begins” 25 Years After Tarasoff, 21 J. LEGAL MED. 187, 192–200 (2000).
\end{itemize}
charge” relationship it specifies. This was a remarkable move by the court, because section 319 provided the only possible special relationship applicable to the Tarasoff case under a strict reading of section 315(a). Even though a relationship defined by sections 316 through 319 did not exist in the Tarasoff case, Justice Tobriner relied on section 315(a) to expand the scope of special relationships that could create liability.

The Tarasoff approach to section 319’s “take charge” component as it is incorporated into section 315(a) is in direct contrast to the Nebraska Supreme Court’s approach in Bartunek. Since analysis of section 315(a) in concert with section 319 was an issue of first impression in Nebraska, the Bartunek court relied on other jurisdictions in its analysis of “takes charge.” The Nebraska Supreme Court also placed heavy emphasis on the two illustrations to section 319, one about a patient with an infectious disease permitted to leave the hospital, and the other about a “homicidal maniac” permitted to escape from a sanitarium. The court stated that these illustrations “make plain” that a custodial relationship is required by section 319.

195. 551 P.2d at 343. See supra notes 111-13 and accompanying text for Restatement language referring to and defining section 319 and its relationship to section 315(a).

196. See Tarasoff, 551 P.2d at 339-40; Restatement (Second) of Torts § 315 cmt. c (1965); Lake, supra note 185, at 129-35.

197. Tarasoff, 551 P.2d at 343-44.

198. In its section 315(a) analysis, the Nebraska Supreme Court relied on the following cases, which denied a duty in probation or parole settings: Seibel v. City and County of Honolulu, 602 P.2d 532 (Haw. 1979); Fitzpatrick v. State, 439 N.W.2d 663 (Iowa 1989); Schmidt v. HTG, Inc., 961 P.2d 677 (Kan. 1998); Lamb v. Hopkins, 492 A.2d 1297 (Md. 1985); Humphries v. N.C. Department of Correction, 479 S.E.2d 27 (N.C. Ct. App. 1996); Do Mun Kim v. Multnomah County, 970 P.2d 631 (Or. 1998); Small v. McKenenn Hospital, 403 N.W.2d 410 (S.D. 1987); Fox v. Custis, 372 S.E.2d 373 (Va. 1988). Bartunek v. State, 266 Neb. 454, 462, 666 N.W.2d 435, 442 (2003). This is the list of cases cited in support of not finding a section 315(a) duty based on a special relationship between Piper and the State. However, two of them should be removed from the list, because they do not really present holdings on this type of duty. Fitzpatrick collapses sections 315(a) and 315(b) by discussing reliance by the victim (which fits under 315(b) instead) and holds that there was no duty to control a parolee because, in the cases it analyzed, a “much closer nexus existed between the injured parties and agents of the state . . . than has been shown to exist between the present plaintiffs and the affected state agencies.” 439 N.W.2d at 667 (emphasis added). Humphries does not address a special relationship between the State and the probationer either. It discusses only special relationships where the agency and the injured party have a relationship and where there is detrimental reliance. 479 S.E.2d at 28. Both of those situations fit under section 315(b) and not section 315(a). See infra subsection III.B.2.

199. Bartunek, 266 Neb. at 462, 666 N.W.2d at 441-42; see Restatement (Second) of Torts § 319 cmt. a, illus. 1 & 2 (1965).

200. Bartunek, 266 Neb. at 462, 666 N.W.2d at 441. For an analysis of section 315(a) and an emphasis on custody similar to that in Bartunek, see Nasser v. Parker,
However, *Tarasoff* and cases in other jurisdictions that have extended *Tarasoff* demonstrate an expansion of the scope of section 315(a) to include special relationships between dangerous persons and negligent parties that fall outside those described by the comment to section 319.

An analysis by Professor Peter F. Lake of Justice Tobriner's omission of any discussion of section 319 in his *Tarasoff* opinion is instructive:

Perhaps [Tobriner's avoidance of section 319] is because that section contains a hint of ambiguity, namely, that one must "control" a third person whom one has merely taken "charge" of. This ambiguity suggests that expanding the traditional list of special relationships remains a possibility, assuming taking charge means something less than taking control. Furthermore, the "rule" set forth in section 319 is noticeably broader than its illustrations.  

Professor Lake emphasizes that, while the therapists in *Tarasoff* did not take charge of or commit Poddar, "it is more accurate to say that the therapists were in a position to take charge if necessary," and that that position to take charge was the source of their duty.

The view that a custodial relationship is not what is meant by "takes charge" is also found in caselaw from other jurisdictions relied on by *Bartunek*. These cases also show that the power to take control has been used as a basis for duty in cases outside the psychiatric setting and in the noncustodial law enforcement settings of parole and probation. The *Bartunek* court did not address these cases from other jurisdictions, which illustrate the *Tarasoff* approach to "takes charge." However, analysis of a few of these cases will illustrate a sound legal basis for imposing a duty to *Bartunek* under section 315(a).

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455 S.E.2d 502 (Va. 1995) (holding that a psychotherapist had no duty to warn the intended victim of his patient, who had threatened to kill the victim, that the patient had left an institution and was at large, because there was no custodial relationship). In *Nasser*, the Virginia Supreme Court specifically rejected *Tarasoff* on the basis that there was no custodial relationship in *Tarasoff* to trigger application of section 315(a) via section 319. *Id.* at 505-06. This explicit rejection of *Tarasoff* is the first such decision by "any court of last resort." Peter Lake, *Virginia Is Not Safe for "Lovers": The Virginia Supreme Court Rejects Tarasoff in Nasser v. Parker*, 61 BROOK. L. REV. 1285, 1285 (1995). The *Nasser* court also relied on *Fox*, 372 S.E.2d 373, a parole case that the Nebraska Supreme Court cited in *Bartunek*. *Nasser*, 455 S.E.2d at 504-06; see *Bartunek*, 266 Neb. at 462, 666 N.W.2d at 442. For a critique of the *Nasser* opinion and its reliance on the lack of section 319 analysis in *Tarasoff*, see generally Lake, *supra* note 185.

201. Lake, *supra* note 185, at 130 (emphasis added).

202. *Id.*

In *Division of Corrections v. Neakok*, the Supreme Court of Alaska relied on *Tarasoff* and section 315 of the *Restatement (Second) of Torts* in considering whether the State of Alaska owed any duty to the victims of its violent parolee to use due care in supervision. In *Neakok*, a violent parolee who had been in prison for assault and rape “shot and killed his teenaged stepdaughter and her boyfriend, and raped, beat and strangled to death another woman” six months after his release from prison “while highly intoxicated.” The parolee had a history of violence and substance abuse related violence, including other rapes, beating his wife, and attempted rape of his stepdaughter while drunk. Prior to release, a prison counselor expressed concern to the Parole Board and other staff members that the parolee would have “trouble with drinking after his release” and that he “would be a particular danger to his stepdaughters, whom he had apparently previously assaulted while drunk.” Nevertheless, the parolee was subject to only the minimum parole conditions, and no plan for parole was developed even though state policy required a plan based on his record. Neither the prison counselor nor the parole officer imposed special conditions of parole even though both were authorized to do so.

Following the murders, the families of the victims sued the State of Alaska and the Parole Board for, among other things, negligent supervision and failure to impose adequate conditions of parole. The court found a duty to use due care in supervision of the parolee. In response to the State’s argument that “actual custody” or a negligent release from custody is required to trigger a duty, the court held that a “duty to control or warn can[not] be so narrowly limited.” The court’s analysis focused on the ability of the State to control the parolee, namely that it could “regulate his movements within the state, require him to report to a parole officer . . . , require him to undergo treatment for alcoholism, and impose and enforce special conditions of parole.” The State also had authority to revoke parole and reincarcerate the parolee for violation of parole conditions. These powers are much like those that the ISP probation officers in *Bartunek*

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205. *Id.* at 1123.
206. *Id.*
207. *Id.* at 1124.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 1126–32.
212. *Id.* at 1126.
213. *Id.*
214. *Id.*
possessed. The Neakok court emphasized that "[w]hile the state could not completely control [the parolee's] conduct, it was hardly in the position of a stranger who (at least according to the traditional rule) cannot be expected to interfere with the conduct of a third person." The court went on to say that parole itself was not the only basis for the special relationship, but rather that the known dangers the parolee posed were significant to the State's "enhanced ability" to control the parolee. The special relationship was thus based on the State's "substantial ability to control the parolee" as well as its "increased ability to foresee the dangers the [particular] parolee pose[d]." The Neakok court analogized this special relationship to that found in Tarasoff and several other noncustodial and law enforcement cases.

The ability to control the parolee was also significant in defining "takes charge" in the State of Washington's Taggart v. State. In Taggart, two cases (Taggart v. State and Sandau v. State) were combined for review. In Taggart, a woman was attacked by a parolee with a violent juvenile and adult criminal history dating back at least fifteen years. The parolee's crimes included first degree burglary, two attempted rapes, assault with intent to commit rape, assault, auto theft, driving while intoxicated, and resisting arrest, all of which involved alcohol abuse. The Taggart assault occurred seven months after the parolee's third release from prison. The parolee received very little supervision from his parole officer—and had more supervision occurred, his heavy drinking in violation of parole would likely have been discovered.

In the Sandau case, a parolee with a violent juvenile and adult criminal history repeatedly raped the nine-year-old son of his girlfriend. The parolee had been in prison for stabbing a man in the

215. See supra note 4.
216. 721 P.2d at 1126.
217. Id.
218. Id.
219. Id. at 1127 (citing, along with Tarasoff, Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977) (acknowledging duty in parole supervision); Semler v. Psychiatric Inst. of Wash., D.C., 538 F.2d 121 (4th Cir. 1976) (acknowledging that a probation officer had a duty to report to the sentencing court a hospital's release of probationer known to be dangerous to young girls); and Petersen v. State, 671 P.2d 230 (Wash. 1983) (acknowledging state hospital was responsible for controlling dangerous propensities of patient)).
221. Id. at 244.
222. Id. at 245.
223. Id.
224. Id.
225. Id.
chest, and was "usually intoxicated" when committing his crimes.\textsuperscript{226} His parole officer received reports that the parolee was drinking and threatening his ex-wife's husband, but did no follow-up.\textsuperscript{227} The "maximum supervision" parolee did not report to his parole officer for over three months.\textsuperscript{228} A warrant for the missing parolee was issued but not recorded, and the officer later learned that he was two states away in Montana, beating his girlfriend and her children and drinking heavily.\textsuperscript{229} Due to administrative delays, he remained free long enough to rape the victim.\textsuperscript{230}

In the consolidated cases, the \textit{Taggart} court considered what duty the State owed the victims, and in doing so held that the features of the parole setting, including powers to regulate parolees' movements within the state borders, to require reporting to the parole officer, to impose special conditions such as drug and alcohol testing and rehab, and to order the parolee not to possess firearms, were sufficient to meet the "takes charge" definition found in section 319 of the \textit{Restatement (Second) of Torts} and applied to section 315(a).\textsuperscript{231} Also, the requirements that parole officers know of their parolees' criminal histories and that progress during parole be monitored provided an additional basis for finding a duty to control the parolee.\textsuperscript{232} The court held that "\textit{when a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm.}"\textsuperscript{233} The \textit{Taggart} court emphasized that a custodial relationship is not the determining factor. Citing \textit{Tarasoff}, it pointed out that in that case, a duty was imposed in regard to an outpatient, not an inpatient or custodial ward, and that the outpatient status was analogous to parole or probation settings.\textsuperscript{234}

\textsuperscript{226} \textit{Id.} at 246. \\
\textsuperscript{227} \textit{Id.} \\
\textsuperscript{228} \textit{Id.} \\
\textsuperscript{229} \textit{Id.} \\
\textsuperscript{230} \textit{Id.} \\
\textsuperscript{231} \textit{Id.} at 255. \\
\textsuperscript{232} \textit{Id.} \\
\textsuperscript{233} \textit{Id.} \\
\textsuperscript{234} \textit{Id.} at 257. The outpatient mental health scenario, similar to that in \textit{Tarasoff}, has been the subject of recent duty analyses as well. For example, in \textit{Rivera v. New York City Health & Hospitals Corp.}, 191 F. Supp. 2d 412, 417-18 (S.D.N.Y. 2002), the court specifically relied on sections 315 and 319 of the \textit{Restatement (Second) of Torts} as adopted under New York law in holding that mental health providers were liable for an attempted murder and assault committed by a paranoid schizophrenic with a history of violence. The patient was undergoing outpatient care at the time of the attack. \textit{Id.} at 417. The court held that, while the duty may be lessened in an outpatient setting, it does not "disappear." \textit{Id.} at 420. Significantly, the court based its holding on the "ability to control" the outpatient, which in this case included an option to seek commitment. \textit{Id.} at 422. Seeking
While Neakok and Taggart found a duty in the outpatient-like parole setting, other cases demonstrate application of this analysis to probation settings as well. In Hertog, ex rel. S.A.H. v. City of Seattle, the Supreme Court of Washington extended its Taggart analysis to a probation case to find a duty, again relying on sections 315(a) and 319 of the Restatement (Second) of Torts. In Hertog, the court found that the probation counselor had a duty to use reasonable care to control the probationer. The probationer in Hertog was a repeat sexual offender and chronic drug and alcohol abuser. The City was sued for negligent supervision of the probationer who, after consuming alcohol and cocaine, raped a six-year-old girl in her home while on probation for a lewd conduct conviction and on pretrial release awaiting charges in a sexually motivated burglary. At the time of the rape, the probation officer, who knew of the probationer’s violent tendencies and violations of probation, planned to wait six months to meet with the probationer; the rape occurred within this six-month gap in supervision. In Hertog, both the probation and pretrial release counselors with supervisory authority were held to have a duty to “protect others from reasonably foreseeable danger resulting from the dangerous propensities of probationers and pretrial releasees under their supervision.”

Other states have adopted an analysis similar to that in Alaska and Washington and have found a “takes charge” duty in negligent

commitment is analogous to reporting probation violations to a sentencing court to institute a revocation hearing, so this reasoning would apply to the construction of “takes charge” as meaning “ability to control” advocated supra for the Bar-tunek case.

235. In Nebraska, “[p]robation means a sentence under which a person found guilty of a crime upon verdict or plea or adjudicated delinquent or in need of special supervision is released by a court subject to conditions imposed by the court and subject to supervision.” Neb. Rev. Stat. § 29-2246(4) (Reissue 1996 & Cum. Supp. 2002). In contrast, “[p]arole term shall mean the time from release [from prison] on parole to the completion of the maximum term, reduced by good time.” Neb. Rev. Stat. § 83-170(11) (Reissue 1999).

236. 979 P.2d 400, 403 (Wash. 1999).
237. Id. at 406–07.
238. Id. at 406–09.
239. Id. at 404.
240. Id. at 403.
241. Id. at 405.
242. Id. at 415. For other examples of Washington cases affirming a duty to use reasonable care in supervision, see Bell v. State, 52 P.3d 503 (Wash. 2002) (acknowledging duty in a case of an abduction and rape by a paroled sex offender), Bishop v. Miche, 973 P.2d 465 (Wash. 1999) (acknowledging duty in a case of an automobile accident death caused by intoxicated probationer on probation for driving while intoxicated), and Savage v. State, 899 P.2d 1270 (Wash. 1995) (acknowledging duty in a case of a rape by a felon parolee with a history of sexual assaults and violence).
supervision cases as well. The Nebraska Supreme Court rejected this view. While it was the court’s prerogative to accept or reject inclusion of probation in a “takes charge” duty, finding such a duty implements a clearly preferable public policy. Furthermore, other jurisdictions clearly demonstrate the legal analysis required for this duty, which takes into account the foreseeability of sexualized violence by certain parolees and probationers.

In addition to the support from other jurisdictions, there is relevant Nebraska caselaw supporting an alternative outcome in Bartunek on the “takes charge” issue. The Bartunek decision, which requires “24-hour-per-day supervision” to trigger a duty and narrowly interprets “takes charge” under section 319, contradicts caselaw holding the State of Nebraska accountable for negligent failure to control a dangerous third party. For example, in Sherrod v. State, the Nebraska Supreme Court affirmed a finding of liability against the Nebraska Department of Correctional Services under the State Tort Claims Act for a beating inflicted on a prisoner by a former cellmate. The attacking inmate was not supervised “24-hours-per-day” even though incarcerated even though incarcerated in the Nebraska State Penitentiary.

243. See Sterling v. Bloom, 723 P.2d 755 (Idaho 1986) (adopting section 319 of the Restatement (Second) of Torts and allowing liability where probationer convicted of a third drunk driving offense was repeatedly in violation of both drinking and driving probation terms without having been reported to the court when he caused extensive injuries in another drunk driving incident), supersession by statute as to new government immunity except in cases of reckless, willful, and wanton conduct recognized in Harris v. State, 847 P.2d 1156 (Idaho 1992) (holding that paroled juvenile’s violent sexual assault could have resulted in state liability only to the extent that these acts were foreseeable and predictable); Doe v. Arguelles, 716 P.2d 279 (Utah 1985) (finding state liability in rape, sodomy, and stabbing of child by inadequately supervised youth sexual offender on parole). Arizona has recognized the viability of a duty in probation settings in two cases where duty was not at issue. See McCleaf v. State, 945 P.2d 1298 (Ariz. Ct. App. 1997) (finding that liability for gross negligence was possible but not applicable because revocation action had been taken by probation officer, albeit later than may have been necessary, and the decision was up to the judge, so there was no proximate cause); Acevedo v. Pima County Adult Probation Dep’t, 690 P.2d 38 (Ariz. 1984) (finding that negligent supervision of probationer was possible in case where probation officer did not enforce the court’s probation order).


245. See Brief in Support of Appellee’s Motion for Rehearing at 4–5, Bartunek (No. S-02-0710) (highlighting the cases discussed infra that Bartunek potentially overturns).


247. Sherrod, 251 Neb. at 356, 557 N.W.2d at 636. Another case similar to Sherrod is Webber v. Andersen, 187 Neb. 9, 187 N.W.2d 290 (1971) (finding that Omaha Police had a duty to control three violent inmates in a city jail who assaulted another inmate despite not being visually supervised 24-hours-per-day).
At the other extreme from the prison setting in terms of supervision, *Sharkey v. Board of Regents of the University of Nebraska* held that the University of Nebraska at Omaha owed a duty to and could be found liable for the injuries sustained by an invitee, which were inflicted by an unknown third party assailant in a known dangerous area of campus. Since the *Sharkey* duty was based on foreseeability and the landowner–invitee relationship, it is not directly analogous to *Bartunek*. However, *Sharkey* represents a case where the State was liable for injuries inflicted by someone over whom it had much less control (next to none) than it had over Piper and where foreseeability was more generalized than it was in *Bartunek*. *Sharkey* involved the foreseeability of criminal activity in remote, dark places involving unknown victims and unknown assailants, whereas *Bartunek* involved the foreseeability of escalating intimate partner violence by a perpetrator under the State’s control against an identifiable victim. Finally, in *Brandon v. County of Richardson*, the duty the court found was based on the special relationship created by the crime witness status of the victim. Although not directly analogous to *Bartunek*, *Brandon* does represent yet another case where there was less than 24-hour visual supervision and where the County had much less control over the at large assailants than the State had over Piper in *Bartunek*, yet where the court nevertheless imposed a duty.

The result of *Bartunek* in light of these other supervisory situations is that there seems to be no case that could possibly meet the 24-hour-per-day visual supervision test, no matter how foreseeable the attack. A better legal standard would focus on the ability to control the third person or the ability to take control if needed. Indeed, this is the standard implicit in the findings of liability in the Nebraska cases of *Sherrod, Sharkey, and Brandon*. Such a standard would effectively serve public policy interests in addressing intimate partner violence committed by Nebraska probationers against identifiable victims. ISP officers have the ability as well as the duty to know where a probationer is 24-hours-per-day through the use of an electronic monitoring device. ISP officers can make arrests with broader powers than the police have.
take control of those violent probationers who pose risks for sexual assault and intimate partner violence.254

b. A Section 315(a) Duty Should Recognize the "Identifiable Victims" of Nebraska's Probationers

In addition to the options for interpreting the meaning of "takes charge" discussed supra, cases from other jurisdictions that have relied on section 315(a) provide insight into the importance of the "identifiable victim" factor in constructing "duty." The Nebraska Supreme Court did not address the glaring reality that DaNell Bartunek was clearly an identifiable victim. This fact sets Bartunek apart from each and every case upon which the Nebraska Supreme Court relied in denying a duty based on a special relationship between the State and Piper.255 Since there is to date no Nebraska caselaw discussing "identifiable victims," analysis must depend on other jurisdictions' use of this factor in constructing duty.

None of the cases from other jurisdictions that the Nebraska Supreme Court cited in its section 315(a) analysis in Bartunek involved an identifiable victim. Even where cases cited by the Bartunek court involved a potentially identifiable class of victims, the class was very

254. While there are general distinctions between regular probation and ISP relating to the level of control and dangerousness of the probationer, see supra note 4, the purpose of this Note is to argue for a duty in cases where a probationer is dangerous, regardless of the type of probation. Of course, the heightened controls an officer has in the ISP program speak to how much ability to control exists for purposes of a "takes charge" analysis. Nevertheless, probation orders themselves define certain levels of control in differing degrees, and each probation order is tailored to the probationer. Similarly, each probationer presents a unique set of dangerousness factors. Since ability to control the probationer and dangerousness are the critical elements the duty advocated here, they should be applied according to the facts of a specific case. The same legal and policy reasons that support a duty in ISP cases may support a duty in regular probation cases as well.

255. The Nebraska Supreme Court relied on the following cases, which denied a duty in probation or parole settings: Seibel v. City and County of Honolulu, 602 P.2d 532 (Haw. 1979) (involving a potentially identifiable class of women who could become victims of sex offender); Fitzpatrick v. State, 439 N.W.2d 663 (Iowa 1989) (involving no identifiable victim in contrast to the general public); Schmidt v. HTG, Inc., 961 P.2d 677 (Kan. 1998) (involving a potentially identifiable class of women who could come into contact with violent sex offender); Lamb v. Hopkins, 492 A.2d 1297 (Md. 1985) (involving a potentially identifiable class of potential drivers on the roads who could be hurt by drunk driver); Humphries v. N.C. Department of Correction, 479 S.E.2d 27 (N.C. Ct. App. 1996) (involving no connection between assailant and shooting victims); Do Mun Kim v. Multnomah County, 970 P.2d 631 (Or. 1998) (involving a potentially identifiable class of convenience store owners and employees who could be robbed or hurt by robber); Small v. McKennan Hospital, 403 N.W.2d 410 (S.D. 1987) (involving a random victim); Fox v. Custis, 372 S.E.2d 373 (Va. 1988) (involving a potentially identifiable class of women who could be raped and victims of arson by prior violent sex offender).
NEBRASKA LAW REVIEW large—nothing close to the identifiable status of Bartunek. Instead of addressing the identifiability of Bartunek, the court focused solely on the distinction between custody and probation and the lack of 24-hour-per-day visual supervision. The result of this choice by the court is, regrettably, that it failed to address implications for constructing a duty grounded in an awareness of identifiable victims.

In Tarasoff, the doctor–patient relationship between the defendant and Poddar was enough to create the special relationship necessary to support a duty owed to Tarasoff. Justice Tobriner stated that "by entering into a doctor–patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." The duty was further explained:

In our view . . . once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances.

Thus, the Tarasoff court imposed on the defendant a duty to use reasonable care; custody or other means of "taking charge" were not necessary, because the victim was foreseeable.

Tarasoff itself did not use the term "identifiable victim." Moreover, Tarasoff did not require the victim to be precisely identified, even though the victim there had been identified: "[T]here may also be cases in which a moment's reflection will reveal the victim's identity. The matter thus is one which depends upon the circumstances of each case, and should not be governed by any hard and fast rule." However, the requirement was developed in Thompson v. County of Alameda to become more definite: "Although the intended victim as a precondition to liability need not be specifically named, he must be 'readily identifiable.'" Other courts have similarly so held. For ex-

256. See supra note 255.
257. See Bartunek, 266 Neb. at 462–64, 666 N.W.2d at 441–43 (discussing section 315(a)).
258. See id.
260. Id. (emphasis added).
261. Id. at 345–46.
262. See Tarasoff, 551 P.2d at 343–44.
263. Id. at 345 n.11.
264. 614 P.2d 728 (Cal. 1980).
265. Id. at 734 (referring to the description of the victim in Tarasoff, 551 P.2d at 341). See also Lake, supra note 185, at 133 n.208. For a historical analysis of Tarasoff and its progeny on the issue of the identifiable victim, see D.L. Rosenhan et al.,
ample, the Utah Supreme Court held that there must be an identifiable "individual or distinct group of individuals" to limit the scope of duty while still requiring reasonable care when danger is foreseeable and meaningful action can be taken.\footnote{266}

While the Alaska Supreme Court inNeakok\footnote{267} analyzed "takes charge" issues to find a duty, as discussed \textit{supra}, it also moved on to address foreseeability as an element of that duty. The \textit{Neakok} court stated that since preventing harm to the public was a purpose of the parole system, danger to the public would be a foreseeable outcome of negligence.\footnote{268} The court relied on \textit{Tarasoff} and subsequent cases to address whether the exact identity of the victim had to be known to trigger the duty, and found that it did not.\footnote{269} The court went on to hold that the victims were identifiable even though not specifically so, because they were residents of a small isolated community and were family and friends of the assailant.\footnote{270} The \textit{Neakok} court relied on \textit{Thompson} to hold that if the plaintiff could prove that the victims were in a discrete enough group to be effectively warned of the danger, there could be a duty.\footnote{271}

Another state case relying on foreseeability analysis is the Massachusetts case of \textit{A.L. v. Commonwealth.}\footnote{272} In \textit{A.L.}, a probationer who had been convicted of child sexual abuse three times was hired and retained as a Boston public school teacher due to the negligent supervision of his probation officer, and two young boys were consequently molested.\footnote{273} The court stated that the "most critical factor in this analysis is whether a defendant could anticipate that he would be expected to act to protect the plaintiff and could foresee harm to the

\footnotesize{\textit{Warning Third Parties: The Ripple Effects of Tarasoff, 24 PAC. L.J. 1165, 1173–79 (1993).}}

\footnote{266}{Higgins v. Salt Lake County, 855 P.2d 231, 240 (Utah 1993). The \textit{Higgins} court also discussed the policy decisions behind constructing a duty with limitations: [O]ur overriding practical concern is whether the one causing the harm has shown him- or herself to be uniquely dangerous so that the actor upon whom the alleged duty would fall can be reasonably expected, consistent with the practical realities of that actor's relationship to the one in custody or under control, to distinguish that person from others similarly situated, to appreciate the unique threat this person presents, and to act to minimize or protect against that threat. When such circumstances are present, a special relationship can be said to exist and a duty sensibly may be imposed. \textit{Id.} at 237.}

\footnote{267}{721 P.2d 1121, 1127 (Alaska 1986). For the facts of this case, refer to text accompanying notes 204–19 \textit{supra}.}

\footnote{268}{721 P.2d at 1127.}

\footnote{269}{\textit{Id.} at 1129 ("A victim may be 'foreseeable' without being specifically identifiable.").}

\footnote{270}{\textit{Id.} at 1131.}

\footnote{271}{\textit{Id.} at 1132.}

\footnote{272}{521 N.E.2d 1017, 1021–23 (Mass. 1988).}

\footnote{273}{\textit{Id.} at 1019–23.}
plaintiff resulting from his inaction.” 274 The court then held that conditions imposed by the sentencing judge that required the probationer to stay away from young boys created the special relationship and a “duty beyond that owed to the public as a whole.” 275 These orders were “meaningless without the probation officer’s enforcement.” 276

In Taggart, the Washington Supreme Court also addressed foreseeability. 277 It discussed the parolees’ violent history and the bearing that had on propensity to commit the crimes against the victims. 278 One of the parolees “had a history of alcoholism and violent attacks against women, and a poor prognosis for recovery from his mental illness.” 279 The court emphasized that a jury could conclude that he might commit similar crimes again, and that “[t]he fact that Taggart herself was not the foreseeable victim of [the parolee’s] criminal tendencies does not establish as a matter of law that her injury [caused by the attack by the parolee when he was drunk] was not foreseeable.” 280 As to the other parolee, the Taggart court held that the parolee had an extensive violent history, was in violation of his parole, was drinking alcohol, which increased the risk of violence, and was beating his girlfriend and her children. 281 Thus:

A jury might conclude that it was reasonably foreseeable that unless [the parolee] were arrested for violating parole, he would commit further violence against [his girlfriend] or her children, including Sandau [the parolee’s rape victim]. The fact that the violence took the form of raping Sandau, when [the parolee’s] criminal history did not include rape, does not show that injury to Sandau was not foreseeable. Violence against Sandau may have been foreseeable, even though the form of that violence may not have been. 282

Likewise with Bartunek: while Snowardt did not know of Piper’s prior rapes against Bartunek, he did know of prior burglaries by Piper and domestic violence and stalking by Piper against Bartunek and her son. The two core offenses of the night of the attack were burglary and sexual assault of a former intimate partner. Snowardt did know of Piper’s violent history, that he was being investigated for a knifing, and that he was now on probation for a burglary involving possession of a gun and a knife. Moreover, there was an identifiable victim saying she was worried about the escalating threat.

Thus, Bartunek presents an even stronger case for duty than did Taggart, Neakok, or A.L., because Bartunek was specifically identifi-

274. Id. at 1021.
275. Id.
276. Id. at 1022.
278. 822 P.2d at 258.
279. Id.
280. Id.
281. Id.
282. Id. (emphasis added).
able and had in fact identified herself to the State. Nevertheless, the Nebraska Supreme Court relied exclusively on cases with weakly identifiable classes of victims or totally random victims, instead of looking to caselaw in other jurisdictions analyzing duty in the context of identifiable victims. Use of cases more factually similar to Bartunek to support a duty would have demonstrated a legal analysis cognizant of sexualized violence by probationers against known victims.

In using Tarasoff to inform an analysis of Bartunek, it is important to note that, while failure to warn the victim or her family was the basis of the claim in Tarasoff, the new duty created in Tarasoff was not defined as a “duty to warn,” but rather as a “duty to exercise reasonable care to protect the foreseeable victim of that danger,” which is known or should be known when there is a special relationship between the defendant and the dangerous third party. This duty can be met by a variety of means other than warning. Bartunek clearly knew of the threat Piper posed to her, so the issue in her case was not a failure to warn about otherwise unknown threats. The basis of Bartunek’s claim was the State’s failure to control Piper or revoke probation on the multiple occasions where it should have—in short, she, like the plaintiffs in Tarasoff, alleged a failure to use reasonable care under the circumstances.

283. See supra note 255. The court listed Neakok and A.L. as standing for cases opposite its ultimate holding, but did not analyze them. Bartunek, 266 Neb. at 462, 666 N.W.2d at 442. However, the Bartunek court did not even mention Taggart, despite the Appellee’s thorough analysis of Taggart in her brief. See, e.g., Brief of Appellee at 30–32, Bartunek (No. S-02-0710). The Appellee also pointed out to the court that Bartunek was distinguishable from the Taggart plaintiffs, because she was a “readily identifiable foreseeable victim.” Id. at 32.


285. Id. at 345; see also Thompson v. County of Alameda, 614 P.2d 728, 739 (Cal. 1980) (Tobriner, J., dissenting) (“Our opinion in Tarasoff makes clear that failure to warn a victim who is identifiable does not constitute an essential element of the cause of action. We noted that the duty of care requires the defendant ‘to take one or more of various steps, depending upon the nature of the case.’”) (quoting Tarasoff, 551 P.2d at 340).

286. The Nebraska Supreme Court did not reach the issue of whether the probation officer knew or should have known that Piper posed a danger to Bartunek, because it disposed of the case on the duty issue. Bartunek, 266 Neb. at 459, 666 N.W.2d at 439 (“The first and only issue that is necessary for us to address is whether a special relationship existed which gave rise to a specific duty on the part of the State to protect Bartunek from Piper.”); id. at 464, 666 N.W.2d at 443 (“Because [the] conclusion [that there was no special relationship and thus no duty to Bartunek] is dispositive, we need not consider issues relating to breach, causation, or damages . . . .”). However, the district court clearly found breach, based on Piper’s numerous violations of probation, violent background, and “continued harassment” of Bartunek. Record at 11–12, Bartunek (No. CI-99-87) (District Court Journal Entry & J.) (Conclusions of Law and discussion of duty to Bartunek). The district court emphasized that it was the harassment “of the Plaintiff” that made the State’s behavior negligent, thus emphasizing her foreseeable and identifiable character. Id. at 12.
There are benefits to the "identifiable victim" element beyond its acute relevance to the facts in Bartunek. Using this element of section 315(a) would eliminate what the court may have feared to be an ensuing flood of litigation by anyone and everyone hurt by someone on probation, should it have also found probation sufficient to create a "takes charge" relationship. Thus, by limiting the duty to identifiable victims of probationers, regardless of custody or 24-hour-per-day visual supervision, the court could easily have found a duty to Bartunek without allowing unknown or unforeseeable potential victims of Piper to sue as well. In fact, the Neakok court addressed these concerns, emphasizing that "recognition of the duty does not make the state liable for all harm caused by parolees, but rather makes it liable only when its negligent supervision and administration of their parole causes the injury in question." 287

The Bartunek court had multiple legal theories from which to choose in constructing a duty based on the State's relationship with Piper, its ability to control him, and the existence of an identifiable victim. The fact that Bartunek was identifiable provides such an easy way to limit duty, that it is perplexing that the Nebraska Supreme Court did not take the opportunity to use it, especially when it relied solely on cases distinguishable from Bartunek's case on that very characteristic. An approach even more conservative than relying on identifiable victims is to also require a pattern of violations of probation or one serious violation before triggering the State's duty. While the very actions that make a victim identifiable often will automatically be serious violations of probation (e.g., stalking, violating orders, breaking curfew to harass, abusing a child), and will often manifest a pattern, using the status of violating probation in a certain way so as to define the duty provides yet another guard against expanding potential liability in ways with which the court is not comfortable.

Finally, the cost–benefit analysis in Bartunek underscores the importance of finding a duty in such a case even if one does not fully embrace a Tarasoff-like analysis of duty in cases where there is no strict custodial relationship. In Tarasoff, the policy concern in opposition to finding a duty was of patient confidentiality. 288 Justice Tobriner stated:

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy . . . . Against


288. 551 P.2d at 346.
this interest, however, we must weigh the public interest in safety from vio-

cent assault.

... We conclude that the public policy favoring protection of the confiden-
tial character of patient–psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protec-
tive privilege ends where the public peril begins.289

Clearly the third party concern in Bartunek is not that of confidential-
ity, because Bartunek already knew Piper was a threat to her. Moreo-
ver, confidentiality would not be an issue in probation settings, because there is no patient–therapist relationship between probation-
ers and probation officers. The costs of a duty to the State in cases like Bartunek would be merely economic and administrative. One aspect of these costs would require the court to partake in revocation proceedings more often. Another aspect involves the cost of litigation in cases where the facts less clearly fit with any duty the State has defined. A third would be the cost of liability where that duty is breached, causing damages to victims.

These economic and administrative burdens are not nonexistent costs. However, they must be compared to the social cost presented in Bartunek where someone was sexually assaulted and almost killed. Weighed against that counter-consideration, the costs of revocation hearings for dangerous felons in violation of the terms of ISP is minimal. Under the duty advocated for supra, the probationer would already have done enough to face a revocation hearing, and it would be up to the court to decide what would happen next—either maintaining the probation with more restrictions or, alternatively, revoking it and ordering incarceration.290 The violations Piper had accumulated were not trivial ones, were increasingly serious, and were often directed at the identifiable victim, who was violently sexually attacked after the State refused to deal with its probationer’s violations. This situation is much more clear-cut than the nebulous task of negotiating patient confidentiality concerns into a duty. The breach in Bartunek was that the State did not give the sentencing court a chance to look at the case, by not taking Piper before a judge to discuss his violations and his escalating violent behavior toward Bartunek. Once there is a duty, the cost of lawsuits in less clear cases would decrease as the appellate

289. Id. at 346–47.
290. See Neb. Rev. Stat. § 29-2267 (Reissue 1995) (providing for the procedure for probation revocation hearings); Id. § 29-2268 (providing for the range of options the court has following a finding that a probationer has violated a probation condition, including revocation of probation and imposition of a new sentence, reprimand and warning, intensified supervision, additional probation requirements, or an extension of the term of probation). A single violation is sufficient to justify revocation of probation. State v. Clark, 197 Neb. 42, 47, 246 N.W.2d 657, 660 (1976). A court is required to find a violation of probation by clear and convincing evidence. State v. Finnegan, 232 Neb. 75, 77, 439 N.W.2d 496, 498 (1989).
courts face new fact patterns and establish lines of demarcation that can be applied by trial courts. It is true that the cost of state liability to victims could be great, but the remedy for this is competent probation supervision, not elimination of a remedy for victims.

In summary, the State of Nebraska had the power to control Piper and chose not to. It had the power to arrest and hold, which it used, too late, the night of the attack on Bartunek, and the power to institute revocation proceedings, which it failed to use throughout the summer of 1997. Section 315(a) of the Restatement (Second) of Torts provides ample basis for imposing a duty on the State to protect Bartunek by controlling Piper. The fact that ISP provides a level of “takes charge” involvement sufficient to put the State in a special relationship with Piper supports this duty. Even if the court would maintain its view that lack of custody or 24-hour-per-day visual supervision is insufficient to create a “takes charge” relationship alone, probation, or more specifically, ISP, could be the basis of a “takes charge” relationship anyway in cases where there is an identifiable victim like Bartunek. All of the foregoing options for imposing a 315(a) duty better address the reality of intimate partner and sexualized violence in probation cases than what is possible under a “no duty” regime.

2. Section 315(b): Toward a More Reasonable Construction of “Detrimental Reliance” and Recognition of “Aid-to-the-State”

Not only are there opportunities to find a duty to DaNell Bartunek under section 315(a), there are also sufficient opportunities under section 315(b) of the Restatement (Second) of Torts and existing Nebraska caselaw consistent with section 315(b). The Nebraska Supreme Court analyzed Bartunek’s case under section 315(b) according to precedent in Nebraska, but did so incompletely, thus leading to an incorrect finding of “no duty.” It set forth the general rule, as stated in Morgan v. District of Columbia291 and adopted by Nebraska in Brandon v. County of Richardson.292 The Bartunek court quoted from Brandon I:

“We recognize that there are situations that provide exceptions to the no-duty rule: (1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm.”293 Regarding these exceptions, the Bartunek court explained that there is no special relationship just because an individual requests assistance from the police; nor is there a special relationship

when the police gratuitously promise to provide protection.\textsuperscript{294} The court cited \textit{Hamilton v. City of Omaha}\textsuperscript{295} in stating that there is a special relationship when the "police do not benefit from a citizen's aid but nevertheless affirmatively act to protect a specific individual or a specific group of individuals from harm, in such a way as to engender particularized and justifiable reliance."\textsuperscript{296} The \textit{Bartunek} court held that these principles apply to probation officers as well as police officers and that "more than general reliance is needed" to trigger the duty when there is no aid to the State but there has been an undertaking to protect.\textsuperscript{297}

The Nebraska Supreme Court's analysis of section 315(b) focused solely on the detrimental reliance aspect of duty, and dismissed any duty based on Bartunek aiding the State. This analytical choice is inadequate in two respects. First the court chose a legal construction of the detrimental reliance duty that focused only on the night of the attack, where assurances were made to Bartunek's father but were not made to Bartunek personally.\textsuperscript{298} In doing so, the court failed to recognize the factual element of ongoing reliance that Bartunek placed in Piper's probation officer. The second flaw in the court's analysis is its dismissal of the aid-to-the-state legal theory under \textit{Brandon} and failure to apply that legal theory to the facts of \textit{Bartunek}.\textsuperscript{299}

a. "Detrimental Reliance" Under Section 315(b) Now Collides with Contributory Negligence in Nebraska

The Nebraska Supreme Court's analysis of section 315(b) as to detrimental reliance focused on a narrow aspect of the \textit{Bartunek} case. The court emphasized only the night of the attack and thereby dismissed all previous reliance by DaNell Bartunek, which had occurred during the months she interacted with Piper's probation officer Snowardt. The court was thus able to avoid imposing a duty, emphasizing that on the night of the attack assurances were made to Bartunek's father but not to Bartunek herself.\textsuperscript{300} The court held that

\textsuperscript{294} Id. at 460, 666 N.W.2d at 440–41.
\textsuperscript{296} \textit{Bartunek}, 266 Neb. at 460–61, 666 N.W.2d at 441 (quoting \textit{Hamilton}, 243 Neb. at 260, 498 N.W.2d at 560–61 (quoting \textit{Morgan}, 468 A.2d at 1313–14)).
\textsuperscript{297} Id. at 461, 666 N.W.2d at 441.
\textsuperscript{298} Id. See infra subsection III.B.2.a.
\textsuperscript{299} \textit{Bartunek}, 266 Neb. at 461, 666 N.W.2d at 441 ("Plainly, the exception identified in \textit{Brandon} for witnesses and informants is inapplicable in the instant case, and Bartunek does not argue that it is."). See infra subsection III.B.2.b.
\textsuperscript{300} \textit{Bartunek}, 266 Neb. at 461, 666 N.W.2d at 441 ("The record does show that on the evening before the assault, Snowardt assured Bartunek's father that there was no need for him to go to Bartunek's home because Snowardt would notify the McCook Police Department that Piper had missed his curfew."). Bartunek's father testified that he would have gone to be with her had this assurance not been made to him. Bill of Exceptions, Testimony of Dwight Bartunek, Direct Exami-
“even if Bartunek’s father relied on Snowardt’s assurance, this falls short of showing that Bartunek herself, as the plaintiff, relied on Snowardt’s assurances.”

The court also stated that, “in that instance [the night of the attack], Snowardt did exactly as he had promised . . . .” The court held that “there was no evidence that Bartunek acted or refrained from acting in such a way as to exhibit particular reliance on the actions of Snowardt.”

The court cited no authority to support its narrow night-of-the-attack approach.

The court’s approach ultimately defines a threshold for proving duty that would allow recovery only if Bartunek would have been negligent to herself in the process of “acting or refraining from acting” in order to “exhibit particular reliance” sufficient to meet the Nebraska Supreme Court’s standard. If Bartunek had done less to help herself than she did when she reported violations to Snowardt, secured her home, tried to avoid Piper, enlisted her family’s help, called the police about phone harassment, and called 911 when Piper was breaking in to her house just before the attack, her claim would likely be barred or significantly undermined, because the State would have available defenses for contributory negligence and assumption of risk.

Under the Bartunek holding, the State is able to avoid accountability in the first instance by showing that a plaintiff did not rely enough if she acted in significant ways to help herself despite actions or assurances by the State. Conversely, the State can also avoid accountability by showing that a plaintiff relied too much, did too little to help herself, and was thus contributorily negligent. This outcome is the result of the court’s focus on the night of the attack. Under the court’s holding,

301. Bartunek, 266 Neb. at 461, 666 N.W.2d at 441.
302. Id.
303. Id.
304. Id.
305. See Brief in Support of Appellee’s Motion for Rehearing at 12–14, Bartunek (No. S-02-0710).
306. See id. at 13.
307. See id. The State made both of these arguments to the court. See, e.g., Brief of Appellant at 44–47, Bartunek (No. S-02-0710) (arguing contributory negligence on the theory that Bartunek did not do enough to protect herself from Piper, examples of which offered by the State were her failure to notify police of every infraction or to seek a protection order); see also supra note 98 & infra note 382. Bartunek titled the subsection of her Brief in Support of her Motion for Rehearing that argued these points: “Damned if she does, damned if she doesn’t.” Brief in Support of Appellee’s Motion for Rehearing at 12, Bartunek (No. S-02-0710).
prior actions by a victim may work against, but not in favor of, that plaintiff's reliance claim.

The court's holding fails to take account of the fact that Bartunek's father had become party to the communications between Snowardt and Bartunek precisely because Bartunek was continuously frustrated by Snowardt's inadequate responses. The fact that Bartunek and her father continued to report Piper's violations of probation committed against Bartunek throughout the summer indicates that they relied on Snowardt to do something about Piper, even if Bartunek is the only party with a potential cause of action. Furthermore, nothing in the record indicates that Snowardt told Bartunek or her father that they should lodge their complaints elsewhere. In fact, when Bartunek went to the police, frustrated by Snowardt's unfulfilled assurances that he would "take care of it," she was told that the police could not do much to help, because Piper was Snowardt's client.

Focusing on the night of the attack not only allowed the court to proceed as if Bartunek herself had never relied on Snowardt, but this approach also minimized the meaning of the contact between Bartunek's father and Snowardt in a larger temporal scheme by parsing up the facts of the case. The assurance made that night to Bartunek's father was just one example of a series of assurances and actions over time inducing Bartunek's reliance on an ongoing basis. The court's

308. See supra note 71.
309. See Brief in Support of Appellee's Motion for Rehearing at 11, Bartunek (No. S-02-0710).
310. Id.
311. See supra note 74.
312. The focus here is on the presence of a series of actions and/or assurances to induce reliance. A related issue is the possible difference between actions and assurances as a basis for reliance. The Bartunek court characterized the contact between the probation officer and Bartunek's father on the night of the attack as a single assurance instead of as part of an action or undertaking (or series thereof). 266 Neb. at 461, 666 N.W.2d at 441. In Hamilton v. City of Omaha, 243 Neb. 253, 261-63, 498 N.W.2d 555, 561-62 (1993), the Nebraska Supreme Court discussed the differing approaches to reliance, with some jurisdictions requiring actions and others allowing assurances alone to trigger a duty based on an undertaking to protect. While the Hamilton court did not hold that assurances alone are sufficient to trigger a duty, it did not rule that possibility out either. Id. at 263, 498 N.W.2d at 562 ("[A]ssuming, without deciding, that an officer's assurance alone is sufficient to give rise to a duty, we find that the plaintiff's [suit] was properly dismissed . . . "). Even if the status of assurances alone is unclear under Hamilton, it is nevertheless clear that actions are enough to trigger a duty under Hamilton. Id. at 264, 498 N.W.2d at 563. Moreover, the Nebraska Supreme Court's holding in Bartunek that the assurance to Bartunek's father was insufficient because it was not made to Bartunek herself implicitly holds that an assurance alone would have been enough, had it been made to Bartunek. See Bartunek, 266 Neb. at 461, 666 N.W.2d at 441. Therefore, this analysis proceeds under the assumption that actions and/or assurances are sufficient to trigger a
focus on the single night-of-the-attack assurance excluded consideration of other assurances made to Bartunek over the course of the summer. More importantly, this narrow view of the facts excluded actions by the State over time that induced reliance. Bartunek thought Snowardt would actually do something to control Piper—this was a result of her reliance on a pattern of actions and assurances, not just the single assurance to her father on the night of the attack. Bartunek’s reliance followed Snowardt’s actions of contacting Piper, telling him to stop his behavior, and imposing restrictions on his movement. Bartunek’s reliance was not based on assurances alone; nor was it based solely on state communications to her father.

In considering the disconnect between the court’s night-of-the-attack approach and the facts in the record, it is important to note that nothing in Nebraska caselaw requires a court to focus on only the night of the attack in a case like Bartunek. Although law enforcement cases often only involve a single incident that could trigger reasonable detrimental reliance, they can also involve several isolated events, which are viewed separately. However, these scenarios are not the only possibilities. The chain of actions and assurances over time serves to distinguish Bartunek from the plaintiffs in every case upon which the Nebraska Supreme Court relied. This chain provided an opportunity to define another category of cases fitting the facts of Bartunek. Such a distinction makes sense and would better acknowledge the reality of violence committed by probationers where the State may have ongoing contact with victims.

The Bartunek court relied on Morgan, Hamilton, and Sweeney v. City of Gering. Morgan involved two separate incidents of requests for aid made by the wife of a police officer to the police department, followed by assurances. The Morgan court held that the police adequately complied with both requests, and that they thereby discharged any obligations they may have had in each instance. Hamilton involved a single assurance by a police officer for protection

reliance duty under Nebraska law, even though actions probably present a stronger case for reliance than assurances alone, and the focus will remain on whether the series was sufficient. See also supra note 106.

313. Actions may present a stronger case for reliance than assurances alone. See supra note 312.
314. See supra note 73.
315. See, e.g., Hamilton, 243 Neb. at 255, 498 N.W.2d at 558 (finding that police officer made one assurance to victim of subsequent domestic assault that occurred the same night as the assurance); Morgan v. District of Columbia, 468 A.2d 1306, 1310 (D.C. 1983) (finding two separate but non-actionable assurances when wife of police officer made two separate requests for help from the police department).
317. 468 A.2d at 1310.
318. Id.
on the night of a domestic assault.\textsuperscript{319} In Hamilton, a woman who had been assaulted and then threatened by her ex-husband requested assistance from the police.\textsuperscript{320} A police officer responded and told the woman that he would be in the area to protect her.\textsuperscript{321} Nevertheless, the ex-husband succeeded in attacking the plaintiff again, dragging her down the stairs, and beating her with a tire iron.\textsuperscript{322} The Hamilton court held that the assurance by the police officer was not enough to induce reliance, and that some specific action by the officer was needed to establish a special relationship and thereby a duty.\textsuperscript{323} Even farther removed from the factual scenario in Bartunek than the isolated assurance in Hamilton or the two separate actions taken in Morgan, Sweeney did not involve any contact at all between a government official and the plaintiff alleging detrimental reliance, but rather was about a motorist's unilateral expectation of the city's enforcement of ordinances prohibiting street obstructions.\textsuperscript{324}

In contrast to this caselaw relied upon by the court, Bartunek involved a pattern of similar actions and assurances over a period of time in response to similar incidents, which Bartunek reported with frequent regularity. Each time a report was made, more reliance was induced because of the authority that the probation officer had over Piper. This differs from a situation where a citizen requests help from the police in regard to another citizen who has no special relationship to the police, as in Hamilton.\textsuperscript{325} This situation also differs from that where the authority figure has no information on the probability of attack other than the information from the victim, as in Morgan.\textsuperscript{326} It clearly differs from a unilateral expectation of government action, as in Sweeney.\textsuperscript{327} Thus, the Nebraska Supreme Court should have considered the factual differences in Bartunek and not relied on cases distinguishable on such central grounds.

Once actions or assurances are shown, another element must still be proven to make a case for duty. A reliance-based duty requires not only actions or assurances, but also an affirmative undertaking to protect implicit within the government's actions and assurances.\textsuperscript{328} While Snowardt failed to adequately address Piper's violations and es-
calating threat to Bartunek, he nevertheless did “affirmatively act to protect”329 Bartunek and to address some of Piper’s violations. Snowardt assured the Bartuneks that he would take action and never told them that they should seek protection elsewhere.330 Snowardt did not take the violations to be serious enough to report them to the court, but he did contact Piper about the reports from the Bartuneks and did lead DaNell Bartunek to depend on his further action.331 On only one occasion did Snowardt do more than simply tell Piper to “stop it,” and that was when he imposed a restriction on Piper’s proximity to Bartunek’s residence and her child’s daycare center.332

Even though Snowardt imposed a specific restriction on Piper’s movement, it is important to note that he imposed this order with knowledge that Piper had been continuously violating the terms of his probation and refusing to follow orders, particularly ones that involved staying away from Bartunek.333 Piper did not stop his harassment of Bartunek. Thus, Snowardt’s affirmative actions to protect Bartunek were ultimately inadequate to protect her even though they were enough to induce reliance.334 While Snowardt did act in response to requests to end Piper’s harassment, Snowardt did not act with reasonable care once he undertook actions that induced reliance by Bartunek.335 Regardless of a lack of explicit assurances to Bar-

329. Bartunek, 266 Neb. at 460-61, 666 N.W.2d at 441 (quoting Hamilton, 243 Neb. at 260, 498 N.W.2d at 561 (quoting Morgan, 468 A.2d at 1313-14)).
330. See excerpts from Chronological Notes of Fred Snowardt supra note 73.
331. See supra note 73.
332. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (“7/25/97 ... Told [Piper] he was to develop a 3-block cushion from now on regarding [Bartunek]’s house and Kidd[i]e Korral. He was not to enter that cushion [without] informing me first.”). However, on the same day he imposed this restriction, Snowardt granted Piper free time, off the electronic monitor. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (“7/25/97 ... fr[ee] time tomorrow will be shopping with sister/mom.”).
333. Bartunek, 266 Neb. at 456, 666 N.W.2d at 438; Record at 9, Bartunek (No. CI-99-87) (District Court Journal Entry & J.) (Findings of Fact: “Mr. Piper began violating the terms of this probation almost immediately.”); id. at 10 (Findings of Fact: “Despite many requests by the Plaintiff and her father over the course of two (2) months to have Mr. Piper leave the Plaintiff alone Mr. Snowardt took no action to revoke Mr. Piper’s probation. His only action was to tell Mr. Piper to stop doing it.”); see also Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (noting at least five recorded incidents of the state ordering Piper to stop harassing, contacting, or threatening Bartunek). The very fact that Piper was told the same thing so many times illustrates his refusal to follow these orders and the peculiarity of Snowardt expecting him to do any different with more specific orders; see also Brief of Appellee at 15–17, Bartunek (No. S-02-0710).
334. Quite apart from being effective, Snowardt’s orders for Piper to stop often further enraged Piper, inducing retaliation toward Bartunek for reporting Piper’s behavior to Snowardt. See supra notes 47 & 73.
335. Failure to use reasonable care is exemplified by the pattern that, following incidents of harassment reported to the state, the probation officer (and his replacement during his vacation) consistently failed to follow up with Bartunek or do
tunek by the State on the night of the attack, Snowardt's ongoing actions—including assurances to Bartunek and her father through the summer, combined with his role as the authority figure with responsibility for controlling Piper and actual orders restricting Piper—constituted an undertaking to protect and induced Bartunek's reliance. Given Snowardt's repeated response to Bartunek's complaints, it was reasonable for her to rely on Snowardt to use the control he had over Piper to end the harassment and threats, because she knew that he had the power to revoke probation and to otherwise control Piper beyond what he actually accomplished. Moreover, unlike in Morgan, where the officer discharged his duty, Snowardt did not discharge his duty by fulfilling his promises or complying with requests to control Piper.

One final aspect of the court's detrimental reliance analysis should be examined. Once established, an affirmative undertaking to protect must be specific in two respects. Citing Hamilton and Sweeney, the Bartunek court stated that "[l]iability may be established . . . if the probation officer . . . has] specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking." The court reasoned that under this rule, Bartunek had no special relationship with the State, because she did not prove a specific undertaking to protect or specific reliance on that undertaking. However, the facts of Bartunek support the opposite conclusion.

On the issue of a specific undertaking aimed at a specific individual, rather than the general public, the facts reveal a pattern establishing a special relationship with Bartunek over time. As noted supra, the development of this special relationship over time is the distinguishing factor between Bartunek and the cases on which the Nebraska Supreme Court relied, and is instructive in considering the specificity of the undertaking to protect and the reliance. It cannot reasonably be argued that Snowardt's actions to tell Piper to stay away from Bartunek or his assurances that he would take care of the problem were directed at anyone but Bartunek, even when communicated via her father. It is reasonable to infer that communications to Bartunek's father about ending Piper's harassment were meant to be relayed to Bartunek herself and were meant for her benefit. Certainly these actions to protect Bartunek were not directed to the public in general, because Bartunek was the only identifiable target of Piper's future violence. While Piper had many violations mounting, all of the

any investigation. See Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (6/19/97, 7/21/97, 7/25/97, & 8/12/97); Bill of Exceptions, E24 (Chronological Notes of Don Douglas) (7/11/97); see also supra notes 64 & 66.

336. Bartunek, 266 Neb. at 461, 666 N.W.2d at 441.

337. Id.
incidents of threats and harassment were directed at Bartunek and Bartunek alone. The specificity of the undertaking is thus established.

Further, Bartunek's reliance was specific to Snowardt's undertaking when that undertaking is viewed as the set of actions and assurances that occurred over the course of the summer, rather than just those on the night of the attack. On the night of the attack, any actions taken to protect Bartunek came too late, even if on that evening Snowardt did do what he said he would do, by sending the police to check Bartunek's house. Sending the police to check on her was more like a reaction by Snowardt to his own failure to control Piper than it was an affirmative effort to do so as a fulfillment of his prior undertaking to protect. Snowardt's actions the night of the attack can hardly be seen as discharging his duty to Bartunek. Moreover, Bartunek's state of vulnerability on the night of the attack is itself evidence of her previous reliance on the State.

Bartunek's identifiable character and status as the specific target of undertakings to protect also critically set the case apart from cases upon which the Nebraska Supreme Court relied in Bartunek. In Sweeney, no duty was found when the plaintiff relied on a general expectation that the municipality would keep streets free from obstructions because this was something the municipality should do. Reliance in Sweeney was not based on any specific undertaking to benefit the plaintiff in particular. Likewise, the Hamilton court found that the plaintiff there failed to show that there was more than a general request for police protection that would be owed to any citizen. In contrast, Bartunek's reliance was not based on an assumption that probation officers would do their jobs correctly in order to protect members of the general public. Rather, Bartunek relied on actions taken and assurances made by a probation officer who knew her situation, and who was—however inadequately—addressing with his probationer issues that intimately involved her as an individual.

The Nebraska Supreme Court closed its reliance analysis by emphasizing that Bartunek did not offer any evidence that she acted or refrained from acting in reliance on Snowardt. Requiring a more drastic showing of reliance than Bartunek exhibited amounts to Bartunek being required to act negligently to herself and potentially bar her own claim. Although the court did not formally reach the issue of contributory negligence as a State defense, it effectively did so in its holding on detrimental reliance. Applying the facts to a theory of duty in the way the Bartunek court did amounts to saying that there never

339. Id.
341. Bartunek, 266 Neb. at 461, 666 N.W.2d at 441.
is any duty. A legal analysis interpreting Nebraska's reliance-based duty to include a series of actions, assurances, and reliance over time would more adequately address ongoing violence within probation settings, where victims known to the State are highly likely to rely on a probation officer's power to control a violent probationer following repeated incidents of probation violations.

b. "Aid-to-the-State" Under Section 315(b) and Consequent Increased Danger Should Be Recognized in Probation Settings

The Nebraska Supreme Court in Brandon v. County of Richardson established a duty to a victim based on the victim's aid to the State as a witness and the resulting special relationship between the victim and the State. In Brandon, a transgendered woman who identified as a man was brutally beaten and raped for his transgendered status. The rapists threatened to kill Brandon if the rapes were reported. Brandon nevertheless reported the rapes and was subsequently mistreated by the county sheriff's office during the interview. Brandon agreed to file complaints and testify against the rapists. But, when there was sufficient probable cause to arrest the suspects three days later, the State failed to make arrests. Instead, the county interviewed one of the suspects, thus alerting both suspects of Brandon's report, and allowed them to remain free. Three days later, the suspects murdered Brandon and two others in a house in Humboldt, Nebraska.

Brandon's mother prevailed on her wrongful death claim against the State, based on a duty owed Brandon due to his status as a witness. The court explained the duty in these terms: "The fact that Brandon went to law enforcement and offered to testify and aid in the prosecution of [the rapists] was proved at trial. There was a special relationship between the county and Brandon, and therefore the county had a duty to protect Brandon."

342. 261 Neb. 636, 668, 624 N.W.2d 604, 628 (2001) [Brandon II].
343. Id. at 640–41, 624 N.W.2d at 611.
344. Id. at 646, 624 N.W.2d at 614.
345. Id. at 656–63, 624 N.W.2d at 620–25. The county was found liable for intentional infliction of emotional distress for its outrageous and dehumanizing treatment of Brandon during the interview. Id.
346. Id. at 645, 624 N.W.2d at 613.
347. Id. at 648, 624 N.W.2d at 615.
348. Id. at 645, 624 N.W.2d at 614.
349. Id. at 646, 624 N.W.2d at 614.
350. Id. at 668, 624 N.W.2d at 628.
351. Id.
Lincoln, and instead remained in Humboldt, believing the rapists
would be arrested.\textsuperscript{352} Nevertheless, in both \textit{Brandon I} and \textit{Brandon II}, the court based the duty and special relationship on Brandon's sta-
tus as a witness acting in aid of the State.\textsuperscript{353}

The Nebraska Supreme Court in \textit{Brandon I} adopted the reasoning
of \cite{Morgan v. District of Columbia} and stated that "a special rela-
tionship undoubtedly exists where an individual assists law enforce-
ment officials in the performance of their duties."\textsuperscript{355} In \textit{Bartunek}, the Nebraska Supreme Court explicitly held that the principles of duty
resulting from detrimental reliance and from aid-to-the-state "gener-
ally apply to supervising probation officers."\textsuperscript{356} These two statements
together indicate that under Nebraska law, aid of a supervising proba-
tion officer should be analyzed in the same way as aid of a police offi-
cer or sheriff. Nevertheless, the \textit{Bartunek} court dismissed a duty
based on the exception set forth in \textit{Brandon} for "witnesses and inform-
ants," stating that it was "[p]lainly . . . inapplicable in the instant
case, and Bartunek does not argue that it is."\textsuperscript{357}

In the context of the probation system, a witness to or victim of
violations of probation who reports them to the probation officer and
who is willing to provide further information or assistance is analo-
gous to a witness to a crime reporting that crime to police and cooper-
ating with authorities or offering to testify against the suspects. In
probation situations, witnesses can provide reports, statements, affi-
davits, and physical evidence to probation officers, and this informa-
tion can then be used to support reports of violations to the court.\textsuperscript{358} However, if no effort is made to collect such evidence, lack of effort is a
function of the probation officer's negligent treatment of the situation,
and is not indicative of the status of someone willing and ready to
provide the evidence. Bartunek, her father, and the McCook Police
Department all were known sources of evidence of Piper's violations of
probation, but the State did not treat them as such. This fact should
not be used to exclude a claim based on Bartunek's status as a wit-
ness. She was aiding the state, whether the State wanted the help or
not. By taking what information she gave the State and even acting
on it to a very limited degree, rather than telling her to go elsewhere,

\begin{itemize}
\item \textsuperscript{352} Brandon v. County of Richardson, 252 Neb. 839, 841, 566 N.W.2d 776, 779 (1997) [\textit{Brandon I}].
\item \textsuperscript{353} Brandon II, 261 Neb. at 668, 624 N.W.2d at 628; Brandon I, 252 Neb. at 844, 566 N.W.2d at 780.
\item \textsuperscript{354} 468 A.2d 1306 (D.C. 1983).
\item \textsuperscript{355} Brandon I, 252 Neb. at 844, 566 N.W.2d at 780.
\item \textsuperscript{356} Bartunek v. State, 266 Neb. 454, 461, 666 N.W.2d 435, 441 (2003).
\item \textsuperscript{357} Id.
\item \textsuperscript{358} Bill of Exceptions, Testimony of Probation Supervisor Lonnie Folchert, Direct Ex-
amination 23, 34:22; Bill of Exceptions, Testimony of Chief Probation Officer Ra-
leigh Haas, Direct Examination 198, 203:07.
\end{itemize}
the State established a special relationship with Bartunek. The State is responsible for failing to seek more information from Bartunek as a witness and failing to properly act on information it did have. Bartunek should not have to bear the cost of the harm that this failure eventually caused her.

The State never investigated Bartunek's reports of stalking, harassment, or child abuse. In these many instances, the State never followed up with Bartunek to ask more questions, take statements, or obtain affidavits. This is the kind of information the State would need to institute revocation proceedings. A typical example of how the State handled alleged violations is the child abuse incident, where Piper beat Bartunek's two-year-old until he was black and blue. Not only did Snowardt fail to follow up on the child abuse incident with Bartunek, he "[asked] [Piper] if [it] could wait till tomorrow" when Bartunek insisted that Piper move out after she found bruises on her child—bruises which Piper admitted to causing and for which he was arrested and cited. Snowardt even "reminded [Piper] that he cannot be abusing children[ and a]dvised him that if [Bartunek] had reported the spanking in a timely fashion, he would be in the pen by now." Nevertheless, Snowardt failed to investigate or report this incident to the sentencing court or even to his supervisors, despite

359. See Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (6/19/97, 7/21/97, 7/25/97, & 8/12/97); Bill of Exceptions, E24 (Chronological Notes of Don Douglas) (7/11/97). For one of many examples of this approach to Piper's violations, see Bill of Exceptions, Testimony of Fred Snowardt, Direct Examination 80, 107:25 (Snowardt not returning Bartunek's phone call to interview her about unwanted contacts from Piper she had reported to the probation department) and 108:20 (Snowardt's statement that "there wouldn't be a need" to contact Bartunek about the ongoing situation); see also supra notes 64 & 66.

360. Bill of Exceptions, Testimony of Probation Supervisor Lonnie Folchert, Direct Examination 23, 34:22; Bill of Exceptions, Testimony of Chief Probation Officer Raleigh Haas, Direct Examination 198, 203:07; see also supra note 290.

361. See supra notes 57–59 and accompanying text.


363. See supra notes 48–52 and accompanying text.

364. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (6/19/97). The child abuse was reported to the McCook Police Department in an "untimely manner" only because Bartunek and her children went to Trenton to stay with her parents upon discovering the bruises. In Trenton, Nebraska, Bartunek contacted the police, and they told her to report to the McCook Police Department, since that was the location of the abuse. To do so, the report had to wait until Monday, after the weekend. Bill of Exceptions, Testimony of DaNell Bartunek, Direct Examination 319, --:-- ("Q: Okay. What—and what did you do based on that, based on what the folks in Trenton told you? A: They told us—they advised us to wait until—like the following workday, like Monday or whatever the next following workday was because they had a hard time probably—going to find a detective around in town here. Q: Okay. And so did you then decide you were going to see the McCook police? A: Yes. They told—they advised us to go to the McCook police because that's where it was. That's where I lived.").
the fact that a conviction is irrelevant to the existence of a violation of probation. This pattern extended to situations of harassment as well. For example, when Piper called Bartunek sixteen times in one day and she reported it to police, who in turn reported it to probation, probation again did nothing to follow up with Bartunek or the police, and nothing was reported to the court. Nor did anyone follow up with Piper himself about the incident.

Because the State did not take Bartunek's victimization seriously, it did not treat her as a witness or informant—however, that does not mean she was not one. Her role in reporting the serious violations of probation to the State was in aid of the State, because the State was charged with supervising Piper, a dangerous felon. The manner in which the State treated Bartunek's situation is very much like how the State treated the victim in Brandon.

The State basically ignored the safety of both Brandon and Bartunek. Although Brandon had agreed to be a witness against the rapists, the State failed to protect Brandon from them when it knew Brandon's life had been threatened to prevent the rapes from being reported. In Bartunek the State failed to act on reports of violations or take action to prevent further violence by Piper when it knew or should have known of the threat Piper posed to Bartunek. Both victims had gone to the State in fear for their safety and to report their victimization and provide the State with further information needed to handle the situations. Both had offered to aid the State on an issue that warranted a response from law enforcement.

Under Brandon, a formal arrangement or agreement to aid the State does not appear to be necessary. The Brandon court stated that "[a] special relationship was created between Brandon and the county when Brandon went to law enforcement officials and offered to testify and aid the prosecution of [the rapists]." Likewise, Bartunek offered to aid the State in dealing with its probationer's violations in her efforts to supply information and her willingness to cooperate with Snowardt. Bartunek should have been treated as a witness/informant.

Finally, the special relationship created by an offer to aid the State does not require an additional explicit promise by the State to protect the witness or informant. The Brandon court found an aid-to-the-
state duty despite there being no promise to protect Brandon made by the county—in fact there was not even a plan or effort to protect Brandon, much less a promise.370 Thus, while assurances of protection made in Bartunek are important to a reliance-based duty, they are unnecessary for an aid-to-the-state duty.

Brandon offers a characteristic that is useful to limit an aid-to-the-state duty—a characteristic which is also present in Bartunek. The fact that the State failed to protect Brandon is compounded by the fact that it actually made the situation worse by alerting the rapists of Brandon’s report, yet not making an arrest or providing Brandon with protective custody in the meantime.371 Likewise, the behavior of the probation department in Bartunek made the situation worse for Bartunek. The threats and harassment aimed at Bartunek escalated because the State would tell Piper to stop without taking any real action to control him. The State had a duty to control Piper based on Bartunek’s status as a witness to and victim of his numerous violations, and its failure to do so actually endangered Bartunek further.

An example of this escalation in violence is the manner in which Piper reacted when Bartunek made reports. Bartunek had her father deliver a note to the probation officer that Piper left on her car.372 When the officer asked Piper about it, Piper in turn retaliated against Bartunek for turning over this note by showing up twice at her children’s daycare center to threaten and intimidate her verbally.373 These incidents were reported to the officer, who then again addressed the issue with Piper, who lied about it.374 The ultimate retaliation

370. Brandon II, 261 Neb. at 667, 624 N.W.2d at 627 (“The record is absolutely clear that there was never any plan to provide protection to Brandon.”); see also Brandon II, 261 Neb. at 647, 624 N.W.2d at 615 (indicating that Sheriff Laux testified that he “never offered Brandon special protection from” the rapists); id. at 648, 624 N.W.2d at 615-16 (indicating that Deputy Sheriff Olberding testified that the sheriff’s office “never offered Brandon any protection from” the rapists).

371. Brandon II, 261 Neb. at 648, 624 N.W.2d at 615-16.

372. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (“7/21/97 . . . Upon returning to office, found that [Bartunek’s] dad had dropped off note [Piper] had placed in her car. Copy is in his file.”).

373. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (“7/25/97 . . . Dwight Bartunek called to say [Piper] had came to Kidd[i]e Korral and hassled [Bartunek] about her giving me the note he had left in her car. Said he had been there again this morning. Said [Piper] had threatened them with statement that his sister (from Colo[rado]) was going to be there this morning to ‘straighten her out.’ Told Dwight I would contact [Piper] this morn[ing].”).

374. Bill of Exceptions, E24 (Chronological Notes of Fred Snowardt) (“7/25/97 . . . Travelled [sic] to [Piper’s workplace] and spoke with [Piper] about the above. Denied confronting [Bartunek] at Kidd[i]e Korral about letter . . . Tried to make me believe that Kidd[i]e K. was in accordance with ‘direct route’ to work. Denied having been at [Bartunek’s] this morn[ing]. Told[d] him had till noon to decide if he was going to be honest with me.”), (“7/25/97 . . . [Piper] came to office and apologized for lying to me about being at [Bartunek’s] this a.m. Told him next time I would just file. Told him he was to develop a 3-block cushion from now on
came the night Piper broke into Bartunek's house and attacked her. He had the opportunity to do this, because, far from being defused or controlled, he was further angered by Bartunek's reports relayed by Snowardt and then was left practically unsupervised. Thus, the State participated in escalating the threat to Bartunek as it simultaneously failed to act on the threats at each point during the summer of 1997.\textsuperscript{375}

Thus, even if there is reluctance to extend Nebraska's existing aid-to-the-state duty to probation settings where a victim reports violations of probation that are also aggressions against her, a duty should be found in cases such as Bartunek, where the State's treatment of the witness actually puts her in more danger.\textsuperscript{376} This duty is essential,

\textsuperscript{375} This chain of events is exactly what experts in the field caution against in training materials for probation officers who are supervising domestic violence offenders. See generally Fernando Mederos, Denise Gamache, & Ellen Pence, BATTERED WOMEN'S JUSTICE PROJECT, CRIMINAL JUSTICE CENTER, DOMESTIC VIOLENCE AND PROBATION (——), available at http://www.vaw.umn.edu/documents/bwp/probationv/probationv.pdf. Suggestions include: “Do not tell the offender anything the victim has told you unless you're completely sure that it will not endanger her further. Even if she gives you permission to share what she has told you, make your own assessment about safety and the risk of retaliation.” Id. at 4. The guide also provides guidance for assessment of the history of violence and risk of retaliation and of continued harassment and abuse: “How safe will the victim and the children be? Is it reasonable to expect the offender to restrain himself? Has he respected previous restraining/protective orders? Has he made—and broken—many promises?” Id. at 4–5. Although this information was written to address situations where the probationer is on probation for a domestic violence offense, it is relevant to any probation officer supervising a probationer who is engaging in domestic violence.

\textsuperscript{376} See RESTATEMENT (SECOND) OF TORTS § 321 (1965). Section 321 provides:

\begin{enumerate}
  \item If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
  \item The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.
\end{enumerate}

\textit{Id.} The Nebraska Supreme Court has imposed this duty even when the act endangering another was innocent as opposed to negligent. Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628 (1931). In addition to state tort claims for failure to protect and endangerment by the state, Due Process claims may be available in similar circumstances. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199–202 (1989) (holding that state liability under the Due Process Clause of the Fourteenth Amendment is possible only when a state actor restrains an individual, rendering him or her unable to ensure his or her own safety and the state also fails to provide such safety, or when a state actor acts in such a way as to create or enhance a danger or render the victim more vulnerable). The DeShaney court held that, absent government creation or escalation of a danger, there is no violation of the Fourteenth Amendment's Due Process Clause and a state actor has no Constitutional duty to act to protect when it
because the perpetrator is told of the reports, is inadequately controlled, escalates his behavior against the witness/victim, and the State knows about it, because the witness/victim again reports the retaliation. Such endangerment could be used to limit potentially expansive liability that application of Nebraska's aid-to-the-state duty to probation cases could create, by limiting liability to victims of violations that the State negligently handles.

Other jurisdictions have found a duty toward the victims of harm whose endangerment was increased by the State's negligent supervision. For instance, in *Bonnie v. Commonwealth*, a sexual assault victim brought a claim under the Massachusetts Tort Claims Act alleging negligence by the assailant's parole officer. The court held that a statutory bar to the plaintiff's negligent supervision claim precluded her going to trial on that issue. However, the court did allow the plaintiff to go forward with her case on a theory of liability based on the parole officer's active contribution to her harm because the parole officer had recommended that the parolee continue his employment at a trailer park where he had keys to all the residents' mobile homes. The parolee, who had been convicted of multiple rapes prior to being on parole, later used the keys to enter the plaintiff's residence and attack her.

This active endangerment theory of liability applies to the *Bartunek* case. Snowardt endangered Bartunek by telling Piper about Bartunek's reports regarding Piper's probation violations, yet did nothing to prevent the retaliation against Bartunek that followed. Bartunek was endangered in part because Piper was a violent felon on inadequately supervised probation and in part because she was a witness to and victim of his violations who acted to her detriment to report these violations to the only authority with control over Piper. That authority chose to do nothing, and the escalation continued until she was attacked and made the victim of attempted rape at knifepoint.

Finally, as noted in subsection III.B.1.a *supra*, a critical difference between *Brandon* and *Bartunek* is that in *Bartunek* the State actually had control over Piper, whereas in *Brandon*, the State had no existing relationship with the dangerous third parties. This factor provides further support for an aid-to-the-state duty in probation settings. A legal analysis acknowledging an aid-to-the-state and/or an enhanced

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378. Id. at 426.
379. Id. at 426–27.
380. Id. at 425.
endangerment duty in probation settings would take into consideration the acute danger faced by victims of violence inflicted by the State’s dangerous probationers.

IV. CONCLUSION

The impact of finding “no duty” in Bartunek is severe. There appears to be no fact pattern that could trigger a duty by Nebraska probation officers to control their violent ISP probationers. Also troubling is the court’s failure to address what a victim of a negligently supervised probationer should do now, in light of the lack of legal remedies announced in Bartunek. The holding in Bartunek fails to adequately address the danger of intimate partner violence in probation settings and sets forth a policy that the State does not have to control its probationers even when they are terrorizing victims known to the State who have gone to the State seeking help. Bartunek represents a failure to incorporate the reality of violence against women into legal analysis. That reality provides policy justification for finding a duty and informs foreseeability determinations under existing legal theories that fit the Bartunek case.

Under section 315(a) of the Restatement (Second) of Torts, the Nebraska Supreme Court has barred claims by all plaintiffs hurt by negligent probation supervision, no matter how known, foreseeable, or identifiable they are. The court failed to consider DaNell Bartunek’s status as a current and known potential victim of the State’s probationer, even though this fact provides an easy way to define even a very conservative duty to her. In addition to disregarding Bartunek’s known identity and interactions with the State, the court has said that 24-hour visual supervision is required for a State actor to “take charge” of a violent person. However, it is difficult to define any scenarios where this definition would be satisfied.

In the context of section 315(b), the Nebraska Supreme Court has set a standard of detrimental reliance that could amount to contributory negligence, and has overlooked any aid-to-the-state status of a witness or victim of a violation of probation.381 Just as Bartunek’s interactions with the State could have been used to inform and narrow a duty based on a special relationship between Piper and the State

381. In regard to the reliance duty as a standard that becomes contributory negligence, see Brief in Support of Apellee’s Motion for Rehearing at 12–13, Bartunek (No. S-02-0710) (“When, then, does the law hold a negligent law enforcement officer responsible when he fails to do what a reasonable officer would do to prevent a foreseeable criminal attack? . . . Simply put, this Court’s decision in this case allows for law enforcement officers to evade accountability when they negligently fail to take reasonable steps to prevent a foreseeable criminal attack in every conceivable factual scenario[ ]—no matter what the plaintiff does or refrains from doing.”).
under section 315(a), the ISP relationship could be used to inform and
narrow a duty based on a special relationship between Bartunek and
the State. Bartunek detrimentally relied on the State's undertakings
to do something about its probationer, who was not some random citi-
zen harassing her without any relationship with the State at that
time. Similarly, Bartunek repeatedly informed and attempted to aid
the State in supervising this violent probationer, whom the State
could control. That relationship set Bartunek apart from those who
report crimes or participate in investigations or trials.

The facts of Bartunek support a duty based either on the special
relationship between the State and Piper or the special relationship
between Bartunek and the State, or both. Moreover, when considered
together, elements from each special relationship inform the need for
a duty based on the other, and only strengthen the arguments for each
independent special relationship and duty. Thus, while both special
relationship duties are strong standing alone, Bartunek's case
presented the perfect fact pattern for either special relationship to be
limited by elements of the other in constructing more conservative du-
ties that courts may prefer. Courts that would not find a sufficient
special relationship between a probationer and the State might do so
with the added element of the identifiable victim in contact with the
State about the probationer's violations against her. Similarly, courts
that would not find a sufficient aid-to-the-state or reliance-based spe-
cial relationship between a victim and the State may be persuaded by
situations where the feared person is a probationer under the State's
control, committing violations against the witness or person who is
relying on the State. Not only were these powerful interactive charac-
teristics of the Bartunek case overlooked, the court also overlooked
ways to limit duty based on requiring that there be a certain level or
pattern of probation violations before imposing a duty. Nor did the
court address the possibility of a duty in cases where the State actu-
ally increases the likelihood of harm to an individual. As a result, the
standards of duty set forth in Bartunek are probably impossible for
any plaintiff to meet.

Finally, the policy set forth in Bartunek condoning negligent super-
vision of violent probationers should be contrasted with the intent of
the Legislature in passing the Nebraska State Tort Claims Act\textsuperscript{382}
without exceptions for negligent supervision and negligent failure to
 protect. The Act provides for citizens to make any claim for injury

\textsuperscript{382} \textsc{Neb. Rev. Stat.} §§ 81-8,209–8,235 (Reissue 1996 & Cum. Supp. 2002). The in-
tent of the Legislature in enacting the State Tort Claims Act is set out as follows:
§ 81-8,209. State Tort Claims Act; purpose.
The State of Nebraska shall not be liable for the torts of its officers,
agents, or employees, and no suit shall be maintained against the state,
any state agency, or any employee of the state on any tort claim except to
the extent, and only to the extent, provided by the State Tort Claims Act.
“caused by the negligent or wrongful act or omission of any employee of the state... acting within the scope of his or her office or employment,” where the State, “if a private person, would be liable to the claimant for such damage, loss, injury, or death.” This umbrella would include claims for negligent supervision of probationers unless that activity is specifically excepted in subsequent sections. The list of

NEB. REV. STAT. § 81-8,209 (Reissue 1996). Under the State Tort Claims Act, State immunity is waived in situations that fit the statutory scope of allowable claims. Citizens may sue the State by making

any claim against the State of Nebraska for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.

NEB. REV. STAT. § 81-8,210(4) (Reissue 1996 & Cum. Supp. 2002). This section curtails immunity generally. Specific exceptions are enumerated subsequently. The Legislature exempted specific State behaviors in section 81-8,219. For instance, subsection (1) provides:

§ 81-8,219, State Tort Claims Act; claims exempt.

The State Tort Claims Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.


In Bartunek, the Nebraska Supreme Court did not reach the State’s immunity claims under this section, but the district court did discuss the State’s claims, finding that section 81-8,219(1) did not apply to the situation in Bartunek. Record at 14–15, Bartunek (No. CI-99-87) (District Court Journal Entry & J.) (Sovereign Immunity Based on Discretionary Function). The district court found that since there was breach, the “due care” clause of the section did not apply. Id. at 14. It went on to find that supervision of a probationer is not included within the meaning of “discretionary function or duty” included in the second clause of the section. Id. at 15. The district court relied on the Nebraska Supreme Court’s interpretation of the State Tort Claims Act’s discretionary exemption in Norman v. Ogallala Public School District, 259 Neb. 184, 609 N.W.2d 338 (2000). In Norman, the Nebraska Supreme Court relied on Talbot v. Douglas County, 249 Neb. 620, 544 N.W.2d 839 (1996), in holding: “The discretionary function exemption in tort claims acts extends only to basic policy decisions and not to the exercise of discretionary acts at an operational level. The political subdivision remains liable for negligence of its employees at the operational level, where there is no room for policy judgment.” Norman, 259 Neb. at 192, 609 N.W.2d at 346 (citations omitted). Relying on this authority, the district court in Bartunek found that supervisory decisions made by a probation officer are “not basic policy decisions but ministerial actions. Such decisions are not planning level decisions involving social, economic, or political judgment and do not come within the discretionary function exception.” Record at 15, Bartunek (No. CI-99-87) (District Court Journal Entry & J.); see also supra notes 98 & 307 (discussing the State’s defenses in Bartunek).

exceptions in the Act does not include an exception for negligent supervision or negligent failure to protect—in fact, the State's only claims of immunity in Bartunek were based on discretion and due care, immunity claims that the district court rejected.\textsuperscript{384}

Because no statutory immunities apply to the State under the Bartunek facts, the court's holdings directly contradict legislative intent. The Act allows all claims that could be brought against a private citizen for negligence and does not specifically exclude probation, supervision, or failure to protect situations. Thus, the statute does not act on these cases other than to allow such claims under the general waiver of immunity.\textsuperscript{385} The lack of an exception indicates that Legislature intended that Nebraskans be able to sue for damages caused by the State's negligence in cases of negligent probation supervision and negligent failure to protect victims like Bartunek.\textsuperscript{386} The Bartunek court did not claim to reach the State's defenses of immunity, but it implicitly validated them.\textsuperscript{387} The decision therefore amounts to judicially-created state immunity.

In Taggart v. State, the Supreme Court of Washington addressed legislative intent in holding that parole officers did have a duty to victims under Washington's statutory system. It emphasized that the Legislature could "limit or eliminate" the duty by broadening parole officers' immunity.\textsuperscript{388} This statement was reiterated by the court in Hertog v. City of Seattle over seven years later, which added that "[t]he Legislature has not enacted such legislation."\textsuperscript{389} Thus, legislative silence on immunity for parole officers meant that liability could and should be imposed. Likewise, in Sterling v. Bloom,\textsuperscript{390} where liability was allowed for negligent supervision of a probationer, a concurrence in the Supreme Court of Idaho decision discussed the policy

\textsuperscript{384. See Neb. Rev. Stat. § 81-8,219 (Reissue 1996 & Cum. Supp. 2002); see also supra note 382 (discussing the non-applicability of the immunity exception found in section 81-8,219(1) and claimed by the State in Bartunek). Immunity for negligent supervision or negligent failure to protect was not among the State's claims, because there is no such exception in the Act.

385. See State v. Brouillette, 265 Neb. 214, 225, 665 N.W.2d 876, 887 (2003) ("The legal principle of expressio unius est exclusio alterius recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute."); see also Brief in Support of Appellee's Motion for Rehearing at 15, Bartunek (No. S-02-0710).

386. Brief in Support of Appellee's Motion for Rehearing at 15, Bartunek (No. S-02-0710) (arguing that the Legislature intended "that citizens should be able to hold [the State] accountable for damages caused by [the State's] negligent supervision and negligent failure to protect.").

387. Id. (arguing that the court's holdings "functionally added" exemptions to section 81-8,219).


389. 979 P.2d 400, 408 (Wash. 1999).

ramifications of limiting liability beyond what the Idaho Tort Claims Act required. It argued against any court implementing a "perceived policy need to limit the government's potential liability more than the government itself considered necessary." 391

While the Bartunek court never discussed the legislative intent behind the Nebraska Tort Claims Act, nor any need it perceived to limit the State's potential liability "more than the government itself considered necessary," the court imposed just such a limitation. By finding the State owed Bartunek no duty, the Nebraska Supreme Court reinstated an area of sovereign immunity that the Nebraska Legislature did not provide for in the State Tort Claims Act's exceptions to the general waiver of sovereign immunity. This judicial expansion of state immunity where the Legislature did not leave it intact is a fundamental flaw in Bartunek. Women and other victims of violence will continue to be the parties harmed by this flaw.

Limits on duty such as in Bartunek thwart not only legislative intent and remedies for victims, but also victim safety and a chance at an adequate response to violence against women on a policy level. Judicial commentary on denying a reliance-based duty in Nebraska is instructive not only in considering reliance, but also in considering the

391. 723 P.2d at 777 (Huntley, J., concurring). The preceding context of the quote is provided:

Ultimately, the unambiguous message of the Idaho Tort Claim Act's language and of the relevant case law compelled our decision. In that sense, this is a judicially conservative decision; it adheres closely to the law as the legislature wrote it . . .

In contrast with the majority opinion, the dissent's desired activist result would cast aside the legislature's clear intent as expressed in the statutory language . . . in favor of a perceived policy need to limit the government's potential liability more than the government itself considered necessary.

Id. (emphasis added). As cited in Sterling, the Idaho Tort Claims Act provides:

6-903. Liability of governmental entities—Defense of employees.—(a) Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

723 P.2d at 758 (quoting IDAHO CODE § 6-903 (Michie 1998)) (emphasis in original). After Sterling, the Idaho Legislature did adjust the scope of governmental immunity to provide immunity in all cases except those involving reckless, willful and wanton conduct. See Harris v. State, 847 P.2d 1156 (Idaho 1992); see also supra note 243.
other sources of duty in a case like *Bartunek*. In *Hamilton*, a case upon which the *Bartunek* court heavily relied in its section 315(b) analysis, the dissent wondered:

If recovery is denied when an officer explicitly assures a victim of domestic or other violence that he or she may remain at home and be protected, and fails to do so, then when can liability be established? To permit defendants to escape liability without even a trial in such circumstances would prevent citizens from ever recovering due to clear negligence of the police following a promise of protection which a hapless victim relies on.\(^{392}\)

While *Bartunek* is distinguishable from *Hamilton* in some respects, both cases present situations where the court has decided not to allow liability on state actors under the State Tort Claims Act. Notably, *Hamilton* is yet another case where the court has refused to find a special relationship in a case involving domestic violence. In fact, most of the cases analyzed in this Note that provide duty—not only under detrimental reliance, but also aid-to-the-state, “taking charge” of a violent person, and identifiable victim status—present situations of sexualized violence and violence against women. These cases were not selected for that similarity to *Bartunek*. Rather, they are the types of cases where this duty issue is routinely raised and analyzed.

Violence against women is pervasive. Intimate partner violence constitutes the majority of this violence. This is the cultural reality of women’s lives in Nebraska, as in the rest of the country. The legal analysis and ensuing public policy set forth in *Bartunek* deny this reality. *Bartunek* involved a very specific manifestation of the general problem of violence against women. It offered facts conducive to forwarding a public policy that could address this general problem via a narrow legal duty on state actors with the ability to prevent it in particular types of situations. Using a legal analysis that incorporates the reality of violence against women is the clearest way to get to that duty. Professor Bender suggests that “[i]f something is factually incoherent from women’s experiences and understandings, then it must also be legally incoherent.”\(^{393}\) *Bartunek* is unfortunately one more example of what Bender describes as a legal system where male-centered perspectives dominate and where “women’s perspectives and experiences have been left out of doctrinal development and law application in the tort area.”\(^{394}\)

Women and other victims of violence need sensible remedies like the duty advocated for here. This is a remedy that the State is plenty able to provide by using due care in supervising violent probationers like Piper or by facing liability when it fails to do so. The Nebraska Supreme Court has withheld the accountability to Nebraska’s women

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393. Bender, supra note 160, at 336.
and other victims of preventable and foreseeable violence that such a remedy would provide. Finding a duty in *Bartunek* would have been a crucial step in addressing violence against women as the urgent social problem that it is. A duty to *Bartunek* would have addressed this violence in a case where various legal theories independently support finding a duty, especially when the dynamics of intimate partner violence are considered important to thorough legal analysis. Without such a remedy, systems that condone and perpetuate violence against women will not be held accountable. In turn, actors in these systems are provided no legal incentive or policy direction to act reasonably and within the scope of their public purpose to prevent it. Given the current functioning of these systems, combined now with the policy message of *Bartunek*, violence against women will continue—unchecked by a fundamentally biased institutional and policy framework.

*Gretchen S. Obrist*