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Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference

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IMPOSING DUTIES ON WITNESSES TO CHILD SEXUAL ABUSE: A FUTILE RESPONSE TO BYSTANDER INDIFFERENCE

Jessica R. Givelber

INTRODUCTION

> It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact, which in this class of cases is sometimes strangely lost sight of, viz. that no action arises without a breach of duty. . . . I see my neighbor's two year old babe in [a] dangerous [situation] . . . and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter . . . because the child and I are strangers.
>
> —*Buch v. Amory Manufacturing Co.*[1]

> How much am I supposed to—to sit down and cry about this? I mean, how—I mean, let's be reasonable here. Is my life supposed to halt for—like, for days, weeks and months on end? . . . The simple fact remains, I do not know this little girl.
>
> —David Cash, Jr.[2]

Particularly loathsome crimes often inspire legislation that attempts to either change behavior or express a community's moral outrage.[3] In May 1997, high school senior Jeremy Strohmeyer raped and stran-

1. Buch v. Amory Mfg. Co., 44 A. 809, 810-11 (N.H. 1898) (citation omitted); *see also id.* at 810 ("In dealing with cases which involve injuries to children, courts have sometimes strangely confounded legal obligation with sentiments that are independent of law." (citation omitted)). Scholars who write about the "no duty to rescue" rule frequently cite *Buch* for the proposition that "[w]ith purely moral obligations the law does not deal." *Id.*; *see, e.g.*, David C. Biggs, *"The Good Samaritan is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 22 U. Dayton L. Rev. 225, 228 n.10 (1997) ("[T]he priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved." (quoting *Buch*, 44 A. at 810)); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 Vand. L. Rev. 673, 679 n.21 (1994) (citing *Buch* for the proposition that the law cannot appropriately enforce moral obligations); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247, 247 (1980) (citing *Buch* in explaining why courts refuse to impose a general duty to rescue).

2. *60 Minutes: The Bad Samaritan? David Cash Faces Hostility From Public for Not Taking Action to Prevent the Rape and Murder of Sherrice Iverson by His Friend Jeremy Strohmeyer* (CBS television broadcast, Sept. 27, 1998) [hereinafter *60 Minutes*] (quoting David Cash, Jr.'s response to questions about the brutal attack of a seven-year-old child whom he chose not to "rescue").

3. *See, e.g.*, Biggs, *supra* note 1, at 232 (suggesting that terrible human events that result in the death of "vulnerable victim[s]" often inspire legislation); *Talk of the Nation* (National Public Radio broadcast, Oct. 1, 1998) (interview with law professor Peter Aranella) (discussing the sexual assault and murder of Sherrice Iverson). For a discussion of state legislation responding to popular moral outrage, see *infra* Part III.

gled seven-year-old Sherrice Iverson in a restroom at the Primadonna Resort and Casino in Primm, Nevada.[4] Strohmeyer's best friend, David Cash, Jr., observed Strohmeyer's initial assault of the child, but did not attempt to intervene.[5] Instead, he exited the restroom after two minutes and waited for his friend in the casino.[6] Cash failed to notify either the police or any casino employee of Strohmeyer's actions.[7] Twenty-four minutes later, Strohmeyer emerged from the restroom.[8] He told Cash that he had sexually assaulted and killed Sherrice.[9] The two boys gambled for a while longer and drove home.[10] Later, Strohmeyer was arrested and prosecuted for his vicious attack.[11] To avoid a potential death sentence, Strohmeyer plead guilty to kidnapping, sexual assault, and murder.[12] A Las Vegas judge then sentenced him to life in prison without parole.[13]

Despite the harsh punishment administered to Strohmeyer, Nevada authorities never considered indicting Cash because he did not play an active role in either the molestation or the murder. As a Las Vegas Police Sergeant involved in the case lamented, "[t]here is no law requiring citizens to report a crime . . . [or] to stop a crime. . . . There is a moral obligation, but . . . people [are not arrested for] moral issues."[14] Not surprisingly, however, Sherrice Iverson's brutal murder—a murder David Cash potentially could have prevented—galvanized state and federal legislators to consider enacting such laws.[15]

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4. *See* John M. Glionna, *Strohmeyer Partly Blames Others, Courts: Girl's Killer Admits 'Monstrous' Deed, But Says Casinos, Internet, Cash Share Responsibility*, L.A. Times, Oct. 15, 1998, at A1. Sherrice's father, Leroy Iverson, took his daughter and her older half-brother to the casino that evening. *See id.* Mr. Iverson, however, was apparently gambling elsewhere in the casino when Strohmeyer assaulted and murdered his daughter. *See* Patrick Rogers et al., *Scot Free: Though He Might Have Stopped a 7-Year-Old Girl's Murder, David Cash Gets on with His Life, Untouched by the Law*, People, Sept. 28, 1998, at 139, 141.

5. *See* Glionna, *supra* note 4. Cash maintains that he initially followed Strohmeyer and Sherrice into the restroom. *See 60 Minutes*, *supra* note 2. Strohmeyer forced Sherrice into a stall and locked the door. *See id.* Cash entered the adjoining stall and peered over the top. *See id.* He observed Strohmeyer restraining Sherrice and holding his hand over her mouth in an attempt to muffle her screams. *See id.* Cash tapped his friend on the head but received no response. *See id.*

6. *See 60 Minutes*, *supra* note 2.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See* Glionna, *supra* note 4.

13. *See id.*

14. Rogers et al., *supra* note 4.

15. *See* Caren Benjamin, *Lawyers Say Care Needed in Writing Good Samaritan Laws*, Las Vegas Rev.-J., Sept. 13, 1998, at 1B (describing the reaction by state and federal legislators as a "national gag reflex over . . . [David Cash's] deadly inaction").

The Sherrice Iverson Act,[16] the law proposed at the federal level, was introduced in the Senate by Barbara Boxer of California and in the House by Nick Lampson of Texas on September 9, 1998.[17] The Act proposed an amendment to the Child Abuse Prevention and Treatment Act ("CAPTA")[18] that required states to pass legislation imposing a criminal penalty on witnesses to child sexual abuse who failed to report the abuse.[19] States that chose not to implement such laws would be ineligible for the federal funding CAPTA provides.[20] Although the Act initially expired along with the 105th Congress, Senator Boxer reintroduced the bill on April 14, 1999.[21]

This Note argues against the implementation of the Sherrice Iverson Act. Undoubtedly, the proposition and re-introduction of the bill indicates a well-intentioned commitment to addressing the inactive bystander phenomenon. As critics of good samaritan laws have pointed out, however, only legislation that develops out of systemic problems can result in good public policy.[22] Laws passed to express disgust with one person[23] or to react to a single event, however, are less likely to produce meaningful results because the incidence of cases to which the law would apply fails to justify its enactment.[24] While child abuse is a "tragedy of growing proportions"[25] and thus, arguably, a systemic problem, states already have mandatory child

16. S. 2452, 105th Cong. (1998).

17. *See id.*

18. *See* 42 U.S.C. §§ 5101–5106 (1994). The federal government first enacted the Child Abuse Prevention and Treatment Act ("CAPTA") in 1974. *See id.* The Act grants money to the states for the identification, prevention, and treatment of child abuse. *See id.* § 5104(b)(1), *amended by* CAPTA Amendments of 1996, Pub. L. No. 104-235, § 104, 110 Stat. 3063, 3066. A state's eligibility for such funding depends on the statutory implementation of mandatory reporting of suspected or known child abuse. *See id.* § 5106a(b)(1)(A). The statute must provide the reporter with immunity from civil and criminal liability. *See id.* § 5106a(b)(1)(B). It must also provide for the investigation of reports by the proper state authorities, and in the case of substantiated reports, the statute must provide for the welfare of the abused children. *See id.* § 5106a(b)(2); *see also* Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 Vand. L. Rev. 183, 207-08 (1998) (arguing that CAPTA's 1996 amendments, including a "'good faith' immunity provision" and a "new emphasis on assessment," will have a "chilling effect on child abuse reporting").

19. *See* S. 2452.

20. *See id.*

21. *See* S. 793, 106th Cong. (1999).

22. *See Talk of the Nation*, *supra* note 3 (interview with criminal defense attorney Elizabeth Semil) ("[A] piece of legislation . . . must be in response . . . to a systemic problem. . . . [W]ith regard to people's failure to act in a situation such as the Sherrice Iverson case, [it is unclear] that we have a system-wide problem.").

23. *See* Steve Chapman, *Should Doing Nothing About a Crime Be a Crime?*, Las Vegas Rev.-J., Aug. 31, 1998, at 7B.

24. *See* A. D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273, 1276 (1983).

25. *Improving the Well-Being of Abused and Neglected Children: Hearings Before the Senate Committee on Labor and Human Resources*, 104th Cong. (1996) (statement of Olivia A. Golden, Acting Asst. Secretary for Children and Families, U.S. Dep't of Health and Human Servs.), *available in* 1996 WL 669985.

abuse reporting statutes to deal with this crisis.[26] Furthermore, the futility of passing a duty to rescue or duty to report law is demonstrated by the lack of convictions under eight different state statutes,[27] some of which have been on the books since the early 1970s, that are similar to the law proposed by Senator Boxer and Representative Lampson.

Part I of this Note explores the history and background of the "no duty to rescue" rule,[28] both in tort and criminal law. This part sets forth the traditional "no duty to rescue" rule, the reasons behind the rule, a brief history of the rule's origins, and commentators' reactions to the rule. Part II examines the gradual erosion of the "no duty to rescue" rule. This part details some exceptions to the traditional rule, including the special relationship exceptions, the physician good samaritan laws, and the mandatory child abuse reporting statutes. Finally, this part analyzes the reasoning behind, and the criticism of, these exceptions. Part III discusses the statutory abrogation of the traditional rule evidenced by the good samaritan laws of eight states. This part delineates the eight laws by breaking them into discernible categories and discusses the legislative policies behind the laws. This part also observes that the enactment of these statutes had little impact. Part IV considers the implications of the erosion and statutory abrogation of the traditional rule for the Sherrice Iverson Act. This part concludes that the passage of the Sherrice Iverson Act would be as futile as the passage of the eight state laws that impose similar requirements.

I. THE HISTORY AND BACKGROUND OF THE "NO DUTY TO RESCUE" RULE

This part discusses the history and background of the traditional rule. It presents the "no duty to rescue" rule, the justifications behind the rule, and the rule's early development. This part also examines the survival of the "no duty to rescue" rule despite relentless scholarly attack.

A. *The Traditional Rule and its Rationales*

The traditional "no duty to rescue" rule is that "[t]he duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not

26. *See infra* Part II.A.2.b.

27. For a discussion of these eight statutes, see *infra* Part III.B.

28. The "no duty to rescue" rule is the term used to describe the phenomenon whereby the law holds individuals responsible for only their actions, not for their failure to act. *See* Logarta v. Gustafson, 998 F. Supp. 998, 1001 (E.D. Wis. 1998) (citing Restatement (Second) of Torts § 314 (1965) and various scholars in an effort to set out a brief history of the rule's origins). Good samaritan laws effectively abrogate the "no duty to rescue" rule.

recognized or enforced by law."[29] In other words, absent a special relationship, an individual has no affirmative legal duty to rescue another person in a perilous situation.[30] Furthermore, an individual has neither an affirmative legal duty to report to the authorities that another individual is in danger[31] nor a duty to warn a potential victim of danger.[32]

Support for the traditional rule is found in the fact that the law has historically drawn a sharp distinction between malfeasance (action) and nonfeasance (inaction) in determining the existence of a duty.[33] The importance of the distinction evolved from the common law.[34] As one commentator has observed, "[the] government may put you in jail for hurting someone, but not for declining to help someone."[35] The established defense of nonfeasance that justifies the law, therefore, "overrides the moral perceptions of the judges and the shared attitudes of the community."[36]

Because the common law imposed liability only for malfeasance,[37] statutes could impose punishment on individuals for the consequences of their actions, but not for risks that they did not create and could not control.[38] Omissions or inaction could not give rise to liability because omissions, in and of themselves, do not cause harm.[39] For in-

29. Buch v. Amory Mfg. Co., 44 A. 809, 811 (N.H 1898).

30. *See id.*; *see also* Restatement (Second) of Torts § 314 (1965) (setting forth the basic tort law principle behind the traditional rule: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 203 (2d ed. 1986) (justifying the traditional rule by describing the corresponding criminal law principle behind it, namely, that "one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself" (footnote omitted)).

31. *See* People v. Donelson, 359 N.E.2d 1225, 1227 (Ill. App. Ct. 1977) (observing that no "case in any American jurisdiction directly hold[s] that a person commits an offense by merely remaining silent as to the commission of an offense").

32. *See Buch*, 44 A. at 811.

33. *See, e.g.*, W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, at 373 (5th ed. 1984) [hereinafter Prosser & Keeton] (arguing that the distinction affects the imposition of a duty); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217, 219 (1908) (positing that the distinction between action and inaction has a fundamental place in the common law).

34. *See* Bohlen, *supra* note 33, at 219; Weinrib, *supra* note 1, at 247.

35. Chapman, *supra* note 23; *see also id.* ("OJ Simpson's acquittal doesn't mean we should scrap the jury system, and our inability to punish David Cash doesn't mean we should abandon a fundamental principle of Anglo-Saxon legal systems."); *infra* Part I.B. (discussing the arguments challenging the assumption that punishing someone for declining to help would require the abandonment of a fundamental principle of the Anglo-Saxon system).

36. Weinrib, *supra* note 1, at 258.

37. *See* Heyman, *supra* note 1, at 675.

38. *See* Prosser & Keeton, *supra* note 33, § 56, at 374-75.

39. *See* Bohlen, *supra* note 33, at 220-21; John T. Pardun, Comment, *Good Samaritan Laws: A Global Perspective*, 20 Loy. L.A. Int'l & Comp. L.J. 591, 603 (1998) (citing Lawrence C. Wilson, *The Defense of Others—Criminal Law and the Good Samaritan*, 33 McGill L.J. 756, 811 (1988)).

stance, liability in tort law is created when a defendant has a duty to the plaintiff that the defendant breaches.[40] If the defendant's breach causes the plaintiff's harm, then the law imposes liability.[41] Causation, therefore, is a fundamental element of tort liability.[42] In a situation where an individual whose only "responsibility" for a plaintiff's injury stems from the individual's choice not to rescue the plaintiff from a dangerous situation, however, there is no causation, and therefore, no liability under tort law.[43]

Besides the fact that a duty to rescue rule lacks causation, another objection to the rule is that it represents an attempt at legislating morality. As one scholar has observed:

> [A rule requiring rescue] would run counter to the liberal principles that inform our legal order. . . .
>
> [T]he proper function of law is to protect individual rights against infringement. As long as a person refrains from injuring others, he should be free to act as he wishes. It is inappropriate for the law to require one person to act solely for the benefit of another. Although there may be a moral obligation to aid others in distress, the enforcement of moral precepts is beyond the legitimate province of law.[44]

The merit of this objection rests on the proposition that, ideally, the law serves a greater purpose than merely reflecting a community's moral beliefs.[45]

Further, a practical objection to a duty to rescue requirement is that it is difficult, if not impossible, to enforce. Some of the inherent

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40. *See* Prosser & Keeton, *supra* note 33, § 30, at 164-65.

41. *See id.* at 165.

42. *See id.*

43. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 200-01 (1973) (arguing that because the absence of causation results in immunity from liability, one does not have a duty to alleviate danger that one did not cause). *But see* John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 Wis. L. Rev. 867, 912-14 (arguing that the causation argument fails to justify the "no duty to rescue" rule because none of the special relationship exceptions to the rule require causation). For a discussion of these special relationship exceptions to the rule, see *infra* Part II.A.

44. Heyman, *supra* note 1, at 676. Heyman asserts that libertarian writers such as Richard Epstein, as well as others critical of liberalism's preoccupation with violations of personal autonomy, articulate this objection to the "no duty to rescue" rule most forcefully. *See id.* at 676 nn.11-12.

45. *See id.* at 676. Some who advocate for legislating morality, however, believe that the power of good samaritan laws to articulate a community's attitude toward misbehavior and to teach right and wrong sufficiently justifies the laws' enactment. *See* Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 Wash. U. L.Q. 1, 56-58 (1993). To these advocates, a good samaritan law might "reinforce and value the deeds of those who already practice the ethic involved, while encouraging the broader development of similar behavior and attitudes." Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 88 (1991).

problems with enforcement include determining whether a particular situation required an "easy" or "difficult" rescue,[46] whether a potential rescuer actually realized the extent of the victim's peril,[47] and, in the case of a group rescue, which potential rescuers owed what duties.[48]

B. *The Development of the "No Duty to Rescue" Rule*

The common law did impose some affirmative duties as a matter of public or criminal law.[49] For example, dating back to the mid-thirteenth century, every person had a legal duty to prevent a felony.[50] The law imposed criminal sanctions on individuals who failed to intervene when they knew a felony was being committed and had the ability to prevent it.[51] This duty manifested a "general principle of the traditional legal system" that the government's duty to protect individuals from violence came at a price: in the absence of a governmental "officer," individuals were required to protect each other.[52] The advent of modern police forces in the beginning of the nineteenth century, however, contributed to the elimination of this duty.[53]

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46. *See infra* notes 214-15 and accompanying text.

47. *See infra* note 225 and accompanying text.

48. *See infra* note 229-31 and accompanying text.

49. *See* Heyman, *supra* note 1, at 677.

50. *See id.* at 685. In 1907, the Supreme Court of Nevada, in dicta, observed that "it is the duty of a man who sees a felony attempted by violence to prevent it if possible." State v. Hennessy, 90 P. 221, 226 (Nev. 1907). Ironically, if this had been the state of the law in Nevada in 1997, prosecutors might have been able to charge David Cash, Jr. with a crime.

51. *See* Heyman, *supra* note 1, at 677.

52. *Id.* at 678. This historical duty to prevent felonies provides a basis for a duty to rescue grounded in an individual's obligations as a member of a community. *See id.* at 680. Relational-feminist legal scholars propose a similar justification for a duty to rescue rule. They consider the victim in need of rescue as an interconnected human being. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 32-35 (1988). Therefore, when one rescues another in trouble one does so out of an obligation to one's community, not just to an individual. *See id.* ("Why should our autonomy or freedom not to rescue weigh more heavily in the law than a stranger's harm and the consequent harms to the people with whom she is interconnected?").

53. *See* Heyman, *supra* note 1, at 689; *see also* Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 Yale L.J. 1787, 1796 (1985) (suggesting that imposing a duty to rescue on individuals might interfere with the work of criminal justice officials). Recently, however, society has recognized that private citizens may need to assist police officers in preventing crime. *See* Heyman *supra* note 1, at 689 (discussing how the prevention of crime requires more than society's reliance on the police); Wenik, *supra*, at 1787 (arguing that a duty to report significantly increases the chance of apprehending criminals). The passage by certain states of good samaritan legislation that imposes both a duty to report and to rescue exemplifies this recognition. *See* Heyman, *supra* note 1, at 689 n.66; *infra* Part III (discussing these laws in depth).

Another affirmative duty imposed by common public law was the now dormant offense of misprison of felony,[54] which resembled the modern-day duty to report statutes.[55] One was liable for misprison of felony if he failed to report a felony that he knew of and had reasonable opportunity to disclose without harm.[56] The offense is in "virtual desuetude" because many considered it "anachronistic, strikingly close to accessorial liability in form, and threatening to the Fifth Amendment guarantee against self-incrimination."[57] Therefore, no state court since 1878 has upheld a conviction under this early duty to report law.[58] Thus, both the early duty to rescue and duty to report laws imposing criminal penalties fell out of favor over a century ago.

Like those historically imposed in the public or criminal law context, there were a few affirmative duties in the field of torts that created liability.[59] In early tort law, for instance, actions of trespass on the case[60] could involve nonfeasance in situations where a duty was based on an affirmative undertaking by the defendant.[61] There were also situations where the defendant had affirmative obligations even when he had no such undertaking. For instance, an innkeeper had a duty to a traveler, and a landowner owed a duty to prevent the flooding of a neighbor's land through the repair of adjoining sea walls.[62] In these situations, the distinction between malfeasance and nonfeasance was viewed as less significant than it traditionally had been.[63] These were conspicuous exceptions, however, and as a matter of private common law, the "no duty to rescue" rule has essentially always had a proverbial home.[64]

Courts and commentators have consistently found the law's "persistent[ ] refus[al] to impose on a stranger the moral obligation of com-

54. *See* Yeager, *supra* note 45, at 30; *see also* Wenik, *supra* note 53, at 1791 (arguing that disagreement about misprision of felony is not limited to how the defense is defined, but whether the offense ever existed in the first place).

55. *See* Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 Wm. & Mary L. Rev. 423, 427 n.35, 428 (1985) (observing that the reporting statutes most "closely resemble the common law ban against 'misprision of felony'"). For a discussion of the duty to report statutes of Rhode Island, Massachusetts, Florida, Washington, and Ohio, see *infra* Part III.

56. *See* LaFave & Scott, *supra* note 30, at 600 n.53.

57. Yeager, *supra* note 45, at 30 (footnotes omitted); *see also* Wenik, *supra* note 53, at 1792 (explaining the offense's virtual disappearance as a product of its vague definition and because of its "incompatibil[ity] with modern society").

58. *See* Yeager, *supra* note 45, at 32.

59. *See* Heyman, *supra* note 1, at 685.

60. At common law, an action on the case, or the writ of trespass on the case, lay for tangible injuries to person or property, other than those injuries considered "direct and forcible." Prosser et al., Cases and Materials on Torts 3-4 (9th ed. 1994) [hereinafter Prosser et al., Torts]. Actions for negligence, nuisance, and defamation, among others, all developed out of the common law action on the case. *See id.* at 3.

61. *See* Heyman, *supra* note 1, at 684.

62. *See id.*

63. *See id.* at 684-85.

64. *See id.*

mon humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life,"[65] to be "morally outrageous."[66] Thus, "[t]he absence in the common law of a generalized duty to rescue is ongoing fuel for professorial publication."[67] In light of the criticism that the traditional rule has faced, modern law has carved out exceptions to the rule, whereby the law imposes duties on certain individuals in certain situations. Part II examines these exceptions and their justifications.

II. THE EROSION OF THE "NO DUTY TO RESCUE" RULE

Undoubtedly, the traditional rule has had remarkable endurance. Exceptions to the "no duty to rescue" rule, however, may suggest that a gradual erosion of this rule is inevitable. This part examines three such exceptions: the special relationship exceptions imposed by tort law, the physician good samaritan laws directed at encouraging doctors to voluntarily render aid, and the mandatory child abuse reporting statutes of every state. This part also analyzes the arguments for and against the capacity of these exceptions to erode the rule.

A. *The Exceptions to the Traditional Rule*

Although it has been observed that "[a] moral duty to take affirmative action is not enough to impose a legal duty to do so,"[68] criminal

65. Prosser & Keeton, *supra* note 33, § 56, at 375.

66. Weinrib, *supra* note 1, at 258.

67. Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 Duq. L. Rev. 807, 830 n.95 (1995). One legal scholar in favor of the rule's abrogation notes that because of the law's utilitarian function, it follows that laws exist to serve society's needs. *See* Heyman, *supra* note 1, at 674-76. A more utilitarian law would require an individual to come to the aid of another if one could do so easily. *See id.* at 674-75. As another commentator has observed:

> Critics of the common-law position have generally proposed that the courts ought to recognize a duty to effect what might be termed an easy rescue, that is, a duty that would arise whenever one person is caught in a dangerous situation that another can alleviate at no significant cost to himself.

Weinrib, *supra* note 1, at 250 (footnote omitted). A duty to rescue rule, therefore, would ultimately serve the needs of society more efficiently. *See* Heyman, *supra* note 1, at 674-75. *But see* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83, 119-21 (1978) (arguing that a "no duty to rescue" rule is efficient because potential rescuers would otherwise avoid rescue situations if a duty requiring rescue existed). No recorded case categorically accepts the notion of imposing a legal duty on an individual even if carrying out that duty requires little effort. *See* Adler, *supra* note 43, at 868. Adler observes, however, a trend in the law toward imposing duties, for before 1962 only three recorded cases implicated § 314 of the Restatement—the section concerned with duties—but from the mid-1980s until 1991, twenty cases per year implicated this same section. *See id.* at 877 & n.41.

68. LaFave & Scott, *supra* note 30, at 203.

law does impose penalties in some circumstances for failing to come to the aid of another.[69] Similarly, tort law also has a host of exceptions to the no-duty to rescue rule.[70] Some scholars contend that these exceptions have contributed to a gradual erosion of the traditional "no duty to rescue" rule. This section addresses these contentions.

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69. *See, e.g.*, Model Penal Code § 2.01(3) (1962) (stating that "[l]iability for the commission of an offense may not be based on an omission unaccompanied by action unless . . . a duty to perform the omitted act is otherwise imposed by law").

70. *See, e.g.*, Restatement (Second) of Torts § 314A (1965) (describing special relationships that give rise to a duty to aid). The Restatement sections on exceptions to the "no duty to rescue" rule include §§ 314A, 314B, 315, 321, 322, and 324. Excerpts from the exceptions are provided below because of the important role they play in determining whether an individual has a duty to aid in the absence of an affirmative act. The relevant parts read as follows:

§ 314A. Special Relationships Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against . . . harm . . .

(b) . . . .

(2) An innkeeper is under a similar duty to his guests.

A possessor of land who holds it open to the public is under a similar duty to members of the public . . .

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

§ 314B. Duty to Protect Endangered or Hurt Employee

(1) If a servant . . . comes into a position of imminent danger of serious harm . . . the master is subject to liability for a failure . . . to exercise reasonable care . . . .

. . . .

§ 315. [Duty to Control Conduct of Third Persons]

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 . . . or

(b) a special relation exists between the actor and the other . . .

§ 321. Duty to Act When Prior Conduct is Found to be Dangerous

(1) 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

(2) . . . .

§ 322. Duty to Aid Another Harmed by Actor's Conduct

If the actor knows or has reason to know that by his conduct . . . he has caused such bodily harm to another . . . the actor is under a duty to exercise reasonable care to prevent . . . further harm.

§ 324. Duty to One Who Takes Charge of Another Who is Helpless

One who, being under no duty to do so, takes charge of another who is helpless . . . is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the actor to exercise reasonable care to secure the safety of the other . . . or

(b) the actor's discontinuing his aid or protection.

1. Tort Law's Special Relationship Exception

The special relationship exception is the most common exception to the "no duty to rescue" rule.[71] The exception imposes an affirmative duty that, if breached, can result in both civil and criminal penalties.[72] Generally, the relationships within the exception include those where the potential victim has some special dependence on the potential rescuer, such as children to their parents or employees to their employers.[73] The category of relationships listed in the Restatement that impose an affirmative duty to aid a potentially reliant victim also specifically include common carriers to their passengers,[74] innkeepers to their guests,[75] landholders to their invitees,[76] and masters to their servants.[77] Despite this exhaustive list, it has been observed that "in many situations it is difficult to determine what constitutes a special relationship."[78]

A duty to aid also arises when an individual's prior conduct creates a risk of possibly causing harm to another,[79] when one's conduct has caused bodily harm,[80] and when one begins to help an injured person.[81] Other duties to aid can be based on contract,[82] statute,[83] or because a special relationship exists between the rescuer and a third party, imposing a duty on the rescuer to control the third party.[84]

2. Statutory Exceptions

In addition to tort law's special relationship exceptions to the "no duty to rescue" rule, statutory exceptions exist as well. These include the physician good samaritan statutes and mandatory child abuse reporting statutes.

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71. *See* Adler, *supra* note 43, at 886.

72. *See* Biggs, *supra* note 1, at 228-30 (discussing criminal penalties imposed when a special relationship exists); Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 Buff. L. Rev. 405, 411-14 (1994) (discussing the special relationship exceptions in the context of tort law).

73. *See* Adler, *supra* note 43, at 886-87.

74. *See* Restatement (Second) of Torts § 314A(1).

75. *See id.* § 314A(2).

76. *See id.* § 314A(3).

77. *See id.* § 314A(4).

78. Adler, *supra* note 43, at 886.

79. *See* Restatement (Second) of Torts § 321.

80. *See id.* § 322.

81. *See id.* § 324.

82. *See* Biggs, *supra* note 1, at 228.

83. *See id.* at 229-30

84. *See id.* at 228-29; *see also* Restatement (Second) of Torts § 315 ("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 special relation exists between the actor and the third person . . . .").

a. *Physician Good Samaritan Laws*

In 1959, doctors in California lobbied for, and the legislature passed, the first good samaritan law "reliev[ing] physicians who rendered emergency aid from the traditional duty of due care."[85] Relief from the traditional duty meant that an accident victim could no longer hold a doctor liable for negligently contributing to that victim's injury during a rescue attempt.[86] According to the law, the victim had a cause of action only if the doctor acted with gross negligence or in bad faith.[87]

Today, the legislatures of every state and the District of Columbia have passed good samaritan laws, designed to encourage physicians to render emergency aid at the scene of an accident.[88] These statutes reduce the standard of care owed by doctors who voluntarily offer such aid, "imposing liability only for gross negligence or bad faith."[89] The lowered standard ideally induces physicians who drive past an accident victim by the side of the road to stop and assist that victim.

Physician good samaritan laws do not impose an affirmative duty to rescue or to report. They should not, therefore, be confused with the good samaritan statutes that do impose such duties.[90] These laws, however, are still appropriately categorized as exceptions to the "no duty to rescue" rule. By reducing the standard of care and promoting voluntary rescue, physician good samaritan laws encourage those that can help others to do so. The law facilitates an individual's ability to carry out a self-imposed duty to a stranger and, therefore, arguably contributes to the gradual erosion of the "no duty to rescue" rule.

b. *Mandatory Child Abuse Reporting Statutes*

Mandatory child abuse reporting statutes, enacted in all fifty states,[91] exemplify another exception to the "no duty to rescue" rule. This exception resembles the special relationship exceptions because the statutes impose duties on those who have a particular relationship to a child.[92]

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85. Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 Stan. L. Rev. 51, 52 (1972); *see also* Cal. Bus. & Prof. Code § 2395 (West 1990) (relieving licensees who render "emergency care at the scene of an accident of liability for civil damages").

86. *See* Franklin, *supra* note 85, at 51-52.

87. *See id.* at 52 n.12.

88. *See* Biggs, *supra* note 1, at 232-33 n.40 (listing the physician good samaritan statutes of a number of states).

89. Silver, *supra* note 55, at 428. While some of these states' statutes apply only to doctors, others apply to all licensed medical personnel and to all individuals who volunteer aid. *See* Franklin, *supra* note 85, at 52 n.12.

90. *See infra* Part III.

91. *See* Trost, *supra* note 18, at 194-95 n.63 (providing an exhaustive list of these statutes).

92. *See supra* Part II.A.1.

Child abuse in this country is not a "recent phenomeno[n]";[93] rather, it is a "staggeringly rife and tragically important"[94] age-old epidemic. It did not secure its identity as a "medical condition," however, until the 1962 publication of C. Henry Kempe's article *The Battered Child Syndrome*.[95] The article stimulated the United States Department of Health, Education, and Welfare's Children's Bureau to hold a conference to determine how to best combat the country's recently identified affliction.[96] The exploration led to the passage of the mandatory child abuse reporting statute as the most favored remedy.[97]

By June 1967, all fifty states had enacted mandatory child abuse reporting statutes.[98] After their initial enactment, the statutes underwent significant changes.[99] The first generation of mandatory child abuse reporting laws imposed a duty on physicians to report suspected child abuse solely at their own discretion.[100] Eventually, however, doctors lost the option to report, and the statutes mandated that physicians report all serious physical and non-accidental injuries.[101] These statutes were broadened further through extension of the duty to include all child-care professionals[102] and expansion of the list of the "injuries" deemed report-worthy to include child sexual abuse and neglect.[103]

All of the mandatory child abuse reporting statutes have seven basic elements.[104] These include: (1) a definition of conditions worthy

93. Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 Geo. Wash. Rev. 243, 243 (1982).

94. Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723, 725 (1987).

95. *See* C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. Am. Med. Ass'n 17, 17 (1962); *see also* Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 Fam. L.Q. 141, 142 (1986) (suggesting that Kempe's article "stimulated" widespread concern about child abuse); Trost, *supra* note 18, at 191 (discussing the significance of Kempe's article); Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 Wm. Mitchell L. Rev. 131, 135 (1998) (observing that Kempe's work inspired consideration of the first model child abuse reporting statute).

96. *See* Meriwether, *supra* note 95, at 142.

97. *See id.*

98. *See* Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. Rev. 293, 332 (1972).

99. *See* Leonard Karp & Cheryl L. Karp, Domestic Torts: Family Violence, Conflict and Sexual Abuse § 10.03, at 397 (1989); *see also* Mitchell, *supra* note 94, at 727 (observing that since the 1960s, most states have amended their reporting statutes at least once).

100. *See* Vieth, *supra* note 95, at 135.

101. *See id.*

102. See Robin A. Rosencrantz, Note, *Rejecting "Hear No Evil Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting*, 8 Geo. J. Legal Ethics 327, 340-41 (1995).

103. *See* Vieth, *supra* note 95, at 135.

104. *See* Meriwether, *supra* note 95, at 143.

of reporting;[105] (2) a list of the persons required to report;[106] (3) the degree of certainty necessary to warrant reporting the suspected abuse;[107] (4) penalties imposed for failure to report;[108] (5) criminal and/or civil immunity available to reporters;[109] (6) abrogation of certain/all confidential communication privileges;[110] and (7) delineation

105. *See, e.g.*, Alaska Stat. § 47.17.290(2) (Michie 1998) (defining reportable conditions broadly to include "physical injury or neglect, mental injury, sexual abuse . . . or maltreatment"); *see also* Idaho Code § 16-1602(a) (1979 & Supp. 1998) (defining reportable conditions more precisely to include specific injuries such as "skin bruising" or "burns").

106. *See, e.g.*, Cal. Penal Code §§ 11165.7–11165.10 (West 1992 & Supp. 1999) (mandating that child care custodians, medical practitioners, child protective agency personnel, and commercial film and photographic print processors report abuse). In most states, the statutory list of reporters includes teachers, day-care personnel, foster parents, physicians, nurses, dentists, social workers, psychologists, marriage and family counselors, and law enforcement officers. *See* Inger J. Sagatun & Leonard P. Edwards, Child Abuse and the Legal System 37 (1995). Essentially, the statutory list of reporters includes all professionals who work with children. *See id.* at 10. State legislators widened the category of reporters to "arrest the tremendous increase in child abuse" during the 1980s. Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 Loy. L.A. L. Rev. 1, 4 (1991).

107. *See, e.g.*, Fla. Stat. Ann. § 415.504 (West 1998) (requiring that a reporter "know[ ] or ha[ve] reasonable cause to suspect" that a child has suffered abuse); *see also* Idaho Code § 16-1610 (Supp. 1998) (requiring that reporters have "reason to believe" or actually "observe[ ]" the reportable condition). When a statute mandates that a reporter have a "reasonable suspicion" about the suspected abuse, an objective standard is applied to the reporter's determination. *See* Meriwether, *supra* note 95, at 146. If the statute does not provide that the reporter's belief or suspicion be reasonable, a subjective standard applies. *See id.* The application of one standard versus the other has a major impact on a prosecutor's ability to charge an individual with failure to report. *See id.* A statute implementing an objective standard provides the prosecutor with a greater chance of conviction. *See id.*

108. *See, e.g.*, R.I. Gen. Laws § 40-11-6.1 (1990) (defining the penalty for a failure to report as a misdemeanor with a fine of not more than $500 and/or a prison sentence of not more than one year, or both).

109. *See, e.g.*, N.Y. Soc. Serv. Law § 419 (McKinney 1992 & Supp. 1999) (providing civil or criminal immunity for good faith reporting, the good faith of which is presumed).

110. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3620 (G), (H) (West Supp. 1998) (abrogating all privileges but that of attorney-client). The statutes eliminate certain confidential communication privileges to facilitate effective reporting. *See* O'Brien & Flannery, *supra* note 106, at 26. Most of them abolish the doctor-patient privilege and the spousal privilege. *See id.* Other states specifically eliminate the privileges of psychotherapists, psychologists, and social workers. *See id.* at 26-27 & nn.137-41 (listing examples of these statutes). For an article focusing on the abrogation of the privilege between psychotherapists and their patients, see, for example, Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. Sch. J. Hum. Rts. 711, passim (1993) (arguing that the mandated reporting requirement on psychotherapists has both negative and positive consequences for the psychotherapy relationship). States tend to abrogate the attorney-client privilege and the clergy-communicant privilege only under certain circumstances. *See* O'Brien & Flannery, *supra* note 106, at 27-28. For articles focusing on the abrogation of these two privileges within child-abuse reporting statutes, see Mitchell, *supra* note 94, at 724 (arguing that the conflict between mandatory reporting statutes and the clergy privilege is not "a choice between protecting secrets and protecting

of the reporting procedures.[111]

In Nevada, where the physical and sexual assault of Sherrice Iverson that inspired the proposed federal law in her name occurred,[112] there is an extensive statutory list of individuals required to report the "abuse or neglect" of a child.[113] These individuals include doctors of various types, nurses, social workers, psychologists, marriage and family counselors, hospital administrators, coroners, clergymen and religious healers (unless they have "acquired knowledge of the abuse or neglect from the offender during a confession"), teachers, librarians, school counselors, and attorneys.[114]

Additionally, the Nevada statute provides that those not included in the mandated list of reporters have the option of making a report of suspected abuse or neglect.[115] The designated reporters must report if they have "reason to believe that a child has been abused or neglected."[116] Thus, Nevada requires individuals to make a subjective determination as to whether or not to file a report. Once an individual suspects abuse, he or she must make a report "immediately," or within twenty-four hours, to agencies providing protective services or law enforcement.[117] The statute provides civil and criminal immunity

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children"); O'Brien & Flannery, *supra* note 106, at 6 (contending that the state's interest served by the clergy privilege outweighs its interest in protecting children through mandatory reporting statutes); Rosencrantz, *supra* note 102, at 327 n.2 (suggesting that attorneys should be included in list of mandatory reporters); Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 Law & Psychol. Rev. 409, 409 (1994) (arguing that mandatory reporting statutes should be used as a legal tool to stop Catholic Church officials from protecting priests who molest children).

111. *See, e.g.*, Ark. Code Ann. §§ 12-12-502–12-12-515 (Michie 1995 & Supp. 1997) (requiring, among other things, immediate report by telephone, followed by a written report within 48 hours).

112. *See supra* notes 4-21 and accompanying text.

113. *See* Nev. Rev. Stat. Ann. § 432B.220(2)(a)–(j) (Michie 1996).

114. *See id.* § 432B.220(2)(a)–(e), (i). Attorneys need not report the abuse or neglect of a child if they "acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect." *Id.* § 432B.220(2)(i).

115. *See id.* § 432B.220(3). Some argue that the majority of reports of those who do so voluntarily are often unsubstantiated. *See* Karp, *supra* note 99, at 398. The statutes of 16 states consider all individuals who suspect child abuse to be mandatory reporters. *See* Del. Code Ann. tit. 16, § 903 (1995); Idaho Code § 16-1610 (1979 & Supp. 1998); Ind. Code Ann. §§ 31-33-5-1–31-33-6-3 (Michie 1997); Ky. Rev. Stat. Ann. § 620.030 (Michie 1990 & Supp. 1996); Md. Code Ann., Family Law § 5-705 (1991 & Supp. 1998); Miss. Code Ann. § 43-21-353 (1993 & Supp. 1998); Neb. Rev. Stat. § 28-711 (1995); N.J. Stat. Ann. § 9:6-8.10 (West 1993); N.M. Stat. Ann. §§ 32A-4-1–32A-4-22 (Michie 1995); N.C. Gen. Stat. § 7A-543 (1995); Okla. Stat. Ann. tit. 21, § 846 (West 1983); R.I. Gen. Laws § 40-11-3 (1990 & Supp. 1998); Tenn. Code Ann. § 37-1-403 (1996); Tex. Fam. Code Ann. § 261.101 (West 1996 & Supp. 1999); Vt. Stat. Ann. tit. 33, § 4913 (1991 & Supp. 1998); Wyo. Stat. Ann § 14-3-205 (Michie 1997). These statutes are effectively duty to report statutes not unlike those discussed below. *See infra* Part III.B.4.

116. Nev. Stat. Ann. § 432B.220(1).

117. *See id.*

to all individuals who make good faith reports.[118] Furthermore, in any proceeding to impose liability on a reporter, there is a presumption that the reporter acted in good faith.[119] Finally, Nevada's statute prohibits persons required to report from invoking certain privileges.[120]

B. *Justifications for the Exceptions to the Traditional Rule*

The exceptions to the "no duty to rescue" rule represent a "choice to retain liability for some omissions which are considered morally unacceptable."[121] For instance, the victim's dependent relationship to the rescuer in the case of some of the special relationships justifies the imposition of an obligation to rescue or to protect. Moreover, the exceptions may indicate that the importance of the distinction between malfeasance and nonfeasance gives way to social policy considerations when the relationship in question includes a rescuer who holds power over the welfare of a "vulnerable and dependent" victim.[122]

Furthermore, at least one scholar views the early duty to report and to rescue laws[123] as evidence that the distinction between malfeasance and nonfeasance, in fact, lacked a fundamental place in the common law.[124] This conclusion challenges the distinction's role as the basis for the traditional rule, and subsequently justifies the rule's erosion through exceptions. According to this reasoning, the exceptions to the rule illustrate how little the distinction between inaction and action matters, and should ultimately lead to the rule's reformation.[125]

Critics of the traditional rule also point to the purported success of the exceptions as further evidence to support their position. For in-

118. *See id.* § 432B.160(1)(a).
119. *See id.* § 432B.160(2).
120. *See id.* § 432B.250.
121. State v. Williquette, 385 N.W.2d 145, 151 (Wis. 1986).
122. Prosser & Keeton, *supra* note 33, § 56, at 374.
123. *See supra* Part I.B.
124. *See* Heyman, *supra* note 1, at 677-85.
125. *See, e.g.*, Prosser & Keeton, *supra* note 33, § 56, at 377 (proposing that the broadening of the category of exceptions to the "no duty to rescue" rule may result in a general imposition of a duty); Adler, *supra* note 43, at 869 (suggesting that although courts "pay lip service to these traditional common law rules," they ultimately distort the rules to reach decisions that comply with public policy concerns); Kearney, *supra* note 72, at 410 (arguing that exceptions to the "no duty to rescue" rule manifest the problems inherent in the distinction between malfeasance and nonfeasance); Weinrib, *supra* note 1, at 279 (observing that the recognition of the existence of a moral duty to rescue by those who defend the rule suggests the inevitability of the rule's further erosion).

In contrast to the United States, most European countries impose a duty to rescue. *See* Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, *in* The Good Samaritan and the Law 91, 91-92 (James M. Ratcliffe ed. 1966). Some of these countries include Portugal, the Netherlands, Italy, Norway, Russia, Turkey, Denmark, Poland, Germany, Rumania, France, Hungary, Czechoslovakia, Switzerland, and Belgium. *See id.* Some commentators conclude that Europe's "long and widespread use" of good samaritan laws supports the implementation of similar laws in the United States. Woozley, *supra* note 24, at 1290.

stance, in regard to physician good samaritan laws, studies indicated that, prior to the enactment of these laws, doctors had resisted rendering aid to victims at accident scenes because they feared consequent litigation.[126] A partial immunity from liability, advocates argue, diminishes doctors' fears and produces physicians more willing to behave as good samaritans.[127]

Similarly, the purpose of mandatory child abuse legislation is to "identify children believed to have been abused by ensuring that cases of suspected child abuse are properly identified and reported."[128] Proponents of reporting statutes suggest that the statutes have undoubtedly succeeded, producing an increase in reported cases of child abuse and neglect.[129] In the thirty years since the Children's Bureau created the first model statute, the number of reports has increased dramatically.[130] In 1963, 150,000 reports of child abuse were made; in 1972, child protection agencies documented 610,000 reports; in 1986, they documented 2.1 million reports; and in 1995, the number rose to three million.[131] Without the passage of reporting statutes, these commentators contend, the majority of incidents now attended to might otherwise go unreported.[132]

Advocates of these exceptions to the "no duty to rescue" rule argue that the exceptions solve problems that the traditional rule creates,[133] and that they do, in fact, have the power to affect society's moral climate in certain circumstances.[134] To replace the traditional rule, one scholar has proposed the following standard: "[N]othing more nor less than an obligation to act reasonably under the circumstances unless, on balance, there are recognized policy concerns that militate against the imposition of that duty."[135]

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126. *See* Franklin, *supra* note 85, at 52.

127. *See id.* at 52-53.

128. Meriwether, *supra* note 95, at 149.

129. *See* Sagatun & Edwards, *supra* note 106, at 37.

130. *See* Rosencrantz, *supra* note 102, at 341-42.

131. *See* Vieth, *supra* note 95, at 135.

132. *See* Sagatun & Edwards, *supra* note 106, at 37. Further, evidence suggests that the reports of individuals acting under pain of statutory penalty produce the highest number of substantiated investigations. *See* Vieth, *supra* note 95, at 137.

133. *See* Wenik, *supra* note 53, at 1800.

134. *See supra* note 45 and accompanying text. These advocates also suggest that a duty to rescue is no more intrusive on one's autonomy than current impositions such as testifying as a witness to a crime, serving on a jury, or paying taxes. *See* Yeager, *supra* note 45, at 47-48.

135. Adler, *supra* note 43, at 870. *But see* Rowe & Silver, *supra* note 67, at 845 (criticizing Adler for proposing nothing more than an elimination of the distinction between malfeasance and nonfeasance and a suggestion that its replacement be "better"). In *Lombardo v. Hoag*, 566 A.2d 1185 (N.J. Super. Ct. 1989), the court drew a similar conclusion to Adler when considering the duty of a passenger who gave the keys to a car over to its intoxicated owner:

> An enlightened society should no longer excuse the immoral and outrageous conduct of a person who allows another to drown, simply because he doesn't wish to get his feet wet. Society demands more than that of its citi-

C. *Criticism of the Exceptions to the Traditional Rule*

Critics of the special relationship exceptions support their arguments in numerous ways, but they generally agree that courts have applied these exceptions inconsistently.[136] These critics contend that the duties imposed when one's conduct creates a possible risk, when one's conduct actually injures another, and when one has begun helping another[137] do not even belong on the list of special relationship exceptions because they do not represent examples of nonfeasance.[138]

Additionally, many find absurd the imposition of a criminal penalty on one who begins helping another but stops, when no penalty is imposed on an individual who sees another in need of help and looks the other way.[139] The notion that a relationship between employers and their employees is "special" and therefore worthy of the imposition of a duty to aid, but the relationship between a neighbor and a neighbor's child is that of two strangers warranting no duty, appears equally incongruous.[140]

Criticism of the physician good samaritan law exception focuses on the fact that the statutes have produced almost no litigation, which suggests that they have had no effect on how physicians behave when they confront accident victims in need of emergency care.[141] Notably, when California passed the original good samaritan law,[142] there were no reported cases of accident victims suing doctors who stopped to

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> zens. It demands that a person exercise a duty of care towards another person in order to insure that the other person remains free from harm, if he can do so without peril to himself. And it demands an atmosphere in which all persons will expect that others will conduct themselves in such a manner.

Id. at 1189. A discussion of whether the "no duty to rescue" rule should be replaced with a general duty of reasonable care under the circumstances is beyond the scope of this Note. Applying negligence principles to these situations, however, arguably provides a better solution than the creation of a new federal criminal law.

136. *See* Adler, *supra* note 43, at 896-97; *see also* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (holding that a therapist owed a duty of care, not to control the conduct of a dangerous patient, but to the victim of that patient); Soldano v. O'Daniels, 190 Cal. Rptr. 310, 317 (Ct. App. 1983) (holding a bartender owed a duty to the plaintiff's decedent to permit a patron to call the police in an emergency or to place the call himself); Farwell v. Keaton, 240 N.W.2d 217, 222 (Mich. 1976) (holding that the relationship between two friends was within the special relationship exception to the "no duty to rescue" rule because they were "companions on a social venture" when one was seriously injured).

137. *See* Restatement (Second) of Torts §§ 321–322, 324 (1965).

138. *See* Adler, *supra* note 43, at 898-99; Kearney, *supra* note 72, at 411-13.

139. *See* Adler, *supra* note 43, at 922.

140. *See* Yeager, *supra* note 45, at 9-11 (advocating for a duty to rescue rule, though acknowledging the difficulties in enforcing such rules and the lack of proof regarding their deterrent effect).

141. *See* Franklin, *supra* note 85, at 53.

142. *See* Cal. Bus. & Prof. Code § 2395 (West 1990).

help them.[143] The absence of case law may indicate that the doctors' fears were exaggerated and that the law was unnecessary.[144]

Similarly, critics of the mandatory child abuse reporting statute exception argue that the laws are ineffective in curbing child abuse.[145] Though the statutes may influence the rising number of reports, child protective agencies continue to fail to identify and help abused and neglected children.[146] Furthermore, these critics interpret the increase in the number of reported cases of child abuse differently than do the statutes' advocates. For instance, one commentator attributes the increase in the reports of child abuse from 1.4 million in 1986 to 2.8 million in 1994 to an increase in incidents of abuse;[147] therefore, the increased reporting does not necessarily reflect the statutes' ability to raise the level of consciousness among a greater number of mandated reporters.[148]

Some commentators argue that the drafting of these statutes raises questions as to their efficacy as well.[149] The mandatory child abuse reporting statutes of the fifty states manifest great "disparities in language and, therefore, effect."[150] Indeed, because the provisions vary considerably from state to state, an abused child receives differing degrees of protection depending upon the state in which that child lives.[151] Moreover, the differences make it impossible to accurately ascertain how many children suffer from abuse and neglect.[152] If the actual number of abused children remains a mystery, it is difficult to measure the success of the reporting statutes.[153]

One provision that differs considerably from one statute to another is the definition of "reportable abuse."[154] Critics maintain that

143. *See* Franklin, *supra* note 85, at 52-53.

144. *See id.* at 53; *see also* Woozley, *supra* note 24, at 1276 (noting that more than 20 years after California passed its law, "there [was] no known case in the United States of a malpractice suit being brought against a doctor who responded to a roadside or other emergency outside his office; and to anyone who appreciates what trigger-happy litigants Americans are that is a significant fact" (footnote omitted)).

145. *See* Meriwether, *supra* note 95, at 141; *see also* Freiman, *supra* note 93, at 268-71 (concluding that existing reporting laws are inadequate to protect a growing number of abused children).

146. *See* Meriwether, *supra* note 95, at 141.

147. *See* Jean Peters-Baker, Note, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 UMKC L. Rev. 1003, 1003 (1997).

148. *See id.*

149. *See* Freiman, *supra* note 93, at 267-68. Problems of drafting also arise in the context of the eight good samaritan laws discussed below. *See infra* Part III.

150. Meriwether, *supra* note 95, at 143.

151. *See* Frieman, *supra* note 93, at 251-52.

152. *See id.* at 248-49.

153. *See id.* at 248-50.

154. *See* Mitchell, *supra* note 94, at 729-32. Other statutory provisions that vary considerably from state to state are the speed with which reporters must report after they originally suspect the abuse and the agencies to which reporters deliver their suspicions. *See* Freiman, *supra* note 93, at 260-61. Those that allow reporting to more than one agency "invite[ ] confusion and lack of coordination." *Id.* Additionally,

problems arise if the statute defines the abuse too broadly or too narrowly.[155] A broad statute inevitably leads to over-reporting, which not only overburdens already-taxed child protection agencies,[156] but also contributes to an even greater number of unsubstantiated reports.[157] Conversely, a narrow statute can lead to under-reporting.[158] Further, a statute with an unclear definition renders reporters incapable of applying a uniform standard to suspected abuse.[159]

The inherent difficulty in defining abuse may also render reporting laws incapable of the "clarity constitutionally required of . . . statute[s] carrying criminal sanctions."[160] Therefore, the complexities and "competing considerations" inherent in defining child abuse, and even in the statutes themselves, may be incapable of reconciliation.[161] Because the legislation's effectiveness depends on actual intervention, a "plethora of reporting laws" without an "influx of services" could compromise the power of these laws to curb child abuse.[162] Although an individual's failure to report the suspected abuse of a child may be a "morally unacceptable" omission, creating exceptions to the traditional rule may not necessarily be the proper response.

Despite the existence of the special relationship exception to the traditional "no duty to rescue" rule, physician good samaritan laws, and mandatory child abuse reporting laws, several states went even further in an attempt to call otherwise innocent bystanders into action. Part III discusses the effect of these attempts.

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some states only require the reporting of children abused by their caretakers, *see* Vieth, *supra* note 95, at 133-34, while others require reports only of very recent abuse. *See* Sagatun & Edwards, *supra* note 106, at 37-38.

155. *See* Meriwether, *supra* note 95, at 149-50 (pointing out that if the statutory definition is too narrow, abused children risk going unprotected, but if it is too broad, the state risks an unwarranted intrusion into a family's privacy); *see also* Freiman, *supra* note 93, at 268 (concluding that many states' statutes have "unclear definitions of reportable conditions"). The Supreme Court of Texas criticized its state's broad reporting statute because the statute "conditions the requirement to report on these difficult judgment calls [and] does not clearly define what conduct is required in many conceivable situations." Perry v. S.N., 973 S.W.2d 301, 307-08 (Tex. 1998).

156. *See* Freiman, *supra* note 93, at 262 (arguing that over-reporting puts too great a demand on a state's investigative services).

157. *See* Meriwether, *supra* note 95, at 150; *see also* Sagatun & Edwards, *supra* note 106, at 38 (arguing that over-reporting occurs not only because reporters do not know what child abuse "means," but also because they fear criminal or civil liability if they fail to report).

158. *See* Meriwether, *supra* note 95, at 150-52; *see also* Vieth, *supra* note 95, at 137 (listing other reasons for under-reporting, such as ambiguity in the law and lack of training of reporters); *see also* Freiman, *supra* note 93, at 262 (arguing that ignorance of the laws leads to under-reporting).

159. *See* Meriwether, *supra* note 95, at 153-54.

160. *Id.* at 165.

161. *Id.* at 166.

162. Freiman, *supra* note 93, at 268; *see also* Levine, *supra* note 110, at 735 ("Protecting children depends on the availability of resources to serve children and families adequately after a case is identified.").

III. ABROGATION OF THE TRADITIONAL "NO DUTY TO RESCUE" RULE

This part analyzes the good samaritan laws that eight states have enacted.[163] This part briefly discusses the phenomenon whereby tragic human events inspire good samaritan legislation. This part then divides the good samaritan statutes of the eight states into discernible categories, examines the policies behind the laws, and considers the negligible effect of these laws.

A. *The Murder of Kitty Genovese*

Vermont's Duty to Aid the Endangered Act,[164] the country's first official abrogation of the traditional rule, was not inspired by a tragic human event.[165] Nevertheless, it is still appropriate to discuss the

163. Though some differences exist, the statutes of the eight states are essentially the same. In 1989, the Minnesota Court of Appeals described the history of Minnesota's abrogation of the traditional rule beginning with the enactment of its physician good samaritan law. *See* Tiedeman v. Morgan, 435 N.W.2d 86, 88-89 (Minn. Ct. App. 1989). The court could have been describing the history of the good samaritan laws of any of its seven sister states:

> Recognizing the absence of a Good Samaritan duty, the Minnesota Legislature first addressed the topic with a declaration of immunity for those who volunteer to render emergency care. The declaration of immunity was later accompanied by a statutory duty to volunteer reasonable assistance. It is evident to us that these enactments deal with the historic Good Samaritan law topic of volunteering assistance to one with whom a person has no special relationship. Until modified by statute in 1983, no duty to volunteer assistance existed. This statutory duty contrasts markedly with established common law duties.

Id. (citations omitted).

164. Vt. Stat. Ann. tit. 12, § 519 (1973) (effective Mar. 22, 1968).

165. Although one commentator claims that the murder of Kitty Genovese in 1964 in the Kew Gardens section of Queens inspired Vermont's 1968 bill, he cites no authority for this proposition. *See* Pardun, *supra* note 39, at 608. Furthermore, the article cited most frequently as the leading authority on the history of Vermont's statute mentions only the physician-inspired good samaritan legislation as the "primary motivation behind the Vermont bill." Franklin, *supra* note 85, at 52 n.13. Another commentator cited frequently for his work on the good samaritan laws of all eight states, however, concludes that the 1983 rape of a woman on a pool table in a New Bedford, Massachusetts bar inspired the laws passed after that year. *See* Yeager, *supra* note 45, at 24 & n.114. Presumably, if one infers from the dates of enactment that the laws were inspired by highly publicized events, then the Kitty Genovese case may well have motivated the laws enacted in the late 1960s and very early 1970s. *See* Minn. Stat. Ann. § 604A.01 (Supp. 1999) (originally enacted as § 604.05 (1971); § 604.05(1) (effective Aug. 1, 1983)); Vt. Stat. Ann. tit. 12, § 519; Wash. Rev. Code Ann. § 9.69.100 (West 1998) (effective 1970). Minnesota's 1971 statute offered immunity to those who volunteered to render emergency aid. *See* Minn. Stat. Ann. § 604.05 (West 1971). Presumably, it was merely a slightly broader version of a physician-good samaritan law. Genovese's murder, however, may have played a part in its passage. In 1983, Minnesota's legislature added a subdivision to the law that imposed an actual duty to volunteer reasonable aid. *See id.* § 604.05(1) (West 1983). The aforementioned barroom rape, observed by numerous bar patrons, inspired the 1983 change to the statute. *See infra* note 206; *see also* Biggs, *supra* note 1, at 234 ("In Minnesota, an expanded duty to aid statute's sponsor was moved to introduce the bill by reports of

1964 murder of Kitty Genovese. Not only do the majority of commentators refer to the event when discussing the endurance of the "no duty to rescue" rule in this country,[166] but the proximity of the event to the enactment of this country's first good samaritan statute cannot be ignored.[167]

On the night of March 13th, 1964, Kitty Genovese was repeatedly assaulted and eventually murdered outside of her apartment in Queens, New York.[168] For over thirty-five minutes, Genovese's aggressor repeatedly attacked her with a knife while she screamed and crawled toward her apartment door.[169] Thirty-seven of Genovese's neighbors listened to and watched the attack on the well-lit street, yet they took no action whatsoever to assist her, not even placing a phone call to the police.[170] While the public was stunned at the brutality of the murder, their shock intensified when they realized that the witnesses had violated no law through their indifference.[171] As a result, legal scholars advocated a change in the "no duty to rescue" rule.[172] No state took any action, however, until four years later, when Vermont enacted the Duty to Aid the Endangered Act.[173] Over the next sixteen years, Minnesota,[174] Wisconsin,[175] Rhode Island,[176] Ohio,[177]

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the gang rape . . . of a woman in a New Bedford, Mass., barroom . . . ." (footnote omitted)).

166. *See, e.g.*, Biggs, *supra* note 1, at 236 (questioning how the witnesses to Genovese's murder would have been prosecuted if a duty to rescue law had existed in New York in 1964); Heyman, *supra* note 1, at 677 (positing that "the traditional common law may well have recognized a duty to act in cases like the murder of Catherine Genovese"); Silver, *supra* note 55, at 423 (observing that Genovese's murder brought "national attention" to "the issue of a legal duty to assist those in distress"); Woozley, *supra* note 24, at 1276 & n.12 (questioning whether those who heard Genovese's screams would be liable under a good samaritan law for failing to rescue, or only those who saw her attacked); Yeager, *supra* note 45, at 20 n.94 (citing the murder of Kitty Genovese as "the best-known case of bystander indifference"); Pardun, *supra* note 39, at 608 (concluding that the murder of Genovese inspired the passage of Vermont's good samaritan law).

167. *See supra* note 165 and accompanying text.

168. *See* Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. Times, Mar. 27, 1964, at 1; *see generally* A.M. Rosenthal, Thirty-Eight Witnesses *passim* (1964) (offering a detailed account of Kitty Genovese's murder and a discussion of Gansberg's New York Times article).

169. *See* Gansberg, *supra* note 168.

170. *See id.*

171. *See* Silver, *supra* note 55, at 423.

172. *See supra* note 3, 67 and accompanying text.

173. Vt. Stat. Ann. tit. 12, § 519 (1973) (effective Mar. 22, 1968).

174. *See* Minn. Stat. Ann. § 604A.01(1) (Supp. 1999) (originally enacted as § 604.05 (1971); § 604.05(1) (effective Aug. 1, 1983)).

175. *See* Wis. Stat. Ann. § 940.34 (West 1996 & Supp. 1998) (effective Apr. 24, 1984).

176. *See* R.I. Gen. Laws § 11-56-1 (1994) (effective 1984).

177. *See* Ohio Rev. Code Ann. § 2921.22(A), (I) (Anderson 1996 & Supp. 1998) (effective Jan. 1, 1974).

Washington,[178] Massachusetts,[179] and Florida[180] all adopted similar statutes.

B. *A Categorical Analysis of the Eight Good Samaritan Statutes*

While the eight good samaritan statutes are essentially similar, there are slight differences between them. This section breaks the statutes down into four primary categories and examines how each law fits into each category.

1. Duty of Easy Rescue

The legislatures of seven of the eight states with good samaritan laws have imposed duties of "easy rescue."[181] Regardless of whether the statute requires a duty to simply report or to actually rescue, individuals must fulfill their duties only if they can do so "without danger or peril to [themselves] or without interference with important duties owed to others."[182] Two of these states do not require a duty if another individual has already rendered aid,[183] while three states further qualify the duty their statutes impose by requiring that the individual need only render "reasonable" assistance.[184]

178. *See* Wash. Rev. Code Ann. § 9.69.100(4) (West 1998) (effective 1970).

179. *See* Mass. Ann. Laws ch. 268, § 40 (Law Co-op. 1992) (effective 1983).

180. *See* Fla. Stat. Ann. § 794.027 (West 1992 & Supp. 1999) (effective 1984).

181. *See id.* § 794.027(4) (imposing a duty to report only when the reporter "[w]ould not be exposed to any threat of physical violence for seeking such assistance"); Mass. Ann. Laws ch. 268, § 40 (imposing a duty to report when one "can do so without danger or peril to himself or others"); Minn. Stat. Ann. § 604A.01(1) (Supp. 1999) (originally enacted as § 604.05 (1971); § 604.05(1) effective Aug. 1, 1983) (imposing a "duty to assist . . . to the extent the person can do so without danger or peril to self or others"); R.I. Gen. Laws § 11-56-1 (imposing a duty of "reasonable assistance" when one can do so "without danger or peril to himself or herself or to others"); Vt. Stat. Ann. tit. 12, § 519(a) (1973) (effective Mar. 22, 1968) (imposing a duty to "give reasonable assistance" only if it can be done so "without danger or peril to himself or without interference with important duties owed to others"); Wash. Rev. Code Ann. § 9.69.100(4) (imposing no duty to report on an individual who "has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm"); Wis. Stat. Ann. § 940.34(2)(d)(1) (West 1996 & Supp. 1998) (effective Apr. 24, 1984) (imposing no duty if "[c]ompliance would place him or her in danger"). Ohio's statute is the only one that does not explicitly state that the duty it imposes is one of "easy rescue." *See* Ohio Rev. Code Ann. § 2921.22(A),(I).

182. Vt. Stat. Ann. tit. 12, § 519(a).

183. *See id.*; Wis. Stat. Ann. § 940.34(2)(d)(3).

184. *See* Vt. Stat. Ann. tit. 12, § 519(a); Minn. Stat. Ann. § 604A.01(1); R.I. Gen. Laws § 11-56-1.

2. Duty to Victims of Crimes and of Acts of God

Vermont,[185] Minnesota,[186] and Rhode Island[187] impose on potential rescuers a duty to a victim "that is exposed to grave physical harm."[188] What constitutes "grave physical harm," however, is subject to interpretation. The laws of these three states, therefore, potentially impose a duty on those who know that a victim of a criminal act is in danger or who know that a victim of an "act of God" is in similar peril. The statutes of the other five states impose duties only to those victimized by criminal acts,[189] and not to a victim of a natural disaster.

3. Knowledge of "Grave Physical Harm"

Florida,[190] Massachusetts,[191] Minnesota,[192] Rhode Island,[193] and Washington[194] require that the individual actually witness the victim in a dangerous situation, or be at the "scene of the emergency," to trigger the duty. The three other states require only that the rescuer

185. *See* Vt. Stat. Ann. tit. 12, § 519.

186. *See* Minn. Stat. Ann. § 604A.01.

187. *See* R.I. Gen. Laws § 11-56-1.

188. Vt. Stat. Ann. tit. 12, § 519(a).

189. Acts of God are distinguished from human acts, i.e., criminal acts. Acts of God include "a raging river, a torrential downpour, a hurricane, tornado or earthquake. . . ." Biggs, *supra* note 1, at 244. One commentator has noted that while legal scholars have historically hypothesized about the "no duty to rescue" rule involving acts of God, "the criminal assault," like that of Kitty Genovese, is actually "[t]he paradigm case of a duty to rescue." Heyman, *supra* note 1, at 679. Another scholar, observing the same phenomenon, finds this remarkable because acts of God are the "most worthy of Good Samaritan [legislation]." Biggs, *supra* note 1, at 244. He believes the statutes predominantly focus on duties to victims of criminal acts, however, because of the common law desire to limit the coverage of the criminal law to "acts," rather than failures to act. Since one cannot control "Acts of God," perhaps society should not be involved in forcing action in response to them. Since no human conduct started the process that created victims of "Acts of God" requiring a duty to aid such victims should be beyond the reach of the criminal law. *Id.* at 245 (footnote omitted).

190. *See* Fla. Stat. Ann. § 794.027(1)(2) (West 1992 & Supp. 1999) (effective 1984) (imposing duties to victims of sexual battery); Mass. Ann. Laws ch. 268, § 40 (Law Co-op. 1992) (effective 1983) (imposing duties to victims of myriad crimes); Ohio Rev. Code Ann. § 2921.22(A) (Anderson 1996 & Supp. 1998) (effective Jan. 1, 1974) (imposing a duty to report on all those who know that a felony "has been or is being committed"); Wash. Rev. Code Ann. § 9.69.100(1)(a)–(c) (West 1998) (1970) (imposing duties to victims of a variety of crimes, but specifically mentioning victims of child sexual and physical abuse); Wis. Stat. Ann. § 940.34(2) (West 1996 & Supp. 1998) (effective Apr. 24, 1984) (imposing duties to victims of "a crime"). Rhode Island separates, by provision, its duty to rescue statute from its duty to report statute. Though its duty to rescue statute applies to victims of crimes and acts of God, *see supra* notes 187-89 and accompanying text, its duty to report statute applies only to victims of sexual assault. *See* R.I. Gen. Laws § 11-37-3.1 (1994) (effective 1983).

191. *See* Fla. Stat. Ann. § 794.027(1), (2).

192. *See* Mass. Ann. Laws ch. 268, § 40.

193. *See* Minn. Stat. Ann. § 604A.01(1) (Supp. 1999) (originally enacted as § 604.05 (1971); § 604.05(1) (effective Aug. 1, 1983)).

194. *See* R.I. Gen. Laws § 11-56-1 (1994) (effective 1983).

have knowledge of the victim's peril.[195] The difference between imposing a duty when one knows of a victim in danger versus a situation where one actually witnesses that victim in danger can have a potentially profound effect on the statute's reach. If a duty is imposed only when a bystander witnesses the victim in danger, then the duty does not apply when the bystander is merely told by another of the danger. Conversely, if one has a duty as soon as she becomes aware of an endangered victim, then there will be a greater number of circumstances in which one must render aid.[196]

4. Statutes Imposing Duties to Rescue and to Report

Duties to rescue and to report differ in what they require of a rescuer. A duty to rescue requires actual intervention, while a duty to report only requires the rescuer to notify the authorities. Although Vermont,[197] Minnesota,[198] Wisconsin,[199] and Rhode Island[200] have statutes imposing duties of actual rescue, only Vermont does not additionally require a duty to report.[201] The other four states simply require a duty to report with no supplemental duty to rescue.[202] Further, seven of the statutes impose criminal penalties for the breach of the duty they impose.[203] Generally, the penalties for failing to comply with a duty to report statute are greater than the penalties for violating one's duty to rescue.[204]

195. *See* Wash. Rev. Code Ann. § 9.69.100(1).

196. *See* Ohio Rev. Code Ann. § 2921.22(A) (Anderson 1996 & Supp. 1998) (effective Jan. 1, 1974); Vt. Stat. Ann. tit. 12, § 519(a) (1973) (effective Mar. 22, 1968); Wis. Stat. Ann. § 940.34(2)(a) (West 1996 & Supp. 1998) (effective Apr. 24, 1984).

197. The dearth of case law implicating these statutes provides that these conclusions are nothing more than conjecture. A case implicating Ohio's statute, however, is perhaps indicative of how other courts might consider the knowledge/witness element of the statutes. *See In re* Stichtenoth, 425 N.E.2d 957 (Ohio Ct. App. 1980). Although Ohio's statute requires only knowledge of a crime before one's duty to report is triggered, the court held that as long as events led to the notification of the authorities, the statute did not impose a duty to report on an individual. *See id.* at 958. The holding, narrowing the statute's scope, perhaps reflects the court's recognition of the inherent problems with an overly broad "knowledge" requirement.

198. *See* Vt. Stat. Ann. tit. 12, § 519(a).

199. *See* Minn. Stat. Ann. § 604A.01(1) (Supp. 1999) (originally enacted as § 604.05 (1971); § 604.05(1) (effective Aug. 1, 1983)).

200. *See* Wis. Stat. Ann. § 940.34(2)(a).

201. *See* R.I. Gen. Laws § 11-56-1 (1994) (effective 1984).

202. *See* Vt. Stat. Ann. tit. 12, § 519.

203. *See* Fla. Stat. Ann. § 794.027 (West 1992 & Supp. 1999) (effective 1984); Mass. Ann. Laws ch. 268, § 40 (Law Co-op. 1992) (effective 1983); Ohio Rev. Code Ann. § 2921.22 (Anderson 1996 & Supp. 1998) (effective Jan. 1. 1974); Wash. Rev. Code Ann. § 9.69.100 (West 1998) (effective 1970).

204. *See* Fla. Stat. Ann. § 794.027; Mass. Ann. Laws ch. 268, § 40; Ohio Rev. Code Ann. § 2921.22(A)(I); R.I. Gen. Laws § 11-56-1; Vt. Stat. Ann. tit. 12, § 519(a); Wash. Rev. Code Ann. § 9.69.100(4); Wis. Stat. Ann. § 940.34(2)(a). Only Minnesota does not impose a criminal penalty. *See* Minn. Stat. Ann. § 604A.01(1). A violation of Minnesota's statute, however, results in a fine of double the amount of that of Vermont's. A petty misdemeanor under Minnesota law carries a fine of not more than

C. *Policies Behind the Statutes*

Because the majority of states may have passed their good samaritan laws in response to bystander indifference to Kitty Genovese's murder and to the well-publicized rape of a woman on a pool table in a New Bedford, Massachusetts bar,[205] the policy behind these laws was arguably to criminalize such apathy.[206] A further policy consideration, however, was the legislatures' belief in the symbolic power of the law.[207] When Vermont's good samaritan law was first enacted in the late 1960s, it imposed a $100 criminal fine on an individual who violated the statute.[208] At least one scholar opined that the penalty was relatively insignificant, due to Vermont's concern for its role as the forerunner of this type of legislation.[209] More than three decades later, however, the penalty remains the same, even though seven other states now have laws that impose similar duties. This fact may indicate that the policy behind Vermont's statute included a belief that it was useful for the law to make purely symbolic gestures. Other states have acknowledged the largely symbolic components of their good samaritan laws.[210]

D. *Why the Eight Statutes Lie Dormant*

In 1973, an article exploring the background and approach of the country's first abrogation of the traditional "no duty to rescue" rule concluded with the following observation:

$200. *See id.* § 609.02(4a). Moreover, Wisconsin's bill imposes a more severe criminal penalty than the laws of either Vermont or Minnesota. An inactive bystander risks a fine of up to $500 and a prison sentence of up to thirty days. *See* Wis. Stat. Ann. § 939.51(3)(c) (defining the penalties imposed for a class (c) misdemeanor).

205. *See, e.g.*, Wash. Rev. Code Ann. § 9.92.020 (defining the penalty for failure to report as a gross misdemeanor, which includes a fine of up to $5000 and a prison sentence of up to one year).

206. In 1983, patrons of Big Dan's bar in New Bedford, Massachusetts, observed for over an hour as four men raped and assaulted a 21-year-old woman. *See The Tavern Rape: Cheers and No Help*, Newsweek, Mar. 21, 1983, at 25, 25. Initial police statements and news accounts reported that at least 15 witnesses not only failed to intervene on the woman's behalf or call the police, but even cheered for her attackers. *See id.* Though these accounts proved exaggerated, *see* Jonathan Friendly, *The New Bedford Rape Case: Confusion over Accounts of Cheering at Bar*, N.Y. Times, Apr. 11, 1984, at A19, the public expressed outrage at news of the incident, and the legislatures of Massachusetts, Minnesota, and Rhode Island responded with good samaritan legislation. *See* Mass. Ann. Laws ch. 268, § 40; Minn. Stat. Ann. § 604A.01; R.I. Gen. Laws §§ 11-37-3.1, 11-56-1.

207. *See supra* notes 171-72 and accompanying text.

208. *But see Talk of the Nation*, *supra* note 3 (interview with criminal defense attorney Elizabeth Semil) ("[I]t's extremely important for the public to understand that when laws like this are proposed, they are part of a political agenda for politicians who are gearing and measuring their points in the poll [and] that they will do little to aid . . . public problem[s], if indeed [they exist].").

209. *See* Vt. Stat. Ann. tit. 12, § 519(c).

210. *See* Franklin, *supra* note 85, at 55 n.30.

> On paper, at least, Vermont has made history, but the statute's practical effect remains to be seen. Within the state we do not know whether any behavior has been altered—a carefully done study would be enlightening.
>
> Nor can we yet tell whether the Vermont statute will create enforcement or interpretive difficulties. In view of this lack of experience and information, other states may be reluctant to impose a similar duty—or perhaps the lack of bad experience will hearten those otherwise inclined to follow Vermont's lead.[211]

Although these comments were made more than twenty-five years ago, they continue to hold true today. To a substantial degree, there is still a lack of experience and information regarding the enforcement of good samaritan laws. In each state that imposes a duty to rescue or to report, the statutes have produced virtually no case law.[212]

Although no consensus exists as to why these laws lie dormant, many posit that it is because the laws are virtually impossible to implement. For instance, the requirement that the rescue be "easy" arguably curbs the statutes' reach, and may be irreconcilable with their broader goals, because an "easy rescue" will almost always provide an inactive bystander with the option of doing nothing.[213] Criticism of

211. *See* Pardun, *supra* note 39, at 606. An original sponsor of Minnesota's bill "indicate[d] that its purpose was largely symbolic, consonant with Minnesota's vision of an ideal society." *Id.* (quoting Representative Bill Luther). According to Wisconsin prosecutors, their law has a symbolic component as well. *See id.* at 606-07. The citizens of Wisconsin, one prosecutor concluded, "would report [a serious] crime without [a law] on the books." Yeager, *supra* note 45, at 16 n.70 (quoting letter from James C. Babler, District Attorney, Barron County, Wis., to Yeager (Nov. 11, 1991) (on file with Yeager) (alterations in original)). A representative of Wisconsin's Attorney General's office insisted that although "it might be a little rosy-eyed to say this, I think the good people of Wisconsin generally aid victims when they see them in trouble." Dave Daley, *Few Prosecuted Under State "Samaritan" Like France, Wisconsin Requires Residents to Help Crime, Accident Victims*, Milwaukee J. Sentinel, Sept. 5, 1997, at 9A (quoting James Haney, director of research and information for Wisconsin Attorney General Jim Doyle).

212. Franklin, *supra* note 85, at 61.

213. In the last 30 years, Vermont's courts have had only one opportunity to consider the civil liability the statute might impose, *see* Sabia v. State, 669 A.2d 1187, 1194 (Vt. 1995) (holding that if individuals are expected to provide "reasonable assistance" under this section, civil liability may be imposed if their acts are grossly negligent or if they expect to be compensated for their services), and one opportunity to confront the criminal liability it does impose. *See* State v. Joyce, 433 A.2d 271, 273 (Vt. 1981) (holding that Vermont's Duty to Aid the Endangered Act does not impose a duty to intervene in a fight). According to a spokeswoman for Vermont's attorney general, "no one has ever been cited under [Vermont's] law." Chapman, *supra* note 23. Similarly, according to an assistant attorney general in Minnesota, that state's good samaritan law "has never been used." *Id.*; *see also* Yeager, *supra* note 45, at 25 (noting the lack of "appellate decisions upholding the conviction of a defendant prosecuted under a contemporary easy-rescue statute"). This similar virtual lack of case law in Minnesota makes some question the utility of its law. *See* Pardun, *supra* note 39, at 597. Moreover, in Wisconsin as well, since the statute's passage more than 15 years ago, Wisconsin's prosecutors have used the state's good samaritan statute only once to convict an inactive bystander. *See* State v. La Plante, 521 N.W.2d 448, 452 (Wis. Ct.

good samaritan legislation focuses on this issue of what exactly constitutes danger or peril to oneself,[214] creating a difficult as opposed to an easy rescue, and thus relieving rescuers of their duties.

In its one opportunity to consider the utility of the state's good samaritan law, Vermont's Supreme Court's decision indicated that that the "easy rescue" requirement prevented the law's implementation.[215] Ironically, in this criminal case, it was the defendant who used Vermont's good samaritan law as an affirmative defense to charges that he assaulted and battered his son.[216] Because bystanders observed the assault but did not intervene, the defendant argued that their inaction represented "tacit" approval of his conduct.[217] If his son had been "exposed to grave physical harm," the defendant contended, then those who observed the beating would have had a duty to intervene.[218] Their inaction, he argued, should indicate to the jury that he was not "trying to seriously injure his son."[219] Unpersuaded by this argument, the Vermont Supreme Court concluded that intervening in this fight produced too great a risk of danger or peril to the potential

App. 1994) (rejecting a constitutional challenge to the bystander's conviction). The good samaritan laws of Rhode Island, Florida, Washington, and Massachusetts lie equally as dormant as the statutes of the three states mentioned above. Because Ohio's statute imposes a duty to report all felonies, it has a broader reach than the statutes of the other seven states and has produced more case law. *See, e.g.*, State v. Miccichi, No. 86AP08066, 1987 WL 14481, at *2 (Ohio. Ct. App. July 20, 1987) (holding that a dentist's unreasonable delay in reporting the theft of drugs from his office constituted a violation of Ohio's duty to report statute); State v. Wardlow, 484 N.E.2d 276, 279 (Ohio Ct. App. 1985) (holding that a reporting statute gives a person fair notice that failing to report a serious crime which the person has knowledge about is forbidden); *In re* Stichtenoth, 425 N.E.2d 957, 958 (Ohio Ct. App. 1980) (holding that the statute does not require an individual to report if events have occurred that result in notification). But as the cases cited above indicate, Ohio's statute has not been applied to situations involving the good samaritan scenario whereby a stranger comes to the aid of another by making a phone call to the police or attempting an "easy rescue."

214. One commentator concludes that "even in the most wide ranging statutes covering the duty to aid, the language and the limitations written into the statutes allow for all but the easiest rescues to be aborted by the would-be Samaritan." Biggs, *supra* note 1, at 246. Another scholar, while acknowledging the difficulties a prosecutor would have in proving a bystander had knowledge that another person was in danger, that the danger was serious, etc., argues that the difficulty of proving these facts "poses no problems with which the criminal law is unfamiliar; questionable proof of 'knowledge' is routinely presented in criminal trials, and 'serious danger' commonly arises when a defendant claims to have justifiably harmed or killed another." Yeager, *supra* note 45, at 23 n.111; *see also* Silver, *supra* note 55, at 433 (arguing that although it is difficult to establish that a bystander "knew of injury or peril," establishing such knowledge is merely the problem of proving what was on a defendant's mind, a problem which "exists in nearly every criminal prosecution").

215. *See, e.g.*, Yeager, *supra* note 45, at 25 (asking the question of what exactly is an "easy rescue").

216. *See Joyce*, 433 A.2d at 273.

217. *See id.* at 272-73.

218. *See id.* at 273.

219. *Id.* (quoting Vt. Stat. Ann. tit. 12, § 519(a) (1973) (effective Mar. 22, 1968)).

rescuers.[220] The statute imposes a duty only in cases of "easy rescue," and this case did not qualify as one.[221] The bystanders, therefore, breached no duty and the defendant's affirmative defense failed.[222]

Even a duty to report would cause prosecutors problems with enforcement in the context of a Genovese-type situation.[223] Prosecutors would need to determine which onlookers actually heard the victim's screams, whether those onlookers who heard the screams knew that the person screaming needed their assistance, whether assistance had already been provided, and whether the onlookers' inaction was "a conscious decision not to render aid," as opposed to inaction "based on . . . a desire for self-preservation" or an inability to determine the source of the screaming.[224]

Additionally, in instances where bystanders fail to satisfy their statutory duty to act, the fact that the prosecutor's "first priority would always be to obtain convictions against the violent offenders" themselves presents further obstacles for good samaritan laws.[225] Because these "bystanders would be critical witnesses"[226] against these offenders, "[t]he availability of 'objective' witnesses may be foreclosed if they are threatened with a criminal prosecution of their own."[227]

Cases of group rescue are unusually complicated and costly, because they involve a determination of which individual actually owed what duty.[228] For instance, under Minnesota's statute, it is unclear whether the law imposes a duty even when others have already ren-

220. *Id.*

221. *See id.*

222. *See id.*

223. *See id.* Notably, if Kitty Genovese's murder had taken place in a state with a good samaritan law imposing a duty to rescue (as contrasted with a duty to report), the danger to a rescuer coming to her aid would have been far too great to warrant the imposition of any statutory duty as well. *See, e.g.*, Vt. Stat. Ann. tit. 12, § 519(a) (1973) (requiring that a person render aid only "to the extent that [it] can be rendered without danger or peril to himself").

224. Although one commentator's research revealed virtually no charges brought by prosecutors under the duty to rescue laws of Vermont, Minnesota, Wisconsin, and Rhode Island, it did confirm that prosecutors employed the duty to report statutes of Rhode Island, Washington, Ohio, Massachusetts, and Florida. *See, e.g.*, Yeager, *supra* note 45, at 32 & n.153 (discussing an instance of use of the Ohio statute). Prosecutors admitted, however, that the employment was limited. *See id.* at 35. A combination of few incidents and an inability to identify the perpetrating offenders contributed to this limitation. *See id.*; *see also* Wenik, *supra* note 53, at 1803 (arguing that the reporting statutes of Ohio, Washington, and Massachusetts are "plagued with serious defects as presently drafted" and observing that the Ohio statute's failure to adequately define "knowledge" may result in an individual reporting a rumor). The number of convictions under these reporting statutes remains negligible.

225. Biggs, *supra* note 1, at 236.

226. Yeager, *supra* note 45, at 35 n.162 (quoting a letter from Kitty-Ann van Doorninck, Admin. Deputy Office of Prosecuting Attorney, Pierce County Wash., to Yeager (Apr. 3, 1992) (on file with Yeager)).

227. *Id.*

228. *Id.* (quoting a letter from Gilbert J. Nadeau, Jr., First Assistant District Attorney for Bristol District, Mass., to Yeager (Nov. 13, 1991) (on file with Yeager)).

dered aid to the victim. In a group rescue situation similar to the New Bedford case,[229] whether a phone call to the police by one patron in the bar would have suspended everyone else's duty to rescue is uncertain. If Minnesota's statute, like Vermont's, would indeed suspend the duty if another had already rendered aid, then what would happen if the aid rendered by another was not "reasonable?"[230] A bystander at Big Dan's, relying on another patron's rescue attempt, might risk liability if that attempt was later considered to be less than reasonable.

Yet another explanation for the continued inactivity under the eight good samaritan laws is that the special relationship exceptions to the traditional "no duty to rescue" rule may render these laws superfluous. In 1994, the Supreme Court of Wisconsin upheld the first conviction of an inactive bystander under the state's eleven-year-old good samaritan law.[231] In January 1992, Karie LaPlante hosted a party at her home.[232] During the course of the evening, one of her guests told LaPlante that she planned to physically assault another guest at the party.[233] When a fight finally broke out, seven of the party guests brutally beat the victim while LaPlante and others watched.[234] The State charged and obtained a conviction against the defendant-party host for failing to aid the victim and for failing to call others who might have rendered aid.[235] LaPlante challenged the constitutionality of the statute and its application to her case.[236] The court rejected LaPlante's contention, observing that "[a] plain and reasonable reading of the statute reveals that any person who knows that a crime is being committed and knows that the victim is exposed to bodily harm

229. *See* Landes & Posner, *supra* note 67, at 96-97; Yeager, *supra* note 45, at 23 n.111; Pardun, *supra* note 39, at 605 ("The capital needed to investigate, arrest, and adjudicate violators of these laws could reach exorbitant amounts. . . . [T]he resources saved by not enacting Good Samaritan laws would result in the prosecution of offenders of more serious crimes instead of violators of a general duty to assist."). Some argue, however, that because incidents like Kitty Genovese's murder, which could have potentially produced 38 defendants, are "quite unusual," focusing on the problems of litigating mass-bystander situations is unnecessary. Silver, *supra* note 55, at 432 n.59. To conclude that the incidents are "quite unusual," however, begs the question of why good samaritan legislation is necessary in the first place.

230. *See supra* note 206.

231. *See* Silver, *supra* note 55, at 432-33 & n.61. Minnesota, Rhode Island, and Vermont all require "reasonable assistance." *See* Minn. Stat. Ann. § 604A.01(1) (Supp. 1999) (originally enacted as § 604.05 (1971); § 604.05(1) effective Aug. 1, 1983); R.I. Gen. Laws § 11-56-1 (1994) (effective 1984); Vt. Stat. Ann. tit. 12, § 519(a) (1973) (effective Mar. 22, 1968).

232. *See* State v. La Plante, 521 N.W.2d 448, 452 (Wis. 1994). Notably, *La Plante* is also the state's most recent conviction under the statute.

233. *See id.* at 449.

234. *See id.*

235. *See id.* "[S]everal individuals who were at defendant's party witnessed defendant standing idly by while victim was brutally beaten." *Id.* at 448. The fact that LaPlante was not alone when she observed the fight is telling, for prosecutors charged only LaPlante with a crime. *See id.* at 449.

236. *See id.*

must either call for a law enforcement officer, call for other assistance or provide assistance to the victim."[237]

Although the Wisconsin court convicted LaPlante under its good samaritan law, the conviction was not necessarily based on the court's belief that citizens should all behave as good samaritans or risk prosecution. Instead, the conviction may have rested on the court's sense that a party host who creates a risk to her guests owes those guests a duty. In other words, the nature of the special relationship (as recognized by tort law) between the rescuer (LaPlante) and the victim (her guest) may have warranted the imposition of a duty.[238] If this sense was not the basis for the conviction, then presumably the prosecutors would have charged, and the court would have convicted, all of the people who observed the fight with a violation of Wisconsin's duty to aid act,[239] rather than only the host.

Whether the lawmakers that enacted the eight good samaritan statutes in their states were motivated by symbolism[240] or by a genuine belief that they could actually affect their citizens' behavior,[241] it cannot be denied that the laws have failed. Commentators often ask why bystanders fail to intervene when they observe another human being in trouble.[242] Some argue that fear paralyzes them.[243] Others contend

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237. *See id.*

238. *Id.* at 451.

239. For a discussion of tort law's special relationship exceptions, see *supra* Part II.A.1. Two sections of the Restatement (Second) of Torts may have influenced the court's determination that LaPlante owed a duty to her guest: § 315, which imposes a duty to control the conduct of a third person as to prevent him from causing physical harm to another person if a special relationship exists between the actor and the third person; and § 321, which imposes a duty on one who creates an unreasonable risk of causing physical harm to another. *See* Restatement (Second) of Torts §§ 315, 321 (1965).

Similarly, in *Tiedeman v. Morgan*, 435 N.W.2d 86, 88 (Minn. 1989), the court relied on a special relationship exception to the "no duty to rescue" rule, rather than implicating the state's good samaritan law. The defendants in *Tiedeman* argued that the immunity provision of Minnesota's good samaritan law applied to them in a situation where they negligently failed to rescue a guest in their home. *See id.* at 88-89. The court held that the statute was inapplicable to the defendants' case, however, because a special relationship exception, not Minnesota's good samaritan law, imposed a duty on the hosts to their guest. *See id.* at 88. The court recognized:

> the existence of a common law duty of care for those who know or should know of the needs of one in circumstances under their control . . . . . Based on both the meaning and the purpose of the Good Samaritan statute, we conclude it does not apply to the pre-existing duty of care asserted here.

Id.

Like *La Plante*, *Tiedeman* may suggest that in the rare case implicating a good samaritan law, a court may rely on the special relationship exceptions as a basis for its ruling.

240. *See supra* note 235 and accompanying text.

241. *See supra* note 211 and accompanying text.

242. *See* Franklin, *supra* note 85, at 58 ("[T]he legal requirement of rescue would, in moments of hesitation, tip the balance toward the desired action. Some rescuers might be moved initially by awareness of such a law."). A study indicates that if people know a legal duty to aid another exists, they judge more harshly the failure to

that bystanders free-ride on each other, each one assuming that the other will render the aid.[244] Notwithstanding the various explanations, people simply do not want to "get[ ] directly involved."[245] While good samaritan laws may purport to save lives and prevent injuries,[246] there is no evidence that they actually do so, nor that the "no duty to rescue" rule hinders the good these laws might accomplish. Therefore, as discussed below in part IV, if Congress passes the Sherrice Iverson Act, it will almost certainly prove to be as futile as previous attempts have been to legislate duties to report and rescue.

IV. THE SHERRICE IVERSON ACT: A FUTILE RESPONSE TO BYSTANDER INDIFFERENCE

This part examines three reasons why the Sherrice Iverson Act is destined to fail: the law would be strikingly similar to the eight good samaritan statutes examined above, it would not have succeeded in saving Sherrice Iverson's life, and the mandatory child abuse reporting statutes of all fifty states negate the need for such a bill.

A. *Comparison to Dormant Good Samaritan Laws*

The uselessness of the Sherrice Iverson Act can best be demonstrated by comparison to the latent good samaritan statutes previously examined.[247] Senator Boxer and Congressman Lampson's proposed CAPTA amendment would require that any state accepting funding for child abuse prevention must provide

> an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law providing for a criminal penalty on an individual 18 years of age or older who fails to report to a State or local law enforcement official that the individual has witnessed another individual in the State engaging in sexual abuse of a child.[248]

In her 1998 introduction to the Senate of the Sherrice Iverson Act, Boxer explained that "[t]he details of these laws, including the penalties imposed, are left to the states. The bill only requires people to report the crimes they witness; it does not require them to intervene in

act. *See id.* at 58-59. If told that a duty does not exist, people regard the failure as nothing more than distasteful. *See id.* at 59.

243. *See* Yeager, *supra* note 45, at 15-20.

244. *See id.* at 15-16.

245. *See* Biggs, *supra* note 1, at 234-35; Wenik, *supra* note 53, at 1788-89.

246. Bibb Latané & John M. Darley, *Social Determinants of Bystander Intervention in Emergencies*, *in* Altruism and Helping Behavior: Social Psychological Studies of Some Antecedents and Consequences 13, 14 (Jacqueline R. Macaulay & Leonard Berkowitz eds., 1970) (exploring the psychology behind those that do not get involved and concluding that "apathy," "indifference," and "unconcern" do not accurately describe their behavior).

247. *See* Silver, *supra* note 55, at 428.

248. *See supra* Part III.

potentially dangerous situations."[249] The Sherrice Iverson Act would be, therefore, almost identical to the dormant good samaritan reporting statutes of Rhode Island and Washington,[250] and closely resemble the good samaritan statutes of Florida and Massachusetts, states with laws that impose duties to report sexual offenses.[251]

The policies behind Boxer and Lampson's Act are also strikingly similar to those of the eight state good samaritan laws. Boxer and Lampson introduced the Sherrice Iverson Act in response to the public outrage at David Cash, Jr.'s "deadly inaction."[252] Lampson argued that the Sherrice Iverson "case clearly indicates that there is a need to pass this law."[253] Because crimes against children, according to Lampson, are "on the rise, this type of legislation is more important than ever before."[254] Further, in response to an assertion that he was attempting to legislate morality, Lampson acknowledged the inherent problems in a law that allows government to mandate that people make "correct choices,"[255] but suggested that it was the responsibility of the government to step in when people refuse to do the right thing.[256]

As the analysis of the good samaritan laws enacted in eight states[257] demonstrated, however, there are many reasons as to why passing such legislation at the federal level is not the proper response to Sherrice Iverson's death. The justifications offered by Boxer and Lampson in support of the Sherrice Iverson Act are eerily similar to those offered by advocates of the good samaritan statutes that were passed over twenty-five years ago and have proven to be utterly useless.

249. S. 793, 106th Cong. § 2 (1999); S. 2452, 105th Cong. § 2 (1998). Currently, all 50 states have laws requiring certain individuals to report child abuse. *See* Trost, *supra* note 18, at 194. The child abuse reporting law that would be imposed on the states by the Sherrice Iverson amendment differs from the reporting laws presently imposed because the federal amendment would require all individuals over eighteen to report. Most reporting statutes require only certain professionals to report such as: physicians, teachers, child-care workers, social workers, psychologists, etc. The Sherrice Iverson Act also would differ from current reporting laws because it would impose a mandatory criminal penalty, and it addresses child sexual abuse specifically.

250. *See* S. 2452 (statement of Senator Boxer). Boxer misstated the number of states with such laws. *See id.* ("Only two states, Vermont and Minnesota, currently have such 'good samaritan' laws."). There are actually eight states with such laws: Vermont, Minnesota, Wisconsin, Washington, Rhode Island, Massachusetts, Florida, and Ohio. For a discussion of these states' statutes, see *supra* Part III.

251. The Sherrice Iverson Act would be particularly similar to Washington's reporting statute. *See* Wash. Rev. Code Ann. § 9.69.100 (West 1998) (1970).

252. *See* Fla. Stat. Ann. § 794.027 (West 1992 & Supp. 1999) (effective 1984); Mass. Ann. Laws ch. 268, § 40 (Law Co-op. 1992) (effective 1983).

253. *See supra* note 15 and accompanying text.

254. *New Bill Requires Reporting of Sex Crimes*, Las Vegas Rev.-J., Sept. 10, 1998, at 4A.

255. *Id.*

256. *Talk of the Nation*, *supra* note 3.

257. *See id.* ("[I]f we can't grow up in our own lives, having the sense of right and wrong . . . then I believe that we have to have government respond to it.").

Rather than repeating mistakes of the past simply out of some sense of justice, Congress should heed the lessons that these state statutes have taught and refuse to implement the Act into law.

B. *The Sherrice Iverson Act Would Not Have Saved Sherrice Iverson*

Not only would the Sherrice Iverson Act, if ultimately passed, likely lie as dormant as the eight good samaritan laws have, it would have failed to save the victim that inspired its passage. The Sherrice Iverson Act imposes a duty only on those who "witness" child sexual abuse.[258] But it is unclear as to how much of Strohmeyer's assault of Sherrice Iverson that Cash actually witnessed.[259] Therefore, if Nevada's legislature had already implemented a law like the Sherrice Iverson Act when Sherrice was murdered, prosecutors still might have struggled in trying to convict Cash of a crime. Presumably, Boxer and Lampson drafted the Act to create a narrowly tailored law that did not encroach too severely on an individual rescuer's personal freedom. The difficulty with doing so, however, is that the law as drafted may not have reached even the behavior from which it was inspired.[260]

The fact that the Sherrice Iverson Act would not have saved the seven-year-old girl in Nevada is not surprising. This is because "[e]ye witnesses to sexual batteries are rare."[261] Further, if one does, in fact, witness a sexual battery, that person is usually prosecuted as a "codefendant or accessory."[262] Therefore, the likelihood that the proposed Sherrice Iverson Act will actually help curb child sexual abuse through a requirement that the abuse be witnessed is quite slim.

C. *Mandatory Child Abuse Statutes Negate the Need for the Sherrice Iverson Act*

Finally, the child abuse reporting statutes of the fifty states provide abused children with a certain degree of protection that would obviate the need for a good samaritan law aimed at the prevention of child sexual abuse.[263] Evidence exists that these statutes, though imper-

258. *See supra* Part III.

259. *See supra* note 249 and accompanying text.

260. *See supra* note 5 and accompanying text.

261. *See supra* notes 214-31 and accompanying text.

262. Yeager, *supra* note 45, at 35 n.162 (quoting letter from C. Marie King, Assistant State Attorney, 6th Jud. Cir., Fla., to Yeager (Nov. 25, 1991) (on file with Yeager)); Telephone Interview with Lawrence Bushing, Deputy Bureau Chief of the Family Violence and Child Abuse Bureau of the New York County District Attorney's Office, (Apr. 23, 1999) (concluding that witnesses to child sexual abuse are "rare, but not unprecedented"). Because child sexual abuse occurs most frequently in the home, such abuse is only "occasionally" witnessed. *See id.*

263. *See* Yeager, *supra* note 45, at 37 (quoting letter from C.W. Goodwin, Chief Assistant State Attorney, 2nd Jud. Cir., Fla., to Yeager (Nov. 25, 1991) (on file with Yeager)).

fect,[264] already help to curb child abuse.[265] On the other hand, there is little evidence that good samaritan laws deter people from committing crimes, aid in aborting crimes in the process of being committed, or save victims from potential acts of violence.[266]

Implementation of the Sherrice Iverson Act would also create increased confusion and difficulty in an already ambiguous field. Although child sexual abuse "provokes society's strongest reaction,"[267] defining the conduct remains as elusive as defining any other kind of abuse.[268] Therefore, without a clear definition of child sexual abuse, recognizing that one has witnessed this kind of abuse is potentially as difficult as concluding that one's suspicion merits reporting.[269] Further, commentators argue that statutes requiring everyone to report abuse produce a "flood of unreliable reports."[270] Reports from professionals, to whom the state mandatory child abuse reporting statutes primarily address, are more likely to be substantiated than those from ordinary citizens.[271] Untrained individuals, with potentially no knowledge about children, may encounter insurmountable difficulties when forced to determine whether to report what they have witnessed.

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264. For a discussion of these reporting statutes, see *supra* Part II.A.2.b.

265. For a discussion of the problems inherent in the mandatory child abuse reporting statutes, see part II.C.

266. *See* Rosencrantz, *supra* note 102, at 341-42 (concluding that the increased number of abused children brought to the attention of public authorities over a twenty-nine-year period indicates the success of reporting statutes).

267. *See supra* Part III.D. In some circumstances, therefore, the statutes might provide even greater protection to children than the Sherrice Iverson Act would provide. For instance, these laws ostensibly require strangers to the child to report not only what they witnessed, but that to which they merely had knowledge. *See, e.g.*, Fla. Stat. Ann. § 415.504 (West 1998 & Supp. 1999) (requiring that a reporter have knowledge of or reasonable cause to suspect the abuse); Minn. Stat. Ann. § 626.556 (West 1983 & Supp. 1999) (requiring reporter have knowledge of or reason to believe abuse exists).

268. Meriwether, *supra* note 95, at 159.

269. *See id.* at 154-60.

270. In questioning the constitutionality of the state's mandatory reporting statute, Nevada's Supreme Court emphasized the importance of clear statutory definitions: "Because a criminal penalty may be imposed on persons who fail to comply with the reporting requirements of [this section], the terms of that statute must be clear enough to inform those who are subject to the reporting provisions what conduct will render them liable to a criminal sanction." Washoe County v. Sferrazza, 766 P.2d 896, 897 (Nev. 1988). The court concluded that the statute's requirement that an individual report suspected abuse "immediately"

> vests in the prosecuting authorities unbridled discretion to determine whether a report of suspected child abuse was made quickly enough to satisfy the mandate of [this section. Therefore] a professional who . . . suspect[s] a child is being abused . . . report[s] his suspicions only at great risk to himself of prosecution for failing to make an "immediate" report. [This section] fails to inform [mandated reporters] what conduct will render them liable for criminal sanctions.

Id.

271. Vieth, *supra* note 95, at 156.

CONCLUSION

The introduction of a federal good samaritan law to Congress in the aftermath of Sherrice Iverson's death and Strohmeyer's trial was undoubtedly done with the best intentions. Barbara Boxer and Nicholas Lampson's attempt to make a statement to the country that behavior like David Cash, Jr.'s will not be tolerated is laudable. But history has unequivocally proven that these laws do not actually affect a bystander's behavior or make it easier for prosecutors to charge that bystander with a crime. In light of the dormancy of current good samaritan legislation and the availability of child abuse reporting statutes, the Sherrice Iverson Act will have no impact on the tragedies it attempts to address and should not be signed into law.