
PROTECTORS OF PREDATORS OR PREY: BYSTANDERS AND UPSTANDERS AMID SEXUAL CRIMES

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In the wake of widespread revelations about sexual abuse by Harvey Weinstein, Larry Nassar, and others, the United States is reckoning with the past and present and searching for the means to prevent and punish such offenses in the future. The scourge of sexual crimes goes far beyond instances perpetrated by powerful men; this misconduct is rampant throughout the country. In some of these cases, third parties knew about the abuse and did not try to intervene. Scrutiny of—and the response to—such bystanderism is increasing, including in the legal world.

In order to align law and society more closely with morality, this Article proposes a more holistic, aggressive approach to prompt involvement by third parties who are aware of specific instances of sexual crimes in the United States. This Article begins by documenting the contemporary scope of sexual crimes in the United States and the crucial role bystanders play in facilitating them.

The Article next provides an overview and assessment of “Bad Samaritan laws”: statutes that impose a legal duty to assist others in peril

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The author’s public engagement on this topic has drawn on the research and recommendations contained in this Article. Those activities include advising policymakers on drafting or amending Bad Samaritan laws and other legislation (including the federal Harassment and Abuse Response and Prevention at State (HARPS) Act sponsored by Congressperson Jackie Speier) and publishing op-eds in the *Boston Globe* (*When Speaking Up is a Civic Duty*, on August 5, 2018) and the *San Francisco Chronicle* (*No Cover for Abusers; California Must Close Gap in its Duty-to-Report Law*, on June 23, 2019).

This Article is current as of September 27, 2019. Any errors are the author’s alone.

through intervening directly (also known as the “duty to rescue”) or notifying authorities (also known as the “duty to report”). Such laws exist in dozens of foreign countries and, to varying degrees, in twenty-nine U.S. states, Puerto Rico, U.S. federal law, and international law. The author has assembled the most comprehensive global database of Bad Samaritan laws, which provides an important corrective to other scholars’ mistaken claims about the rarity of such statutes, particularly in the United States. Despite how widespread these laws are in the United States, violations are seldom, if ever, charged or successfully prosecuted.

Drawing on historical research, trial transcripts, and interviews with prosecutors, judges, investigators, and “upstanders” (people who intervene to help others in need), the Article then describes four prominent cases in the United States involving witnesses to sexual crimes. Each case provides insight into the range of conduct of both bystanders and upstanders.

Because not all such actors are equal, grouping them together under the general categories of “bystanders” and “upstanders” obscures distinct roles, duties, and culpability for violating those duties. Drawing on the case studies, this Article thus presents original typologies of bystanders (including eleven categories or sub-categories), upstanders (including seven categories), and both kinds of actors (including four categories), which introduce greater nuance into these classifications and this Article’s proposed range of legal (and moral) responsibilities. These typologies are designed to maximize generalizability to crimes and crises beyond sexual abuse.

Finally, the Article prescribes a new approach to the duty to report on sexual abuse and possibly other crimes and crises through implementing a combination of negative incentives (“sticks”) and positive incentives (“carrots”) for third parties. These recommendations benefit from interviews with sexual violence prevention professionals, police, legislators, and social media policy counsel. Legal prescriptions draw on this Article’s typologies and concern strengthening, spreading, and standardizing duty-to-report laws at the state and territory levels; introducing the first general legal duty to report sexual crimes and possibly other offenses (such as human trafficking) at the federal level; exempting from liability one of the two main bystander categories the Article proposes (“excused bystanders”) and each of its six sub-categories (survivors, “confidants,” “unaware bystanders,” children, “endangered bystanders,” and “self-incriminators”); actually charging the other main bystander category the Article proposes (“unexcused bystanders”) and each of its three sub-categories (“abstainers,” “engagers,” and “enablers”) with violations of duty-to-

report laws or leveraging these statutes to obtain testimony from such actors; and more consistently charging “enablers” with alternative or additional crimes, such as accomplice liability. Social prescriptions draw on models and lessons from domestic and foreign contexts and also this Article’s typologies to recommend, among other initiatives, raising public awareness of duty-to-report laws and creating what the Article calls “upstander commissions” to identify and “upstander prizes” to honor a category of upstanders the Article proposes (“corroborated upstanders”), including for their efforts to mitigate sexual crimes. A combination of these carrots and sticks could prompt would-be bystanders to act instead as upstanders and help stem the sexual crime epidemic.

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INTRODUCTION

Man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good. – Martin Luther King, Jr.¹

The hottest places in hell are reserved for those who, in a time of great moral crisis, maintain their neutrality. – Dante²

We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented. Sometimes we must interfere. – Elie Wiesel³

“I didn’t want to get involved.” So said a witness to perhaps the most notorious fatal sexual assault in U.S. history, that of twenty-eight-year-old Catherine “Kitty” Genovese over half a century ago.⁴ “[I] didn’t want to get into problems.” So said a spectator to the gang rape⁵ of twenty-one-year-old Cheryl Araujo in 1983.⁶ “I’m not going to lose sleep over somebody else’s problems.” So said an onlooker to the lethal kidnapping and molestation of seven-year-old Sherrice Iverson in 1997.⁷ “If that was my daughter, I wouldn’t care. I’d just let her be dead.” So said a person aware of the nearby rape of an unconscious sixteen-year-old girl in 2012.⁸ These chillingly candid, cowardly, apathetic statements by people who declined to intervene in or even report these heinous acts of sexual violence⁹ might as well have

1. MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 229 (Clayborne Carson ed., 1998).

2. JOHN F. KENNEDY, *THE STRATEGY OF PEACE* 105 (Allan Nevis ed., 1960) (quoting Dante).

3. Elie Wiesel, 1986 Nobel Peace Prize Acceptance Speech Delivered at Oslo, Norway (Dec. 10, 1986) (available at <http://eliewiesel.org/elie-wiesel/nobelprizespeech> [<https://perma.cc/7V7K-QD7E>]).

4. Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at A1.

5. There is no consensus on the definition of rape. One popular definition is “sex without the victim’s consent.” Jed Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1376 (2013).

6. *Barroom Rape Trial Hears of Failed Call*, N.Y. TIMES, Mar. 8, 1984, at B19 [hereinafter *Failed Call*] (quoting Vladimiro Pacheco) (internal quotation marks omitted); Jay Sterling Silver, Opinion, *Can the Law Make Us Be Decent?*, N.Y. TIMES, Nov. 7, 2012, at A27.

7. Nora Zamichow, *The Fractured Life of Jeremy Strohmeyer*, L.A. TIMES, July 19, 1998, at A1 (quoting David Cash).

8. *Ohio Teens Convicted of Rape* (CNN television broadcast Mar. 17, 2013), <http://www.cnn.com/2013/03/17/justice/ohio-steubenville-case/index.html> [<https://perma.cc/3KAM-PXVB>].

9. Like rape, see *supra* note 5, there is no consensus on the definition of sexual violence. Most such definitions include rape and certain other violent acts. See DARA KAY COHEN, *RAPE DURING CIVIL*

been uttered more recently by the numerous “bystanders”¹⁰ to such crimes in the United States today.

In the wake of widespread revelations about sexual abuse by Harvey Weinstein,¹¹ Larry Nassar,¹² and others,¹³ the country is reckoning with the past and present and searching for legal and other means to prevent and punish such crimes in the future.¹⁴ In this “post-Weinstein World”¹⁵ “tipping point”¹⁶ of the “#MeToo” movement,¹⁷ *Time* magazine pronounced the 2017 “Person of the Year” to be “The Silence Breakers”: women (and some men) who have spoken out about the inappropriate and often illegal treatment they have suffered.¹⁸ During this watershed moment, more than two hundred prominent men (and at least four women¹⁹) across industries—including government, journalism, business, academia, athletics, and entertainment—have been accused of sexual misconduct.²⁰ Indeed, in just the first two

WAR 4 (2016).

10. According to the Oxford English Dictionary (“OED”), a bystander is “a person who is present at an event or incident but does not take part.” *Bystander*, OXFORD ENGLISH DICTIONARY <https://en.oxforddictionaries.com/definition/bystander> [<https://perma.cc/FE3U-79EG>].

11. See, e.g., Ronan Farrow, *Abuses of Power*, NEW YORKER, Oct. 23, 2017, at 42, 42; see also Jodi Kantor & Megan Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*, N.Y. TIMES, Oct. 6, 2017, at A1.

12. Scott Cacciola & Victor Mather, *Gymnasts’ Abuse Draws Sentence Likely to be Life*, N.Y. TIMES, Jan. 25, 2018, at A1.

13. See *infra* Part I.

14. See, e.g., Nellie Bowles, *As Men’s Misdeeds Pile Up, Women Debate the Reckoning*, N.Y. TIMES, Dec. 7, 2017, at A17.

15. The “post-Weinstein World” is a popular shorthand for referring to the era after October 2017, when Weinstein’s misdeeds were widely reported. See, e.g., Vanessa Friedman, *Empowered or Just Eye Candy?*, N.Y. TIMES, Nov. 30, 2017, at D1.

16. See, e.g., *All Things Considered: Why ‘The Weinstein Effect’ Seems Like a Tipping Point*, NAT’L PUB. RADIO (Nov. 4, 2017, 5:43 PM), <https://www.npr.org/2017/11/04/562137110/why-the-weinstein-effect-seems-like-a-tipping-point> [<https://perma.cc/6A87-VN4B>].

17. See, e.g., Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979> [<https://perma.cc/Z7T2-RRQ7>].

18. Stephanie Zacharek et al., *The Silence Breakers*, TIME, Dec. 18, 2017, at 34, 37.

19. Jacey Fortin, *Allegations of Harassment End Woman’s Election Bid*, N.Y. TIMES, Dec. 16, 2017, at A11; Zoe Greenberg, *A Female Professor, Her Male Student and the Limits of #MeToo*, N.Y. TIMES, Aug. 14, 2018, at A1; Melanie Mason & Alene Tchekmedyian, *Garcia Created a Hostile Workplace, Ex-Staffers Say*, L.A. TIMES, Feb. 19, 2018, at B3; Melanie Mason, *Leading #MeToo Leader is Accused of Sexual Misconduct*, L.A. TIMES, Feb. 9, 2018, at B1; Kim Severson, *#MeToo Star Settled Claim of Her Own*, N.Y. TIMES, Aug. 19, 2018, at A1.

20. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/EJ3P-XHMG>]. Another study found that, over 18 months, the #MeToo Movement ousted at least 417 high-profile executives and employees across industries. See Jeff Green, *#MeToo Snares More Than 400 High-Profile People*, BLOOMBERG (June 27, 2018, 3:46 PM), <https://www.bloombergquint.com/business/2018/06/25/-metoo-snares-more-than-400->

months after Weinstein, a powerful person was accused of abuse at a rate of almost once every twenty hours.²¹ Some of these offenses have been perpetrated against so many—and such young—victims that the wrongs are occasionally characterized as “atrocities,”²² a term traditionally applied to genocide, war crimes, and crimes against humanity.²³

Given the astronomical number of sexual crimes perpetrated nationally²⁴—and that third parties sometimes disregard or even enable the misconduct²⁵—we are compelled to return to an age-old question: What, if any, duties do we owe our fellow human beings—relatives, friends, colleagues, neighbors, and strangers alike?²⁶ Criminalizing sexual abuse is clearly inadequate. Calling on third parties, including men and boys,²⁷ to help combat this epidemic voluntarily has likewise proven insufficient. We must consider new strategies to prevent and punish such heinous offenses.

This Article proposes such a new strategy, which aligns law and society more closely with morality. I suggest a more holistic, aggressive approach to prompt involvement by third parties who are aware of specific instances of sexual crimes in the United States.

high-profile-people-as-firings-rise [https://perma.cc/ZHX4-3SPP].

21. Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017), <http://www.latimes.com/projects/la-na-sexual-harassment-fallout> [https://perma.cc/P9VS-CEYR].

22. Rachael Denhollander, Opinion, *The Price of Raising an Army*, N.Y. TIMES, Jan. 28, 2018, at SR2; Elisabetta Povoledo, *Pope Condemns Abuse of Children, Saying, “We Abandoned Them,”* N.Y. TIMES, Aug. 20, 2018, at A1.

23. ZACHARY D. KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS 2 (2016).

24. See *infra* Part I.

25. See *id.*

26. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 7–13, 223–29 (1998); William Genovese, Letter to the Editor, *From Kitty Genovese’s Brother: ‘The Final Chapter,’* N.Y. TIMES, Apr. 7, 2016, at A24.

27. See, e.g., Patricia Fabiano et al., *Engaging Men as Social Justice Allies in Ending Violence Against Women: Evidence for a Social Norms Approach*, 52 J. AM. C. HEALTH 105, 105–11 (2003). The White House (under President Barack Obama) and the Departments of Justice and Health and Human Services endorsed such a strategy. Barack Obama, U.S. President, Remarks by the President at “It’s On Us” Campaign Rollout (Sept. 19, 2014) (available at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/19/remarks-president-its-us-campaign-rollout> [https://perma.cc/E4RP-4QXQ]); *OVW Grants and Programs*, U.S. DEP’T JUST., <https://www.justice.gov/ovw/grant-programs> [https://perma.cc/W22E-YTYN]; see also JENNY DILLS ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, *SEXUAL VIOLENCE ON CAMPUS: STRATEGIES FOR PREVENTION* 14 (2016). NGOs promoting this approach are proliferating. See, e.g., A CALL TO MEN, <http://www.acalltomen.org> [https://perma.cc/YZC3-6MY4]; IT’S ON US, <http://www.itsonus.org> [https://perma.cc/RBT5-M8BH]; MEN CAN STOP RAPE, <http://www.mencanstoprape.org> [https://perma.cc/58E6-2CYN]; MEN STOPPING RAPE, INC., <http://www.men-stopping-rape.org> [https://perma.cc/HZE4-JC68]; MEN STOPPING VIOLENCE, <http://menstoppingviolence.org> [https://perma.cc/9T3V-S6KE]; NAT’L ORG. FOR MEN AGAINST SEXISM, <http://nomas.org> [https://perma.cc/2LTP-EFZ5].

Because the scope of affirmative duties is potentially vast, this Article focuses on three aspects. First, I concentrate on criminal law—namely “Bad Samaritan laws,”²⁸ which impose a legal duty to assist others in peril through intervening directly (also known as the “duty to rescue”) or notifying authorities (also known as the “duty to report”).²⁹ Tort law raises distinct issues that other scholars address.³⁰

Second, between the two types of Bad Samaritan laws, this Article specifically examines the duty to report. While necessarily intertwined with this duty, the duty to rescue faces separate concerns.³¹

Finally, for three reasons, this Article centers on sexual abuse as opposed to other crimes and crises.³² Sexual crime survivors often do not report the offense.³³ Indeed, the U.S. Department of Justice estimated that,

28. In contrast, Good Samaritan laws “encourage citizens to administer care by granting statutory immunity from civil damages, thus removing fear of liability.” Holly R. Farris, *Reading Between the Lines: The South Dakota Supreme Court’s Interpretation of S.D.C.L. Section 20-9-4.1* in Gronseth v. Chester Rural Fire Protection District & Chester Fire Department, 56 S.D. L. REV. 122, 129 (2011).

29. See, e.g., Heather Benzmilller, Note, *The Cyber-Samaritans: Exploring Criminal Liability for the “Innocent” Bystanders of Cyberbullying*, 107 NW. U. L. REV. 927, 944, 954 (2013).

30. Two scholars recently clarified tort law’s approach to “affirmative duties” and did so without critiquing whether the general no-duty rule should change. Kenneth S. Abraham & Leslie Kendrick, *There’s No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649, 1654 (2019). A third scholar recently considered that precise normative question, asking whether the #MeToo movement “has the potential to accelerate and intensify the trend to hold third parties responsible in tort” Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 45 (2018).

31. Some scholarship erroneously groups duty-to-rescue laws and duty-to-report laws together, such as by referring to the latter as a subset of the former. E.g., Jay Logan Rogers, Note, *Testing the Waters for an Arizona Duty-to-Rescue Law*, 56 ARIZ. L. REV. 897, 902 (2014) (classifying duty-to-report laws as a form of duty-to-rescue laws). However, while some concerns of the two duties do overlap, others are distinct. For example, given that the duty to rescue requires direct intervention, it is typically more perilous than the duty to report for those who comply because the intervenor’s identity would more likely be revealed and he or she may be ensnared in the very danger he or she seeks to mitigate. See, e.g., VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 431–52 (12th ed. 2010). Moreover, the duty to report shares similarities with a generally sanctioned duty—the duty to testify in court when subpoenaed—whereas no such analogous duty exists for the duty to rescue. See Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 106–07 n.6 (1999). For a forthcoming discussion of the duty to rescue, see Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. (forthcoming 2020).

32. Other scholars have recently scrutinized bystanderism in different contexts. One such situation is the role transnational corporations play in human rights abuses. See, e.g., Jena Martin Amerson, *“The End of the Beginning?”: A Comprehensive Look at the U.N.’s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 873–935 (2012); Jena Martin Amerson, *What’s in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN’S L. REV. 1, 1–48 (2011). Another such scenario arises when migrants are in distress. See, e.g., Ray, *supra* note 31.

33. *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/NR4L-DENP>] (“Only 230 out of every 1,000 sexual assaults are reported to police.”); see also *infra* note 94 and accompanying text.

in 2016, only twenty-three percent of rapes and sexual assaults were reported to police, making these offenses the least reported of any type of crime.³⁴ Reports by third parties would thus promote prevention and punishment. Additionally, when survivors themselves do report sexual crimes, they often face skepticism.³⁵ Such frequent doubt of a complainant is unique to sexual crimes,³⁶ raising concern that survivors are denied the constitutional guarantee of equal protection.³⁷ Corroborating reports would further bolster victims' claims. Moreover, some Bad Samaritan laws in the United States were adopted specifically to address sexual offenses.³⁸ Precedent thus exists for promulgating such statutes in this context.

This Article proceeds in five parts. Part I documents the contemporary scope of sexual crimes in the United States and the crucial role bystanders play in facilitating them.

Part II provides an overview and assessment of Bad Samaritan laws. Such laws exist in dozens of foreign countries and, to varying degrees, in twenty-nine U.S. states, Puerto Rico, U.S. federal law, and international law.³⁹ These statutes are thus much more prevalent, especially in the United States, than scholars typically convey.⁴⁰ However, international law, U.S. federal law, U.S. territories, and most U.S. states do not feature a general Bad Samaritan law (applying to a range of situations unrestricted to particular types of victims or third parties). Where such statutes do exist in

34. U.S. DEP'T OF JUSTICE, NCJ 252121, CRIMINAL VICTIMIZATION, 2016: REVISED 7 (2017), <https://www.bjs.gov/content/pub/pdf/cv16.pdf> [https://perma.cc/B5NJ-R4D4].

35. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1, 21 (2017) (“[T]he criminal justice system has generally treated rape complainants with incredulity.”); *id.* at 28 (“[L]aw enforcement officers often default to incredulity when women allege sexual assault”); *id.* at 57 (“Often when police officers and prosecutors confront an allegation of sexual violence, they unduly doubt the trustworthiness of the complainant and the plausibility of her account.”). The view that law enforcement insufficiently responds to sexual abuse reports is tragically bolstered by recent revelations from the #MeToo movement. Police have routinely dismissed such reports, leading legal scholar Catharine MacKinnon to conclude that “[m]any survivors realistically judged reporting pointless.” Catharine A. MacKinnon, Opinion, *#MeToo and Law’s Limitations*, N.Y. TIMES, Feb. 5, 2018, at A19. In the Nassar case, for example, reports of his sexual molestation to the FBI, as well as to numerous athletic and academic officials, did not prompt urgency in addressing the matter or preventing further abuse. Dan Barry et al., *Molested as F.B.I. Case Plodded for a Year*, N.Y. TIMES, Feb. 4, 2018, at A1.

36. Tuerkheimer, *supra* note 35, at 33 (“The typical law enforcement investigation is guilt-presumptive (and potentially problematic for that reason). In sexual assault cases, this presumption is flipped. Investigators start from the proposition that the complainant is lying and act to confirm this belief.”).

37. *Id.* at 8, 52–56.

38. *See infra* Part III.

39. *See infra* Section II.B.

40. *See infra* note 131 and accompanying text.

the United States, violations are seldom, if ever, charged or successfully prosecuted. This Part begins by presenting the controversy over Bad Samaritan laws, both traditional arguments for and against, as well as new arguments the Article proposes on each side based on recent developments. This Part then documents the status of Bad Samaritan statutes in domestic, foreign, and international law and cases involving such laws in the United States. I have compiled an appendix of Bad Samaritan laws—containing a survey of U.S., foreign, and international statutes⁴¹—that comprises the most comprehensive global database of such laws.

Drawing on historical research, trial transcripts, and interviews with prosecutors, judges, investigators, and “upstanders,”⁴² Part III describes four prominent cases in the United States involving witnesses to sexual crimes.

41. *Bad Samaritan Laws*, ZACHARY D. KAUFMAN, <http://www.zacharykaufman.com/projects/bad-samaritan-laws> [<https://perma.cc/5PPB-MJ3P>] [hereinafter Appendix]. Please be advised that the permanent link does not allow searching within the Appendix’s database. Please use the nonpermanent link to access this database. If the nonpermanent link no longer functions, please contact the author to access the database.

42. Harvard University Kennedy School of Government Professor (and former U.S. Permanent Representative to the United Nations) Samantha Power is credited with coining the modern usage of “upstander” in 2002 while she was promoting her Pulitzer Prize-winning book, *“A Problem from Hell”: America and the Age of Genocide*. See S. Res. 105, 216th Leg. (N.J. 2015); Press Release, Facing History & Ourselves, New Jersey State Legislature Have Passed Resolution to Acknowledge the Term “Upstander” (Aug. 6, 2015), <https://www.facinghistory.org/news-and-media/new-jersey-state-legislature-have-passed-resolution-acknowledge-term-upstander> [<https://perma.cc/F7VU-TB2R>]; see also SAMANTHA POWER, *THE EDUCATION OF AN IDEALIST* 131–32 (2019); *Samantha Power*, HARV. KENNEDY SCH., <https://www.hks.harvard.edu/faculty/samantha-power> [<https://perma.cc/VGD8-HD6L>]. Facing History and Ourselves, a nonprofit international educational and professional development organization, then helped popularize the term. Press Release, Facing History & Ourselves, *supra*. Two American high school students, Sarah Decker and Monica Mahal, initiated a grassroots campaign in 2014 that advocated adding the word to the dictionary. Ben Zimmer, *Word on the Street: Teenagers stand up for “Upstander,”* WALL ST. J., Sept. 10, 2016, at C4; Press Release, Facing History and Ourselves, *supra*. Decker and Mahal’s state senator in New Jersey co-sponsored a supportive resolution that the state legislature passed in 2015. N.J. S. Res. 105 (“Urg[ing] Merriam-Webster, Inc. and the Oxford University Press to include the word upstander in their dictionar[ies].”). Oxford University Press complied, and the OED ultimately added the term in 2016. *New Words List December 2016*, OXFORD ENG. DICTIONARY, <https://public.oed.com/updates/new-words-list-december-2016> [<https://perma.cc/96JB-G7H4>]. The OED defines an upstander as “[a] person who speaks or acts in support of an individual or cause, particularly someone who intervenes on behalf of a person being attacked or bullied.” *Upstander*, OXFORD ENG. DICTIONARY, <https://en.oxforddictionaries.com/definition/upstander> [<https://perma.cc/ZC5U-3M56>].

To date, the term “upstander” has been used seldom in legal scholarship. Of the mere twelve law review articles in which the term appears anywhere (according to a search on August 31, 2019, in Westlaw of the term “upstander!” in the text field of the “Law Reviews & Journals” directory), the only other instance besides this Article of the word featuring in the title occurred in 2017 in an article by then-Dean of Harvard Law School Martha Minow: Martha Minow, *Upstanders, Whistle-Blowers, and Rescuers*, 2017 UTAH L. REV. 815 (2017). In Minow’s Article about individual acts of courage and how such conduct can be supported, she states, “The term upstander gives recognition and approval to people who stand up for their beliefs, even if they are alone; it means not being a bystander.” *Id.* at 815.

These are the same tragedies from which the quotations in the beginning of this Article arose. The events are, chronologically: (1) the rape and murder of twenty-eight-year-old Catherine “Kitty” Genovese in Queens, New York, on March 13, 1964 (the “Genovese case”); (2) the gang rape of twenty-one-year-old Cheryl Araujo in New Bedford, Massachusetts, on March 6, 1983 (the “Araujo case”); (3) the rape and murder of seven-year-old Sherrice Iverson in Primm, Nevada, on May 25, 1997 (the “Iverson case”); and (4) the rape of an unnamed sixteen-year-old girl in Steubenville, Ohio, the night of August 11–12, 2012 (the “Steubenville case”). The callousness of witnesses in these cases has come to represent the immorality and indifference of humanity. While other legal scholarship has commented on these episodes,⁴³

43. On the Genovese case, 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, 926; Peter M. Agulnick & Heidi V. Rivkin, Note, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT’L L. REV. 93, 93–94, 97 (1998); 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, 234–36 (1997); Anthony D’Amato, *The “Bad Samaritan” Paradigm*, 70 NW. U. L. REV. 798, 799, 806–09, 811 n.46 (1976); Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REFORM 439, 441, 485 (1994); David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 659 n.10, 690, 698–99 (2006); Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 WASHBURN L.J. 463, 465 (2001); Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 388 n.11 (1998); Amelia Uelmen, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68 *passim* (2017); Daniel B. Yeager, *A Radical Community of Aid*, 71 WASH. U. L.Q. 1, 20 n.94 (1993).

On the Araujo case, see Renu Mandhane, *Duty to Rescue Through the Lens of Multiple-Party Sexual Assault*, 9 DALHOUSIE J. LEGAL STUD. 1, 1 (2000); John T. Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT’L & COMP. L.J. 591, 608–09 (1998); Volokh, *supra* note 31, at 108 n.9.

On the Genovese and Araujo cases, see Amelia H. Ashton, Note, *Rescuing the Hero: The Ramifications of Expanding the Duty to Rescue on Society and the Law*, 59 DUKE L.J. 69, 95 n.166, 102–03, 103 n.201 (2009); Miriam Gur-Arye, *A Failure to Prevent Crime—Should It Be Criminal?*, 20 CRIM. JUST. ETHICS, Summer/Fall 2001, at 3, 5; Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 677–78 (1994); Diane Kiesel, *Who Saw This Happen?*, 69 A.B.A. J. 1208, 1208–09 (1983); Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157, 185 (1994); Mark K. Osbeck, *Bad Samaritanism and the Duty to Render Aid: A Proposal*, 19 U. MICH. J.L. REFORM 315, 315, 324 (1985); Clare Elaine Radcliffe, *A Duty to Rescue: The Good, the Bad and the Indifferent*, 13 PEPP. L. REV. 387, 387 (1986); Shaya Rochester, *What Would Have Seinfeld Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L.Q. 1185, 1200–01 (2001); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 423 (1985).

On the Iverson case, see Alison M. Arcuri, Note, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 486–88 (2000); Jessica R. Givelber, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169, 3169–70 (1999); Andrew D. Kaplan, “Cash-ing Out”: *Regulating Omissions, Analysis of the Sherrice Iverson Act*, 26 NEW ENG. J. CRIM. & CIV. CONFINEMENT 67, 67–68 (2000); Natalie Perrin-Smith Vance, Note, *My Brother’s Keeper? The Criminalization of Nonfeasance: A Constitutional*

this Article provides greater detail and analysis about the third parties involved. Each case offers insight into the range of conduct of such actors. Some spectators tried to intervene in the assaults, demonstrating that such conduct is possible. Other individuals declined to seize opportunities to help. If bystanders had acted instead as upstanders, the assaults might have been prevented or stopped.

As the four cases in Part III demonstrate, not all third parties to sexual violence or other crimes and crises are equal. Grouping them together under the general categories of “bystanders” and “upstanders,” as so often occurs (especially in the case of bystanders), obscures distinct roles, duties, and culpability for violating those duties.⁴⁴ Drawing on the case studies, Part IV thus presents original typologies of bystanders (including eleven categories or sub-categories), upstanders (including seven categories), and both kinds of actors (including four categories), which introduce greater nuance into these classifications and this Article’s proposed range of legal (and moral) responsibilities. These typologies are designed to maximize generalizability to crimes and crises beyond sexual abuse. Specifically, I divide bystanders into two main categories—“excused bystanders” (including six sub-categories: survivors, “confidants,” “unaware bystanders,” children, “endangered bystanders,” and “self-incriminators”) and “unexcused bystanders” (including three sub-categories: “abstainers,” “engagers,” and “enablers”)—and I divide upstanders into seven categories—“risk-accepting upstanders,” “risk-free upstanders,” “altruistic upstanders,” “required upstanders,” “lured upstanders,” “successful upstanders,” and “attempted upstanders.” This Part also formulates typologies applying to both bystanders and upstanders. One grouping is “third parties” and “fourth parties,” and the other is “corroborated” actors and “uncorroborated” actors.

Analysis of Duty to Report Statutes, 36 CAL. W. L. REV. 135, 136–38 (1999); Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053, 1054 (2000).

On the Genovese and Iverson cases, see Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 971–73 (2000); Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 623–26, 672–73 (2010) [hereinafter Levy, *Killing*].

On the Genovese, Araujo, and Iverson cases, see Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571, 571–72 (2000).

On the Steubenville case, see Bridgette Dunlap, *Anyone Can “Think Like a Lawyer”’: How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2836–38 (2014).

On all four cases, see Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 984–85 n.37.

44. See Yeager, *supra* note 43, at 15–20.

Part V prescribes a new approach to the duty to report on sexual abuse and possibly other crimes and crises through implementing a combination of negative incentives (“sticks”) and positive incentives (“carrots”) for third parties.⁴⁵ These recommendations benefit from interviews with sexual violence prevention professionals, police, legislators, and social media policy counsel. The first section contains legal prescriptions that draw on the typologies presented in Part IV and concern strengthening, spreading, and standardizing duty-to-report laws at the state and territory levels; introducing the first general legal duty to report sexual crimes and possibly other offenses (such as human trafficking) at the federal level; exempting from liability one of the two main bystander categories the Article proposes (“excused bystanders”) and each of its six sub-categories (survivors, “confidants,” “unaware bystanders,” children, “endangered bystanders,” and “self-incriminators”); actually charging the other main bystander category the Article proposes (“unexcused bystanders”) and each of its three sub-categories (“abstainers,” “engagers,” and “enablers”) with violations of duty-to-report laws or leveraging these statutes to obtain testimony from such actors; and more consistently charging “enablers” with alternative or additional crimes, such as accomplice liability.

In addition, Part V contains social prescriptions that draw on models and lessons from domestic and foreign contexts and also this Article’s typologies to recommend, among other initiatives, raising public awareness of duty-to-report laws and creating what the Article calls “upstander commissions” to identify and “upstander prizes” to honor “corroborated upstanders,” including for their efforts to mitigate sexual crimes. A combination of this Part’s carrots and sticks could prompt would-be bystanders to act instead as upstanders and help stem the sexual crime epidemic.

The Article concludes by summarizing findings and recommendations and describing future research.

I. BYSTANDERS AND CONTEMPORARY SEXUAL CRIMES

Recent heightened attention to sexual crimes in the United States has illustrated how bystanders often disregard, and thereby facilitate, these offenses. At least sixteen individuals admitted witnessing or knowing of Weinstein’s sexual misconduct but remained silent; his behavior was

45. See also Zachary D. Kaufman, Opinion, *When Speaking Up Is a Civic Duty*, BOS. GLOBE, Aug. 5, 2018, at K6 [hereinafter Kaufman, *Speaking Up*]. For definitions and discussion of “carrots” and “sticks” in legal systems, see Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 354–55 (2013).

notorious within both Miramax and the Weinstein Company, giants in the entertainment industry.⁴⁶ Over a dozen officials from the FBI, U.S. Olympic Committee, U.S.A. Gymnastics, and Michigan State University were slow to act on allegations against Nassar, a physician specializing in treating female gymnasts whom at least 265 girls and young women have accused of sexual abuse.⁴⁷ An employee of former U.S. Congressperson John Conyers stated he saw Conyers touching and stroking the legs and buttocks of female employees on multiple occasions.⁴⁸ A space where restaurateur Ken Friedman, chef Mario Batali, and others allegedly committed sexual misdeeds was commonly referred to among industry insiders as “the rape room.”⁴⁹ Ohio State University (“OSU”) concluded that university officials knew for two decades about, but did nothing to stop, a team physician and university professor, Richard Strauss, from sexually abusing at least 177 male students.⁵⁰ Several former OSU wrestlers claim that then-assistant coach Jim Jordan, now a U.S. Congressperson who has been discussed as a potential Speaker of the House, was aware of Strauss’s crimes and did not intervene.⁵¹ Nearly five hundred women have sued the University of Southern California, claiming that a former head gynecologist at the university’s student health center, George Tyndall, sexually abused them and that school officials disregarded their complaints.⁵² Officials at the highest levels of the Catholic Church, including Pope Francis and the Washington, D.C. archbishop (Cardinal Donald Wuerl), have been accused of covering up the church’s growing sex abuse scandals.⁵³

Scrutiny of—and the response to—such “bystanderism”⁵⁴ is increasing,

46. Farrow, *supra* note 11, at 42–43.

47. Barry et al., *supra* note 35. Nassar was ultimately convicted in January 2018 of multiple sex crimes and sentenced to as much as 175 years imprisonment. Cacciola & Mather, *supra* note 12.

48. Melissa Nann Burke, *New Accusers: Conyers Got Handsey*, DETROIT NEWS, Dec. 6, 2017, at A6.

49. Julia Moskin & Kim Severson, *Allegations Against Restaurateur: ‘I Was Scared,’* N.Y. TIMES, Dec. 13, 2017, at A1.

50. Victor Mather, *Ohio State Team Doctor Abused at Least 177 Men*, N.Y. TIMES, May 18, 2019, at A15 (noting that college personnel knew about Strauss’s crimes starting in 1979 but did not report them until 1996).

51. Catie Edmondson, *Amid Scandal in Ohio, Howls of ‘Deep State,’* N.Y. TIMES, July 7, 2018, at A1.

52. Jennifer Medina, *University of Southern California to Pay \$215 Million Over Sex Abuse Scandal*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/usc-sex-abuse-settlement-george-tyndall.html> [https://perma.cc/6F5J-5E95].

53. Emily Cochrane & Amy Harmon, *Calls Grow for Cardinal Wuerl to Resign as Washington Archbishop*, N.Y. TIMES, Aug. 29, 2018, at A10; Laurie Goodstein & Sharon Otterman, *Ousted U.S. Cardinal Left a Trail of Abused Recruits*, N.Y. TIMES, July 16, 2018, at A1; Jason Horowitz, *Critic of Pope in Open Revolt Vs. the Vatican*, N.Y. TIMES, Aug. 26, 2018, at A1.

54. I define “bystanderism” as the inaction of a bystander. For the OED’s definition of

including in the legal world. Weinstein's own former attorney, David Boies, stated in 2017:

In retrospect, I knew enough in 2015 that I believe I should have been on notice of a problem, and done something about it. I don't know what, if anything, happened after 2015, but to the extent it did, I think I have some responsibility. I also think that if people had taken action earlier it would have been better⁵⁵

Similarly self-critical, in a piece about her own victimhood and silence in response to former U.S. Court of Appeals for the Ninth Circuit Judge Alex Kozinski's sexual misconduct, legal commentator Dahlia Lithwick referred to certain types of bystanders as "[a]ccomplices."⁵⁶ She lamented: "[M]y failure to speak up over the course of my career is part of the reason why it was possible for the women who came after me to be treated as disrespectfully as they were."⁵⁷ Lithwick asserts that "[e]verybody knew" about Kozinski's conduct, and that she and others were "colluding" in their collective failure to intervene.⁵⁸ She thus rhetorically asked about herself: "When a prominent journalist with a national platform chooses—year after year—not to report on an open secret, . . . how can it only be about the victims and the harassers?"⁵⁹ Indeed, it is not. As this Article argues, witnesses and others knowledgeable of sexual misconduct also matter, as has become increasingly clear. Recognizing this fact, and in response to the Kozinski scandal,⁶⁰ in March 2019 the Judicial Conference (the policymaking body for the federal courts) expanded the federal judiciary's Rules for Judicial-Conduct and Judicial-Disability Proceedings to include both "engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault" as a type of misconduct and a failure to report judicial misconduct to the relevant chief district judge or chief circuit judge

"bystander," see *supra* note 10.

55. Ronan Farrow, *Harvey Weinstein's Army of Spies*, NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies> [<https://perma.cc/H6SU-FRVT>].

56. Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/judge_alex_kozinski_made_us_all_victims_and_accomplices.html [<https://perma.cc/S42Q-CZGH>].

57. *Id.*

58. *Id.*

59. *Id.*

60. FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES *passim* (2018), http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [<https://perma.cc/3WPJ-M7JB>] [hereinafter JUDICIAL WORKING GROUP REPORT]; Letter from James C. Duff, Dir., Admin. Office of the U.S. Courts, to Charles E. Grassley, Chairman, Comm. on the Judiciary, and Dianne Feinstein, Ranking Member, Comm. on the Judiciary (Feb. 16, 2010), in JUDICIAL WORKING GROUP REPORT, *supra*, at app.4.

as itself also qualifying as misconduct.⁶¹

For bystanderism to sexual misconduct outside the legal world, legislative and other responses are also increasingly contemplated and implemented. The FBI agent in charge of the Nassar investigation acknowledged that “[t]here is a duty to warn those who might be harmed in the future”⁶²—a duty that the FBI and others apparently failed to discharge. One such passive individual was former President and CEO of U.S.A. Gymnastics Steve Penny. He defended under oath his organization’s decision against forwarding to law enforcement allegations about Nassar’s crimes by claiming: “To the best of my knowledge, there’s no duty to report if you are—if you are a third-party to some allegation.”⁶³ Aware of such inaction, the mother of one of the girls Nassar repeatedly assaulted stated, “Look at all the people who could’ve stopped him earlier. My goal is to find every single one of them . . . [and] expose them all, so this will never happen again.”⁶⁴ In response to the Nassar case,⁶⁵ Ranking Member of the U.S. Senate Judiciary Committee Dianne Feinstein introduced the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 (“Protecting Young Victims Act”).⁶⁶ This bill—which requires reporting suspected child abuse, including sexual abuse, to certain adults who are authorized to interact with minor or amateur athletes at a facility under the jurisdiction of a national governing body—became federal law in February 2018.⁶⁷ Similarly, legislators in Michigan, where Nassar committed many of his crimes, have been working on strengthening their state’s mandatory reporter statute related to child abuse. The chair of the state senate’s judiciary committee declared that he was “appalled by anybody learning of a sexual assault and not reporting” it to the proper authorities and asserted that the reporting law must be “broad enough that anybody who

61. JUDICIAL CONFERENCE, U.S. COURTS, GUIDE TO JUDICIARY POLICY 7, 8 (2019), http://www.cafc.uscourts.gov/sites/default/files/judicial-reports/Judicial_Conduct_and_Disability_Rules_Effective_March_12_2019_0.pdf [<https://perma.cc/MXC8-FA4N>]. The Judicial Conference approved these reforms on March 12, 2019. *Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. COURTS (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms> [<https://perma.cc/L2BT-5ACL>].

62. Barry et al., *supra* note 35.

63. James Dator, *Former USA Gymnastics CEO Steve Penny Arrested for Tampering with Evidence in Larry Nassar Case*, SB NATION (Oct. 18, 2018, 10:19 AM), <https://www.sbnation.com/2018/10/18/17994160/steve-penny-usa-gymnastics-arrested-larry-nassar-tampering> [<https://perma.cc/7KX5-HU2Q>].

64. Barry et al., *supra* note 35.

65. Des Bieler, *Nassar Furor Spurs Congress to Action*, WASH. POST, Jan. 26, 2018, at D1.

66. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018).

67. *Id.*

knew” of conduct like Nassar’s “should have reported it,” and, if not, he or she should be charged with a criminal offense.⁶⁸ Other initiatives to combat bystanderism to sexual misconduct have also made progress. In March 2019, Pope Francis signed new requirements for Vatican officials and diplomats to report sexual abuse to the Holy See’s judicial authorities.⁶⁹ Catholic Church officials who fail to report such abuse face fines of up to five thousand euros or sentences of up to six months in prison.⁷⁰

The scourge of sexual crimes—and the failure of those aware of them to intervene—goes far beyond such instances perpetrated by Weinstein, Nassar, Strauss, and other powerful men; this misconduct is rampant throughout the United States. According to the FBI, 135,755 rapes were reported to law enforcement in the United States in 2017 (the latest full year for which data is available).⁷¹ The Department of Justice estimates that, in the same year, U.S. residents age twelve or older suffered 393,980 rapes or sexual assaults.⁷² The Rape, Abuse, and Incest National Network (“RAINN”) calculates that a sexual assault is perpetrated in the country every 92 seconds.⁷³ Certain groups are particularly at risk, including women and girls,⁷⁴ Native Americans,⁷⁵ African Americans,⁷⁶ students in higher education,⁷⁷ and people with intellectual disabilities.⁷⁸ Such pervasiveness

68. Aaron Keller, *Case of Pedophile Larry Nassar Sparks Talk of Changes to Michigan Law*, LAW & CRIME (Jan. 25, 2018, 9:39 PM) (internal quotation marks omitted), <https://lawandcrime.com/exclusive/revulsion-horror-michigan-seeks-better-laws-in-larry-nassars-wake> [<https://perma.cc/2APL-ZTZE>].

69. Chico Harlan, *Pope Francis Enacts New Legislation Requiring Vatican Officials to Report Abuse*, WASH. POST (Mar. 29, 2019), https://www.washingtonpost.com/world/europe/pope-francis-enacts-new-legislation-requiring-vatican-officials-to-report-abuse/2019/03/29/9703acac-5210-11e9-a3f7-78b7525a8d5f_story.html [<https://perma.cc/HU6E-8FB7>]. Some commentators, however, argue that, instead of mandating such reporting to Vatican judicial authorities, these notifications should be directed at independent, secular law enforcement officials. *Id.*

70. *Id.*

71. 2017 *Crime in the United States*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/rape> [<https://perma.cc/HFS2-T8H7>].

72. RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP’T OF JUSTICE, NCJ 252472, CRIMINAL VICTIMIZATION, 2017, at 3 (2018), <https://www.bjs.gov/content/pub/pdf/cv17.pdf> [<https://perma.cc/35DM-C97Z>].

73. *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/QW9X-TW6L>].

74. *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/XV5Y-SFGQ>].

75. *Id.*

76. MICHAEL PLANTY ET AL., U.S. DEP’T OF JUSTICE, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 3 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.cc/TMB2-THPU>] [hereinafter FEMALE VICTIMS].

77. DILLS, *supra* note 27, at 3.

78. Joseph Shapiro, *All Things Considered: The Sexual Assault Epidemic No One Talks About*, NAT’L PUB. RADIO (Jan. 8, 2018), <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epid>

of sexual violence has led some to declare that the United States is plagued by “rape culture”⁷⁹ and “toxic masculinity.”⁸⁰

II. BAD SAMARITAN LAWS: OVERVIEW AND ASSESSMENT

This Part presents an overview and assessment of Bad Samaritan laws. Section II.A considers the controversy over Bad Samaritan laws, concentrating on duty-to-report statutes. Section II.B summarizes the current status of Bad Samaritan laws in the United States and abroad and generally discusses cases involving duty-to-report statutes. Relevant U.S., foreign, and international statutes are assembled in an appendix.⁸¹

A. CONTROVERSY

The controversy over Bad Samaritan laws applies to one or both types of statutes (duties to rescue and to report) and includes both principled and practical matters. The traditional arguments for and against these laws are discussed in depth elsewhere.⁸² As such, they will only be summarized here. I supplement these arguments with new ones, based on recent social and technological developments that have altered the context for these statutes’ enactment and enforcement. My analysis partly undermines and partly bolsters the rationale for adopting such laws.

A duty to intervene in crimes and crises is already widely endorsed in multiple areas outside law. Certain faiths—such as Christianity,⁸³ Islam,⁸⁴ and Judaism⁸⁵—promote such assistance as a religious obligation. Some

emic-no-one-talks-about [https://perma.cc/Q8BT-KJX5].

79. See Dan Subotnick, “Hands Off”: Sex, Feminism, Affirmative Consent, and the Law of Foreplay, 16 S. CAL. REV. L. & SOC. JUST. 249, 252 (2007) (discussing the term “rape culture”).

80. See Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 112 (2010) (defining “toxic masculinity” as “the constellation of socially regressive male traits that serve to foster domination, the devaluation of women, homophobia and wanton violence” (citation omitted)).

81. See *supra* note 41 and accompanying text.

82. See *supra* note 43.

83. Luke 10:30–37 (containing the Good Samaritan parable). The Bible also addresses sins of omission, implicitly including during opportunities for intervention in crimes and crises. See James 4:17 (“If anyone, then, knows the good they ought to do and doesn’t do it, it is sin for them.”). In addition, the Bible commands aiding individuals in mortal peril. See Proverbs 24:11–12 (“Rescue those being led away to death; hold back those staggering toward slaughter. If you say, ‘But we knew nothing about this,’ does not he who weighs the heart perceive it? Does not he who guards your life know it? Will he not repay everyone according to what they have done?”).

84. Qu’ran 5:32 (“[T]o save a life would be as great a virtue as to save all of mankind.”). For a discussion of Muslim upstanders, see Zachary D. Kaufman, *Islam Is (Also) a Religion of Peace*, FOREIGN POL’Y (Aug. 4, 2016, 4:41 PM), <https://foreignpolicy.com/2016/08/04/islam-is-also-religion-of-peace-humayun-khizr-khan-trump> [https://perma.cc/RA5P-P89Q].

85. Leviticus 19:16 (Common English) (“Do not stand by idly when your neighbor’s life is at stake

secular leaders and scholars—including Jeremy Bentham,⁸⁶ Edmund Burke,⁸⁷ Cicero,⁸⁸ Dante,⁸⁹ Martin Luther King, Jr.,⁹⁰ and Elie Wiesel⁹¹ (himself posthumously accused of sexual misconduct⁹²)—have also emphasized the duty to help others in distress. Even comedy⁹³ and science fiction⁹⁴ have pondered such affirmative obligations.

Bad Samaritan laws are the legal embodiment of these religious and moral codes. Proponents of Bad Samaritan laws argue that such statutes provide the opportunity to express moral revulsion about and retribution against bystanders, and that they can, at least theoretically, prompt intervention, thereby promoting the possibility that emergencies are mitigated and criminals are held accountable.

However, Bad Samaritan laws face pointed, multifaceted criticism. This controversy centers on these statutes' impetus, nature, consequences, and effectiveness. Some rejoinders include concessions about how legitimate concerns can be addressed in the drafting or amendment of duty-to-report laws. Part V elaborates on such legislative strategies.

. . . ."); *Mishnah Sanhedrin* 4:9 (“[W]hoever saves a single life is considered by Scripture to have saved the whole world.”).

86. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 323 (J.H. Burns & H.L.A. Hart eds., 1970) (1789) (“[I]n cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?”); JEREMY BENTHAM, *Specimen of a Penal Code*, reprinted in 1 THE WORKS OF JEREMY BENTHAM 155, 164 (John Bowring ed., 1838) (“Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience.”).

87. Burke reflected: “All that is necessary for the triumph of evil is that good men do nothing.” Harry N. Stull, *Indifference Fosters Gangsterism*, WASH. POST, Jan. 22, 1950, at B8.

88. Cicero stated: “There are . . . two kinds of injustice—the one, on the part of those who inflict wrong, the other on the part of those who, when they can, do not shield from wrong those upon whom it is being inflicted.” CICERO, DE OFFICIIS 25 (Walter Miller trans., 1928).

89. See *supra* note 2 and accompanying text.

90. See *supra* note 1 and accompanying text.

91. See *supra* note 3 and accompanying text.

92. Linley Sanders, *Elie Wiesel Sexually Assaulted Teenager at Charity Event, Woman Claims in ‘Me Too’ Account*, NEWSWEEK (Oct. 23, 2017, 3:53 PM), <http://www.newsweek.com/elie-wiesel-me-too-account-690891> [<https://perma.cc/R6JQ-ABD3>].

93. The series finale of *Seinfeld* centered around a Bad Samaritan law. *Seinfeld: The Finale* (NBC television broadcast May 14, 1998); see also Bagby, *supra* note 43, at 571; Rochester, *supra* note 43, at 1185; Uelmen, *supra* note 43, at 71–73; Marcia M. Ziegler, *Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome*, 104 DICK. L. REV. 525, 525 (2000).

94. Isaac Asimov articulated laws of robotics, one of which features a Bad Samaritan rule. His First Law includes that “a robot may not . . . , through inaction, allow a human being to come to harm.” ISAAC ASIMOV, RUNAROUND, reprinted in I, ROBOT 25, 37 (Bantam hardcover ed. 2004) (1950). For discussion of the benefits and drawbacks of Asimov’s laws of robotics, see, for example, Edmund Mokhtarian, *The Bot Legal Code: Developing a Legally Compliant Artificial Intelligence*, 21 VAND. J. ENT. & TECH. L. 145, 158–61 (2018).

1. Impetus

Critics of duty-to-report laws argue that these statutes are prompted by rare cases, thus making bad law. Demands—sometimes successful—to criminalize bystanderism in the United States have indeed occasionally occurred after notorious, egregious cases of sexual misconduct.⁹⁵

However, perceptions about the frequency and impact of passivity to sexual crimes are evolving. In each of the four historic occurrences of bystanderism that captured national attention described in Part III, just one person was assaulted. Today, the country is appalled at simultaneous revelations of multiple such cases across the country, including some, such as Weinstein, Nassar, and Strauss, involving many victims. As such, not only is this an opportune moment to revisit the issue of criminalizing bystanderism, but it is also perhaps the most compelling instance yet.

2. Nature

The very nature of duty-to-report laws is often condemned. Critics argue that these statutes punish character rather than conduct, that they typically are vague and thus difficult to prove and possibly unconstitutional, that they impinge unacceptably on individual human liberty, that they may be opposed by the very people they seek to help, and that they unfairly prioritize certain subject matter and victims.

Proponents offer rebuttals. Passivity is not only a personality trait but also a type of behavior. Vagueness is neither inherent nor particular to duty-to-report laws and can be addressed through careful drafting and adjudication. Some especially odious situations warrant compelling minimum intervention over preserving maximum liberty.

Certain sexual violence survivors may indeed object to mandatory reporting of such assaults for fear of retaliation, belief that the police would not or could not help, or other reasons.⁹⁶ Some commentators advocate deferring to competent adult survivors' wishes on whether to report the sexual violence they have suffered. These advocates argue that such deference shows respect to these survivors, ensures the survivors' privacy is not violated and their own voices are not trumped, and promotes a culture in which survivors feel that they can confide in others.⁹⁷ Honoring survivors'

95. See *infra* Part III; see also Swan, *supra* note 43, at 1000.

96. See FEMALE VICTIMS, *supra* note 76, at 7.

97. See, e.g., Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013), <https://www.theatlantic.com/national/archive/2013/05/which-matters-more-reporting-assault-or-respecting-a-victims-wishes/276042> [https://perma.cc/9CR9-2623];

wishes can be incorporated into duty-to-report laws.⁹⁸

But even where reporting would be approved by victims, the scope of such mandatory notifications may raise concerns. Duty-to-report laws can be general (requiring reporting of a range of crimes) or specific (requiring reporting only in specific circumstances, by certain professionals, or about particular categories of victims). Statutes specifically about sexual violence, such as in Florida,⁹⁹ necessarily exclude other crimes (such as murder) and non-criminal crises (such as life-threatening emergencies like drowning). Critics may therefore argue that such a narrow statute unfairly and inappropriately prioritizes sexual crimes over other compelling situations that merit and would benefit from similar interventions. To support their position, such critics could invoke as precedent four of the five state laws imposing either a duty to rescue or a duty to rescue or report. These statutes in Minnesota, Rhode Island, Vermont, and Wisconsin apply to situations in which another person is exposed to serious physical injury without regard to whether that harm is sexual in nature or, in three of the states, even a crime at all.¹⁰⁰ Also, many existing state duty-to-report laws extend beyond sexual crimes to include either other violent offenses, such as murder (as in Massachusetts¹⁰¹) or all felonies (as in Ohio¹⁰²).¹⁰³ Similarly narrow as the Florida statute but in a different way, some duty-to-report laws, such as those in California¹⁰⁴ and Nevada,¹⁰⁵ as well as the federal Protecting Young Victims Act,¹⁰⁶ apply only when victims are children. While young people are most at risk of sexual violence,¹⁰⁷ recent events¹⁰⁸ emphasize that

Nicole Westmarland, *How to Respond if Someone Tells You They've Been Raped or Sexually Assaulted*, THE GUARDIAN (London) (July 29, 2015, 8:50 AM), <https://www.theguardian.com/commentisfree/2015/jul/29/sexual-assault-rape-how-to-respond> [<https://perma.cc/9PCJ-AP2X>].

98. See *infra* Section V.A.1.

99. FLA. STAT. § 794.027 (2019) (imposing a duty to report on those who witness the commission of sexual battery).

100. The statutes in Minnesota, Rhode Island, and Vermont apply to any emergency in which another person is exposed to grave physical harm. MINN. STAT. § 604A.01 (2019); 11 R.I. GEN. LAWS § 11-56-1 (2019); VT. STAT. ANN. tit. 12, § 519 (2019). The statute in Wisconsin is narrower, applying only to a crime in which a victim is exposed to bodily harm. WIS. STAT. § 940.34 (2019).

101. MASS. GEN. LAWS ch. 268, § 40 (2019).

102. OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2019).

103. For the full list of state duty-to-report laws, see *infra* Section II.B.

104. CAL. PENAL CODE § 152.3 (West 2019).

105. NEV. REV. STAT. § 202.882 (2019).

106. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018).

107. *Victims of Sexual Violence: Statistics*, *supra* note 74.

108. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:51 PM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001> [<https://perma.cc/J9ZH-6EP6>].

children are far from the only victims.¹⁰⁹ This critique of duty-to-report laws—that they may be too narrow—is not an indictment of the statutes themselves. Rather than an argument against their existence, this concern is more about their extent. The scope of duty-to-report laws can be adjusted to address legitimate concerns over subject matter and victim ages.¹¹⁰

3. Consequences

Duty-to-report laws are criticized for their potential negative effects on incarceration rates, constitutional protections, safety, and accuracy of reports. First, where duty-to-report law violations carry jail time, enforcing these statutes would exacerbate what many scholars have identified as a societal problem of “mass incarceration.”¹¹¹ However, such laws could restrict punishments to noncarceral options, such as a fine, citation, probation, or community service.¹¹²

Second, duty-to-report laws can prompt self-incrimination if the witness is involved in the same or a related crime.¹¹³ But this constitutional concern can be avoided through legislative crafting.¹¹⁴

Third, duty-to-report laws may be counterproductive if a reporter harms him- or herself, the person he or she is trying to help, or others. Yet third parties who reasonably perceive peril can and should be exempt from such laws.¹¹⁵ But even if the reporter miscalculates or is unaware of such danger, some situations, like with accepting encroachment on liberty, may warrant societal tolerance of at least a minimal amount of potential harm.

Fourth, duty-to-report statutes, especially if they become more prevalent and punitive, may increase the amount of intentionally or accidentally incorrect reports about crimes and crises, including sexual violence. Prank calls to 911 are already problematic, leading law enforcement to expend precious resources and sometimes overreact. Over the last decade, such hoaxes have become increasingly dangerous and even

109. CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE (2019), <https://www.cdc.gov/violenceprevention/pdf/SV-Factsheet.pdf> [<https://perma.cc/U4JX-9TD9>] (noting that, while “[s]exual violence starts early,” most rape victims experience their first assault as adults).

110. *See infra* Section V.A.2.

111. *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2 (2016); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004).

112. *See infra* Section V.A.5.

113. *See infra* Section V.A.1.

114. *See id.*

115. *See id.*

deadly.¹¹⁶ Some false reports may be motivated by racism, classism, or other discrimination.¹¹⁷ Politicization may also provoke false reports.¹¹⁸ With such high stakes, some observers question whether complainants may be exploited for political gain.¹¹⁹ Afraid of being charged and punished under a duty-to-report law, even well-intentioned individuals may report an incident that does not actually involve any wrongdoing or peril. Malevolent and benevolent individuals alike may thus invoke duty-to-report statutes to claim they were only following the law in expressing a supposedly genuine concern.

While mandatory reporting may indeed lead to additional statements to law enforcement that are inaccurate, the public interest in saving lives and stopping crimes, including sexual violence, may outweigh the additional burden on law enforcement to assess such reports. Furthermore, false reports to police are already a crime¹²⁰ and could be more consistently prosecuted and punished to promote deterrence.

4. Effectiveness

The effectiveness of duty-to-report laws is often questioned. Critics argue that these statutes may be too cost-prohibitive and logistically challenging to investigate and prosecute in cases with numerous bystanders. But even in such circumstances, duty-to-report laws could provide

116. A type of prank call brought to the FBI's attention in 2008, "swatting," involves "individuals making fraudulent 911 calls and reporting threats or ongoing violent situations in order to draw a response from law enforcement, usually a SWAT team." Matthew James Enzweiler, Note, *Swatting Political Discourse: A Domestic Terrorism Threat*, 90 NOTRE DAME L. REV. 2001, 2002 (2015). In 2017, a "swatter" admitted placing an illegitimate 911 call that led a police officer in Kansas to kill an innocent man. Eli Rosenberg & Herman Wong, *Man Arrested After Call to Police Ended in Death*, WASH. POST, Dec. 31, 2017, at A8.

117. In recent years, riders of the Bay Area Rapid Transit ("BART") system have reported African Americans to BART police for non-crimes at disproportionate rates compared to other racial or ethnic groups. Darwin BondGraham, *BART Riders Racially Profile via Smartphone App*, EAST BAY EXPRESS (Aug. 5, 2015), <https://m.eastbayexpress.com/oakland/bart-riders-racially-profile-via-smartphone-app/Content?oid=4443628> [<https://perma.cc/Z9NJ-HHKU>]. Similarly, BART riders have reported people perceived as homeless for conduct that is not illegal. *Id.*

118. At least two such incidents have already occurred within the last two years. In November 2017, a woman tried to convince the *Washington Post* that U.S. Senate candidate Roy Moore impregnated her in the hope that the newspaper would publish the false claim and thus, when the error was revealed, discredit its earlier reporting about accusations against Moore of sexual assault and child molestation. Shawn Boburg et al., *Post Was Approached with False Claim About Moore*, WASH. POST, Nov. 28, 2017, at A16. The following month, a forged document surfaced describing a false allegation of sexual harassment against U.S. Senator Chuck Schumer. Eileen Sullivan, *After a Hoax Allegation, Schumer Files a Report*, N.Y. TIMES, Dec. 14, 2017, at A15.

119. Kenneth P. Vogel, *Activists Exploit Effort to Expose Sex Harassment*, N.Y. TIMES, Jan. 1, 2018, at A1.

120. *E.g.*, CAL. PENAL CODE § 148.5 (West 2019).

investigators and prosecutors with a helpful tool to hone in on particularly egregious bystanders. Of course, these statutes would carry risks associated with law enforcement discretion, which is pervasive in criminal justice and can be applied in a discriminatory fashion.¹²¹ Biased investigators and prosecutors could unfairly leverage duty-to-report laws against targets of their animus. Yet enforcement of other laws requires similar choices and risks. Moreover, given how widespread duty-to-report statutes already are and how rarely they are charged,¹²² concern over discriminatory application, at least for now, may be overblown.

Critics also contend that duty-to-report laws are unlikely to compel “upstanderism”¹²³ (because such prosecutions are rare, convictions are even rarer, and punishment, usually as a misdemeanor, is minimal) and that they may be irrelevant (because genuinely Good Samaritans will intervene even in the absence of duty-to-report laws and others will not even in the presence of such statutes). However, any current assessment of the likelihood and relevance of duty-to-report laws prompting upstanderism is an unfair indictment of the laws themselves. Precisely because these statutes are so little known and seldom enforced, their impact is unclear.

In addition, the effectiveness of duty-to-report laws is often misunderstood to lie only in their ability to prompt upstanderism and punish bystanderism. Prosecutors can also leverage duty-to-report laws to elicit witness cooperation by offering immunity in exchange for testimony. The quantification and impact of this second usage of duty-to-report laws is difficult to evaluate because it may not always be disclosed to the public. Anecdotal evidence does suggest, however, that this other feature of duty-to-report laws is sometimes employed.¹²⁴ As will be discussed in the next Part, Ohio had not just one but two relevant duty-to-report laws in effect at the time of the Steubenville case.¹²⁵ While these statutes did not compel anyone to report the rapes while they occurred or even shortly thereafter, prosecutors, using evidence gleaned from mobile devices and social media, were ultimately able to persuade three bystanders to testify against the two assailants by granting immunity, including from the applicable duty-to-

121. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 26–27 (1998); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1523–37 (1981).

122. See *infra* notes 144–50.

123. I define “upstanderism” as the conduct of an upstander. For the OED’s definition of “upstander,” see *supra* note 42.

124. See *infra* Section III.D.

125. See *id.*

report statutes.¹²⁶ Strengthening, spreading, and standardizing such laws would enable prosecutors to use them more frequently and effectively as tools to promote cooperation among witnesses.

Finally, there is reason to believe that duty-to-report laws may be more effective today than ever before. Recent revelations and outrage over sexual misconduct in the United States coincide with technological advancements that can facilitate upstanderism, making the current era all the more ripe for legal developments. The advent of mobile devices and social media has produced three related outcomes. First, mobile devices and social media can be used to document crimes and crises, including sexual violence, to be shared and viewed either later or even while the events occur.¹²⁷ Second, mobile devices and social media can reduce both the burden on and risk to witnesses in reporting emergencies. Finally, mobile devices and social media can be used to establish the presence and behavior of witnesses, including whether such individuals passively or actively encouraged or enabled perpetrators. In short, technological advancements are increasing awareness of emergencies, decreasing justifications for not reporting them, and strengthening evidence of witnesses and their conduct.

B. STATUTES AND CASES

Duty-to-report laws are far more common than many Americans—including scholars—have recognized. These statutes are already widespread throughout the United States (and beyond) and often cover sexual crimes, particularly against children.

But the scope of American Bad Samaritan laws is narrower than elsewhere. Dozens of foreign countries have national laws requiring bystander intervention, whether duties to rescue¹²⁸ or to report.¹²⁹ Two

126. *See id.*

127. *See id.*

128. Duties to rescue are found in a wide variety of forms in dozens of countries. *See* Appendix, *supra* note 41. Countries that have legislated duties to rescue include heirs of a wide variety of legal traditions, such as France (CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 223-6), Germany (Strafgesetzbuch [STGB] [PENAL CODE] § 323c, *translation at* <https://germanlawarchive.iuscomp.org/?p=752> [<https://perma.cc/Q34V-7KKU>]), Japan (KEIHŌ (PEN. C.) 1907, art. 217), the Australian Northern Territory (*Criminal Code 1983* (NT) sub-div. 155), and the nations of the former Soviet Union (see, for example, UGOLOVNIY KODEKS ROSSIJSKOI FEDERATKII [UK RF] [Criminal Code] art. 125 (Russ.); KRIMINALNY-PROTSESUALNY KODEKS UKRAINY (KPKU) [CRIM. C.] art. 135 (1960) (Ukr.); CRIMINAL CODE OF THE REPUBLIC OF UZBEKISTAN, art. 117 (1998); CRIMINAL CODE OF THE AZERBAIJAN REPUBLIC, art. 143 (2000)).

129. Globally, duties to report vary more than do duties to rescue. Some countries, such as France, have adopted a general duty on all citizens to report all crimes. C. PÉNAL [C. PÉN.] [PENAL CODE] art. 434-1. More commonly, reporting statutes mirror those in certain U.S. states in singling out particular

international laws, both of which the United States has ratified, require rendering assistance in outer space.¹³⁰ A third international law, which the United States has not ratified, mandates providing aid at sea.¹³¹ Furthermore, in 2005, United Nations (“UN”) member states, including the United States, unanimously adopted a resolution, the 2005 World Summit Outcome, part of which declared the “Responsibility to Protect” (“R2P”) doctrine.¹³² The United States and all other signatories pledged to defend their own people and, through the UN, foreign populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.¹³³ R2P arguably thus constitutes a duty to rescue amid these atrocity crimes.¹³⁴

crimes to be reported by all citizens (for example, violent crimes, sexual crimes, crimes against minors) or in imposing a duty to report crimes on particular classes of citizens (such as public employees or those whose work involves a close association with children). *See, e.g.*, FLA. STAT. § 794.027 (2019) (imposing a duty to report on those who witness the commission of sexual battery); *see also* Patient Protection and Affordable Care Act, Pub. L. 111–48, § 6703, 124 Stat. 127, 782 (2010) (requiring health care professionals to report suspected cases of elder abuse). In some jurisdictions reporting can satisfy the duty to rescue. *E.g.*, MINN. STAT. § 604A.01 (2019) (“Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel.”). However, such an approach is not universal; French courts have ruled that alerting the authorities alone does not satisfy the duty to rescue. *See* Edward A. Tomlinson, *The French Experience with the Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT’L & COMP. L. 451, 482 (2000).

130. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (popularly known as the “Outer Space Treaty”) requires states parties and their astronauts to render “all possible assistance” to foreign astronauts. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. V, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205. The Outer Space Treaty was adopted by the U.N. General Assembly on December 19, 1966; opened for signature on January 27, 1967; and entered into force on October 10, 1967. Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Fifty-Eighth Session, U.N. Doc. A/AC.105/C.2/2019/CRP.3, at 1 (2019) [hereinafter Peaceful Uses of Outer Space Report]. The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (popularly known as the “Rescue Agreement”) elaborates on the Outer Space Treaty’s mandated provision of aid. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119. The Rescue Agreement was adopted by the U.N. General Assembly on December 19, 1967; opened for signature on April 22, 1968; and entered into force on December 3, 1968. Peaceful Uses of Outer Space Report, *supra*, at 2. The United States has ratified both the Outer Space Treaty and the Rescue Agreement. *Id.* at 9.

131. The U.N. Convention on the Law of the Sea contains an article on the “[d]uty to render assistance.” United Nations Convention on the Law of the Sea, art. 98, Dec. 10, 1982, 1833 U.N.T.S. 397. The United States is not among the 168 state parties to the treaty. *United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1 [<https://perma.cc/K7NA-E3CH>].

132. G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005).

133. *Id.* ¶¶ 138–39.

134. Jay Butler, *Amnesty for Even the Worst Offenders*, 95 WASH. U. L. REV. 589, 592 (2017) (The principle of R2P “insists that the international community has a duty (not merely a right) to intervene diplomatically or, as a last resort, militarily when a government is unwilling or unable to protect its people from large-scale loss of life.”); *id.* at 594 (arguing that R2P asserts “that there is not merely a right, but a

In comparison, no general Bad Samaritan statute exists in U.S. federal law.¹³⁵ “Action for neglect to prevent” applies exclusively to enumerated civil rights.¹³⁶ Title IX of the Education Amendments of 1972 designates mandatory reporters of only sex-based discrimination, including sexual harassment and sexual violence, and even then just in institutions of higher education.¹³⁷ As previously noted, the Protecting Young Victims Act specifically concerns child abuse in an athletic context.¹³⁸ Special relationships and situations may also trigger upstanderism in tort or criminal law.¹³⁹

Many duties to report arise under U.S. state law, and their scopes are generally broader than comparable statutes at the federal level. State reporting duties typically apply either with respect to reportable conduct (for example, violent crimes, sexual abuse, or offenses against minors) or with respect to categories of citizens obliged to report (for example, public employees or professionals whose work involves close association with children).

Existing state laws usually mandate certain professionals to report the mistreatment of particular vulnerable populations or specific injuries sustained by anyone. Most states have designated certain teachers and a few other types of specialists and experts as mandatory reporters of suspected

positive duty incumbent on all states . . . to bring an end to grave abuses occurring within a state” (emphasis in original).

135. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that a town and its police department could not be sued under 42 U.S.C. § 1983 for failing to enforce a restraining order, which led to murder of three children); *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 191 (1989) (holding that a state agency’s failure to prevent child abuse does not violate the child’s right to liberty under the Fourteenth Amendment). “Misprision of felony,” a crime tracing its origins to the common law and codified in 1909, requires concealment of a known felony rather than mere failure to report or otherwise intervene in a crime. 18 U.S.C. § 4 (2018); *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977) (“The mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C.A. § 4.”); see also Arcuri, *supra* note 43, at 475–76.

136. 42 U.S.C. § 1986 (2018).

137. 20 U.S.C. §§ 1681–88 (2018); see also Marle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 75–76 (2017).

138. See *supra* note 66.

139. See, e.g., *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (explaining that “[t]here are at least four situations in which the failure to act may constitute breach of a legal duty,” including: (1) “where a statute imposes a duty to care for another;” (2) “where one stands in a certain status relationship to another;” (3) “where one has assumed a contractual duty to care for another;” and (4) “where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid”); RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965) (identifying the following special relations as giving rise to duty to aid or protect: common carrier, innkeeper, possessor of land who holds it open to the public, and one who is required by law to take or who voluntarily takes custody of another under circumstances that deprive the other of normal opportunities for protection).

child abuse.¹⁴⁰ Healthcare providers generally must report child and elder abuse as well as gunshot and stab wounds.¹⁴¹

While none of the aforementioned U.S. federal or state laws obligate the majority of individuals to report or otherwise intervene in any crimes or crises, Bad Samaritan laws—whether duties to rescue, to report, or either—that do apply to most or all witnesses exist in twenty-nine states and Puerto Rico.¹⁴² Thus, Bad Samaritan laws to which anyone in the jurisdiction could be subjected exist in one form or another in the majority of states, applying to almost two-thirds of all Americans.¹⁴³ Scholars typically undercount such laws in the United States,¹⁴⁴ conveying the false impression that a small fraction of these statutes exist at the state level and that far fewer Americans are subject to them. Some scholars also mislabel such laws in the United States as strictly imposing *either* a duty to rescue *or* a duty to report, whereas

140. Swan, *supra* note 43, at 1004. The most common form of specific reporting duty, requiring the reporting of sexual abuse of a child, is found in the criminal law of all fifty states and other U.S. territories, although these laws mandate reporting of crimes only by certain classes of people. See CHILDREN'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2016), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/Y8P7-JEGB>] [hereinafter MANDATORY REPORTERS].

141. NANCY DURBOROW ET AL., FAMILY VIOLENCE PREVENTION FUND, COMPENDIUM OF STATE STATUTES AND POLICIES ON DOMESTIC VIOLENCE AND HEALTH CARE 2 (2010), https://www.acf.hhs.gov/sites/default/files/fysb/state_compendium.pdf [<https://perma.cc/T5XJ-XDJ3>]; MANDATORY REPORTERS, *supra* note 140, at 2; STETSON UNIV., GUIDE ON U.S. STATE AND TERRITORY MANDATORY REPORTING STATUS AND STATUTES 1 (2016), <https://www.stetson.edu/law/academics/elder/home/media/Mandatory-reporting-Statutes-for-elder-abuse-2016.pdf> [<https://perma.cc/F7WC-URDM>].

142. The twenty-nine states are: Alaska, California, Colorado, Delaware, Florida, Hawai'i, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. Appendix, *supra* note 41.

143. According to the U.S. Census Bureau's latest (2018) estimation, the total population of the United States is 327,167,434. The U.S. Census Bureau also estimates the combined population of the twenty-nine states and Puerto Rico to be 202,817,500, or 62% of the country's overall population. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2018, <https://www.census.gov/data/datasets/time-series/demo/popest/2010s-national-total.html> [<https://perma.cc/F7WC-URDM>].

144. For example, my list of twenty-nine states with Bad Samaritan laws is almost triple the length of a similar list provided by Eugene Volokh. See Eugene Volokh, *Duty to Rescue/Report Statutes*, VOLOKH CONSPIRACY (Nov. 3, 2009, 12:24 AM), <http://volokh.com/2009/11/03/duty-to-rescuereport-statutes> [<https://perma.cc/X9FH-3EHK>] (identifying ten states that feature Bad Samaritan laws: California, Florida, Hawai'i, Massachusetts, Minnesota, Ohio, Rhode Island, Vermont, Washington, and Wisconsin); see also, e.g., Levy, *Killing*, *supra* note 43, at 616 (claiming that "only four states have enacted bad-Samaritan laws: Minnesota, Rhode Island, Vermont, and Wisconsin" (footnotes omitted)); Patricia Grande Montana, *Watch or Report? Livestream or Help? Good Samaritan Laws Revisited: The Need to Create a Duty to Report*, 66 CLEV. ST. L. REV. 533, 540 (2018) (claiming that only "a few states" have enacted Bad Samaritan laws); Swan, *supra* note 43, at 1000 (claiming that only "[a] small minority of states" feature Bad Samaritan laws).

certain laws in fact impose a duty to rescue *or* to report.¹⁴⁵ Still other scholars mislabel duty-to-report laws as duty-to-rescue laws.¹⁴⁶ These two forms of mislabeling erroneously suggest that compliance with particular Bad Samaritan laws requires direct intervention whereas notifying authorities would suffice.

Of all the states with Bad Samaritan laws, five feature a duty to rescue in whole or part, although the relevant scopes and explicit requirements differ. Some of these statutes are broader than others: three (Minnesota, Rhode Island, and Vermont) apply when a person is exposed to “grave physical harm” whether criminal or not, one (Wisconsin) applies only when the bodily harm is caused by a crime, and the fifth (Texas) applies only when a specific crime (aggravated sexual assault of a child) is committed or attempted.¹⁴⁷ The laws in three of these states (Minnesota, Texas, and Wisconsin) explicitly note that the duty can be discharged through reporting alone, effectively making these statutes duties to rescue *or* to report.¹⁴⁸

Laws that explicitly require *only* reporting are much more widespread in the United States. Twenty-eight states (four of which overlap with the five states featuring duty-to-rescue laws¹⁴⁹) and Puerto Rico have adopted a duty to report, although these statutes’ scopes also vary. Some of these twenty-eight states have adopted more general duty-to-report laws, applying to a wide range of crimes. Nine such states require any person to report a broad array of crimes, generally those involving violence, including sexual

145. *E.g.*, Geest & Dari-Mattiacci, *supra* note 45, at 375 n.96 (classifying Wisconsin as having a duty-to-rescue law, whereas the law is actually a duty to rescue *or* to report); Givelber, *supra* note 43, at 3193 (same).

146. *E.g.*, Victor D. López & Eugene T. Maccarrone, *Should Emergency Good Deeds Go Unpunished? An Analysis of the Good Samaritan Statutes of the United States*, 45 RUTGERS L. REC. 105, 106 (2017), http://lawrecord.com/files/45_Rutgers_L_Rec_105.pdf [<https://perma.cc/8UHW-AP3G>] (classifying Hawai‘i as having a duty-to-rescue law, whereas the law is actually a duty to report); Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 92–93 (2005) (same).

147. MINN. STAT. § 604A.01 (2019); 11 R.I. GEN. LAWS § 11-56-1 (2019); TEX. PENAL CODE ANN. § 38.17 (West 2019); VT. STAT. ANN. tit. 12, § 519 (2019); WIS. STAT. § 940.34 (2019).

148. MINN. STAT. § 604A.01 (2019) (“Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel.”); TEX. PENAL CODE ANN. § 38.17(a)(2) (West 2019) (stating that the relevant person violates the law where “the actor fails to assist the child *or* immediately report the commission of the offense to a peace officer or law enforcement agency” (emphasis added)); WIS. STAT. § 940.34(2)(a) (2019) (stating that the relevant person “shall summon law enforcement officers or other assistance *or* shall provide assistance to the victim” (emphasis added)).

149. Of the five states with duty-to-rescue laws, only Vermont does not have either a separate duty-to-report law (as in the cases of Rhode Island and Texas, both of which have two separate duty-to-report laws) or a Bad Samaritan law that explicitly considers reporting to the authorities as a form of providing aid (as in the cases of Minnesota, Texas, and Wisconsin).

violence.¹⁵⁰ Other of the twenty-eight states and Puerto Rico have adopted more specific duty-to-report laws, applying to a narrower set of crimes or victims. Eighteen such states and Puerto Rico require everyone to report suspected child abuse or neglect.¹⁵¹ Three states require everyone to report sexual crimes, although two of these states mandate such reporting only when the victim is a child.¹⁵² One state requires everyone to report hazing.¹⁵³

Some categories of state Bad Samaritan laws overlap. Besides the statutes in Minnesota, Texas, and Wisconsin that impose a duty to rescue *or* to report,¹⁵⁴ Rhode Island features separate duties to rescue *and* to report,¹⁵⁵ and six states (Alaska, Florida, Massachusetts, Rhode Island, Texas, and Washington) have multiple duties to report.¹⁵⁶

Despite how widespread Bad Samaritan laws are in the United States, violations of such statutes, including duties to report, are seldom charged or successfully prosecuted.¹⁵⁷ Prosecutors typically prioritize addressing the

150. The nine states are Alaska, Colorado, Hawai'i, Massachusetts, Ohio, Rhode Island, Texas, Washington, and Wisconsin. Alaska divides its duty to report violent crimes into separate laws applying to victims who are children and adults. ALASKA STAT. §§ 11.56.765, 11.56.767 (2019). Colorado's statute requires the reporting of all crimes. COLO. REV. STAT. § 18-8-115 (2019). Hawai'i and Wisconsin's statutes require the reporting of all crimes when a victim is suffering from serious physical harm. HAW. REV. STAT. § 663-1.6 (2019); WIS. STAT. § 940.34 (2019). Ohio's statute requires the reporting of all felonies. OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2019). Texas's statute requires the reporting of all felonies in which a reasonable person would believe that serious bodily injury or death may have resulted. TEX. PENAL CODE ANN. § 38.171. The statutes in Massachusetts, Rhode Island, and Washington require the reporting of enumerated crimes. MASS. GEN. LAWS ch. 268, § 40 (2019); 11 R.I. GEN. LAWS § 11-1-5.1; WASH. REV. CODE § 9A.36.160 (2019); WASH. REV. CODE § 9A.36.160 (2019).

151. The eighteen states are Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. DEL. CODE ANN. Tit. 16, § 903 (2019); FLA. STAT. § 39.201 (2019); IDAHO CODE § 16-1605 (2019); IND. CODE § 31-33-5-1 (2019); KY. REV. STAT. ANN. § 620.030 (West 2019); MD. CODE ANN., FAM. LAW §§ 5-705, 5-704.1 (LexisNexis 2019); MISS. CODE ANN. § 43-21-353 (2019); NEB. REV. STAT. § 28-711 (2019); N.H. REV. STAT. ANN. § 169-C:29 (2019); N.J. STAT. ANN. § 9:6-8.10 (West 2019); N.M. STAT. ANN. § 32A-4-3 (2019); N.C. GEN. STAT. § 7B-301 (2019); OKLA. STAT. tit. 10A, § 1-2-101 (2019); 40 R.I. GEN. LAWS § 40-11-3(a) (2019); TENN. CODE ANN. §§ 37-1-403, 37-1-605 (2019); TEX. FAM. CODE ANN. § 261.101 (West 2019); UTAH CODE ANN. § 62A-4a-403 (LexisNexis 2019); WYO. STAT. ANN. § 14-3-205 (2019); *see also* P.R. LAWS ANN. tit. 8, § 446 (2019); MANDATORY REPORTERS, *supra* note 140, at 2.

152. The three states are California, Florida, and Nevada. Florida imposes a duty to report on those who witness sexual battery. FLA. STAT. § 794.027. California's and Nevada's duty-to-report laws only apply when the victim is a child, although California's threshold is "under 14 years of age" and Nevada's is even lower: "12 years of age or younger." CAL. PENAL CODE § 152.3 (West 2019); NEV. REV. STAT. § 202.882 (2019).

153. The state is Massachusetts. MASS. GEN. LAWS ch. 269, § 18 (2019).

154. *See supra* note 147 and accompanying text.

155. 11 R.I. GEN. LAWS §§ 11-1-5.1, 11-56-1; 40 R.I. GEN. LAWS § 40-11-3(a).

156. *See supra* notes 147, 149–52.

157. *See* Pardun, *supra* note 43, at 597. It is unclear how many individuals have been charged with violating Bad Samaritan laws or offered immunity-for-testimony deals. Statistics are not available for all

observed crime over a failure to report it or otherwise attempt to intervene. When prosecutors do consider charging—or threatening to charge—third parties, they tend to concentrate on alternate crimes, such as accomplice liability and aiding and abetting.¹⁵⁸ However, such offenses, while they may overlap with bystander conduct, do not encompass the full range of such behavior. Accomplice liability involves *commission* of certain acts with intent to assist the perpetrator, whereas duties to report and rescue concern *omission* of certain acts and no such *mens rea*.¹⁵⁹ Without enforcement of Bad Samaritan laws, many third parties to crimes and crises are thus left unaddressed.

III. CASE STUDIES

The callous or cruel conduct of witnesses has elevated certain cases of sexual violence to national or even international prominence. This Part describes four such instances in the United States: the Genovese, Araujo, Iverson, and Steubenville cases. All of the cases involved individual female victims, provoked similar disgust about the behavior of not only the perpetrators but also of the witnesses, and prompted calls (sometimes successful) for the introduction of Bad Samaritan statutes and other legal and social innovations. Part IV employs these case studies to propose original typologies of bystanders and upstanders and Part V draws lessons from these case studies to offer prescriptions for prodding bystanders to report certain crimes.

states in which Bad Samaritan laws exist. What data does exist suggests that violations of such laws are infrequently charged. In Massachusetts, which has two duty-to-report laws, no such cases have been reported to Westlaw, the state's Attorney General declined to respond to my inquiry on the record, and a spokesperson for the office of the Suffolk County District Attorney (which has jurisdiction over Boston) told me that the office could not recall ever filing a charge under the law. E-mail and Telephone Interviews with Jake Wark, Spokesperson, Mass. Suffolk Cty. Dist. Attorney's Office (July 27, 2018); Telephone Interview with anonymous employee, Mass. Attorney Gen.'s Office (July 25, 2018). According to the Massachusetts Sentencing Commission, only two cases under the state's more general duty-to-report law have been pursued since 2012 (the earliest year for which data is available), one of which was dismissed. Telephone Interview with anonymous employee, Mass. Sentencing Comm'n (Feb. 14, 2018). No such cases have been reported to Westlaw of Colorado's duty-to-report law either. A review of available references in Westlaw and LexisNexis revealed very few instances in which violations of existing Bad Samaritan laws were actually charged. (This information is incomplete, however, as it represents only reported cases.) Ohio, which has one of the broadest and oldest duty-to-report laws, has seen only eight reported cases since 1972, when the law was enacted. This is nonetheless the highest reported figure for any state with a Bad Samaritan law.

158. Telephone Interview with anonymous former prosecutor involved in the Steubenville Case (Jan. 8, 2018).

159. See Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396–97 (2007).

A. THE GENOVESE CASE

The first incident generally viewed as prompting discussion about Bad Samaritan laws in the United States occurred over half a century ago.¹⁶⁰ On March 13, 1964, twenty-eight-year-old Catherine “Kitty” Genovese was killed outside her Kew Gardens apartment in Queens, New York, after being stalked, stabbed, and sexually assaulted in multiple separate attacks by the same assailant over the course of about thirty-five minutes, starting around 3:20 AM.¹⁶¹ During the attacks, Genovese cried out: “[O]h, my God, he stabbed me! Please help me! Please help me!” and “I’m dying! I’m dying! I’m dying!”¹⁶²

The *New York Times* initially reported that thirty-seven of Genovese’s neighbors watched without calling the police;¹⁶³ that figure was soon revised upwards by one.¹⁶⁴ One neighbor later explained his lack of intervention by stating: “I didn’t want to get involved.”¹⁶⁵ Another said: “I didn’t want my husband to get involved.”¹⁶⁶ Others asserted that they misinterpreted the incident as a “lovers’ quarrel” or were too afraid or tired to help.¹⁶⁷ Still others claimed ignorance about their reason for not interceding.¹⁶⁸

Winston Moseley—a serial rapist of women both before his incarceration for attacking Genovese and during a brief escape from prison afterward¹⁶⁹—admitted assaulting Genovese but later recanted his confession.¹⁷⁰ When initially asked why he thought he could get away with his crimes against Genovese in front of so many witnesses, he replied: “I knew they wouldn’t do anything. People never do.”¹⁷¹

160. Jen Fifield, *Why It’s Hard to Punish ‘Bad Samaritans’*, PEW CHARITABLE TR. (Sept. 19, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/09/19/why-its-hard-to-punish-bad-samaritans> [https://perma.cc/N3FW-CM7E].

161. For initial coverage of the Genovese case, see Gansberg, *supra* note 4; *Queens Man Seized in Death of 2 Women*, N.Y. TIMES, Mar. 20, 1964, at 21; *Queens Woman is Stabbed to Death in Front of Home*, N.Y. TIMES, Mar. 14, 1964, at 26; *Suspect Committed in Slaying of Two*, N.Y. TIMES, Mar. 26, 1964, at 27; Loudon Wainwright, *The Dying Girl that No One Helped*, LIFE, Apr. 10, 1964, at 21, 21. For discussion of Moseley’s sexual assault of Genovese, see Robert D. McFadden, *Winston Moseley, Unsparing Killer of Kitty Genovese, Dies in Prison at 81*, N.Y. TIMES, Apr. 5, 2016, at A21.

162. Gansberg, *supra* note 4.

163. *Id.*

164. A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES 11 (1964).

165. Gansberg, *supra* note 4.

166. *Id.*; A.M. Rosenthal, *Study of the Sickness Called Apathy*, N.Y. TIMES, May 3, 1964, at SM24.

167. Gansberg, *supra* note 4.

168. *Id.*

169. Nicholas Lemann, *A Call for Help*, NEW YORKER, Mar. 10, 2014, at 73, 74–76.

170. Stephanie Merry, *Truer-Than-True Crime*, WASH. POST, June 30, 2016, at C1, C4.

171. ALBERT A. SEEDMAN & PETER HELLMAN, CHIEF! 133 (1974).

The *New York Times* later acknowledged that subsequent investigating (including by Genovese's brother, Bill¹⁷²) disputed facts, or their interpretation, presented in the newspaper's original narrative.¹⁷³ Genovese was attacked twice, not the three times the *New York Times* initially reported.¹⁷⁴ The original *New York Times* article acknowledged that a man (later identified as Robert Mozer¹⁷⁵) implored the assailant to "[I]et that girl alone!,"¹⁷⁶ but the article did not emphasize that Mozer's intervention caused Moseley to leave temporarily (while Genovese still only had nonfatal wounds), which Moseley later admitted.¹⁷⁷ An article in the *New York Times* in 2016 acknowledged that the article the newspaper had published fifty years earlier about the murder "grossly exaggerated the number of witnesses and what they had perceived. None saw the attack in its entirety. Only a few had glimpsed parts of it, or recognized the cries for help."¹⁷⁸ Specifically, few people saw the first attack and only one saw the second.¹⁷⁹ There may have been a total of only two people (Joseph Fink and Karl Ross) who saw the crime occur, understood its nature, and chose not to do anything until too late.¹⁸⁰ Furthermore, contrary to the original claim in the *New York Times* that nobody called the police during the assault, at least one person (Samuel Hoffman) reportedly did.¹⁸¹ Some believe that the police may have ignored and did not record these calls.¹⁸² Hoffman himself theorized that if the police had come when he called, Genovese would probably have survived.¹⁸³ Omitted from the *New York Times*'s original article was the fact that a young woman, Sophia Farrar, left the safety of her apartment—without knowing whether the perpetrator had fled—to hold Genovese in her arms until the police arrived.¹⁸⁴ Farrar is also likely the reason law enforcement arrived

172. THE WITNESS (PBS 2017).

173. An editor's note appended to the online version of the *New York Times*'s initial coverage states the following: "Later reporting by The Times and others has called into question significant elements of this account." Martin Gansberg, *37 Who Saw Murder Didn't Call the Police; Apathy at Stabbing of Queens Woman Shocks Inspector*, N.Y. TIMES (Oct. 12, 2016), <http://www.nytimes.com/1964/03/27/37-who-saw-murder-didnt-call-the-police.html> [<https://perma.cc/4BL6-MRV7>].

174. Jim Rasenberger, *Kitty, 40 Years Later*, N.Y. TIMES, Feb. 8, 2004, § 14, at 1.

175. KEVIN COOK, *KITTY GENOVESE* 208–09 (2014); Lemann, *supra* note 169, at 74.

176. Gansberg, *supra* note 4.

177. Larry Getlen, *Debunking the Myth of Kitty Genovese*, N.Y. POST (Feb. 16, 2014, 1:46 AM), <https://nypost.com/2014/02/16/book-reveals-real-story-behind-the-kitty-genovese-murder> [<https://perma.cc/NU44-WYLB>].

178. McFadden, *supra* note 161.

179. Lemann, *supra* note 169, at 74.

180. Getlen, *supra* note 177.

181. COOK, *supra* note 175, at 206–08; McFadden, *supra* note 161.

182. See Rasenberger, *supra* note 174.

183. COOK, *supra* note 175, at 208.

184. *Id.* at 218–20.

soon thereafter, as she shouted to a neighbor, Ross, to call the police, which he reluctantly did.¹⁸⁵ These and other revised accounts suggest that far fewer of Genovese's neighbors actually witnessed the killing than was initially reported, that the true nature of the incident may not have been clear to some of those who did witness it, that more sympathetic and normal motives than indifference (such as uncertainty, confusion, and fear) may have led the actual witnesses not to interfere, and that some of these witnesses did indeed intervene (albeit unsuccessfully)—with Mozer scaring off the assailant temporarily, Hoffman fruitlessly calling the police, and Farrar, a genuine hero, indirectly summoning law enforcement and directly risking her life to cradle Genovese as she died.

The Genovese murder became a prominent case study in law, psychology, sociology, and popular culture.¹⁸⁶ The case exemplified the supposed “bystander effect” (also known as the “Genovese effect”): the theory that the presence of others discourages individuals from intervening in emergencies. This alleged phenomenon is attributed to a “diffusion of responsibility”: the counterintuitive theory that, the more bystanders there are to an emergency, the less likely any one of them will intercede.¹⁸⁷ Recent studies, however, have cast doubt on that theory, bolstering the notion of safety in numbers.¹⁸⁸

The Genovese case has contributed to numerous and varied initiatives in the United States, including the creation of the national 911 emergency call system, survivor services, rape and stalking prevention programs, community self-help groups, Guardian Angels, Good and Bad Samaritan legislation, and research in behavioral sciences.¹⁸⁹ Moseley himself, unsuccessfully seeking parole,¹⁹⁰ had the gall to argue in an op-ed in the *New York Times* in 1977: “The crime was tragic, but it did serve society, urging

185. *Id.* at 112.

186. See, e.g., Maureen Dowd, Opinion, *20 Years After the Murder of Kitty Genovese, the Question Remains: Why?*, N.Y. TIMES, Mar. 12, 1984, at B1; Merry, *supra* note 170.

187. John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377, 377 (1968); Rasenberger, *supra* note 174.

188. Richard Philpot et al., *Would I Be Helped? Cross-National CCTV Footage Shows That Intervention Is the Norm in Public Conflicts*, AM. PSYCHOLOGIST (forthcoming 2019); Daniel R. Stalder, *Revisiting the Issue of Safety in Numbers: The Likelihood of Receiving Help from a Group*, 3 SOC. INFLUENCE 24, 25 (2008); Daniel R. Stalder, *New Study Suggests Bystander Apathy Is Not the Norm*, PSYCHOL. TODAY (July 15, 2019), <https://www.psychologytoday.com/us/blog/bias-fundamentals/201907/new-study-suggests-bystander-apathy-is-not-the-norm> [<https://perma.cc/2JY6-P7PJ>].

189. See, e.g., COOK, *supra* note 175, at 165–66, 170–71, 201; Carolyn Abate, *History of 911: America's Emergency Service, Before and After Kitty Genovese*, PBS (Jan. 19, 2017), <http://www.pbs.org/independentlens/blog/history-of-911-americas-emergency-service-before-and-after-kitty-genovese> [<https://perma.cc/C5ME-XGZF>].

190. McFadden, *supra* note 161.

it as it did to come to the aid of its members in distress or danger.”¹⁹¹

B. THE ARAUJO CASE

On March 6, 1983, twenty-one-year-old Cheryl Araujo was gang raped at Big Dan’s Tavern in New Bedford, Massachusetts,¹⁹² a crime that came to be known as the “Big Dan’s rape case.”¹⁹³ During the sexual assault, Araujo screamed, kicked, and begged for help.¹⁹⁴ Some witnesses taunted her and cheered during the two-hour attack, and no one called the police.¹⁹⁵ When interviewed by a reporter later about why he did nothing, one bystander rhetorically asked: “Why should I care?”¹⁹⁶

The exact number of people accused of being either rapists or cheering onlookers changed over time.¹⁹⁷ Originally, twenty patrons in the bar were reported to have watched,¹⁹⁸ including “12 to 15 jeering men.”¹⁹⁹ Later it became clear that a total of nine people (all men) were present besides Araujo.²⁰⁰ Six of the men (John Cordeiro, Victor Raposo, Daniel Silvia,²⁰¹ Joseph Vieira, and Virgilio and Jose Medeiros, who were not related) were subsequently charged with aggravated rape.²⁰² The Medeiroses were the only people present during the rape who cheered (yelling “Go for it! Go for it”²⁰³ or “Do it! Do it!”²⁰⁴).²⁰⁵ One patron (Sylvester Vultao) claimed to have been

191. Winston Moseley, Opinion, *‘Today I’m a Man Who Wants to be an Asset,’* N.Y. TIMES, Apr. 16, 1977, at 15.

192. Dudley Clendinen, *Barroom Rape Shames Town of Proud Heritage*, N.Y. TIMES, Mar. 17, 1983, at A16.

193. Jay Pateakos, *Brothers Break Silence in Big Dan’s Rape Case*, HERALD NEWS (Mass.) (Oct. 26, 2009, 4:42 AM), <http://www.heraldnews.com/x665149028/After-26-years-brothers-break-silence> [https://perma.cc/95AW-8FGA].

194. *Court in New Bedford Rape Hears Woman’s Testimony*, N.Y. TIMES, Feb. 25, 1984, § 1, at 12.

195. Clendinen, *supra* note 192.

196. *Id.*

197. *Reports to Police Questioned in New Bedford Rape Trials*, N.Y. TIMES, Feb. 28, 1984, at A18.

198. Fox Butterfield, *Trial of Six Starts Today in Pool Table Rape in Massachusetts*, N.Y. TIMES, Feb. 6, 1984, at A14.

199. Jonathan Friendly, *The New Bedford Rape Case*, N.Y. TIMES, Apr. 11, 1984, at A19.

200. *Id.*; Alan Levin, *Big Dan’s: Questions Persist*, STANDARD-TIMES (Mass.), Apr. 1, 1984, at 1.

201. Sources cited elsewhere in this Article differ on the spelling of Daniel Silvia’s name. *E.g.*, Butterfield, *supra* note 198 (spelling the surname “Silvio”); Levin, *supra* note 200 (spelling the surname “Silva”). For consistency, this Article has chosen to use the spelling used in the trial transcript: “Silvia.” Transcript of Record vol. 1, at 1, Commonwealth v. Vieira, Nos. 12265, 12266 (Bristol Cty. Super. Ct. July 9, 1984) (on file with author).

202. Butterfield, *supra* note 198; *Bartender Testifying in Rape Case Says He Sensed Trouble at Tavern*, N.Y. TIMES, Mar. 3, 1984, § 1, at 10.

203. Friendly, *supra* note 199.

204. Alan Levin & Margaret Charig, *The Bartender Tells His Story*, STANDARD-TIMES (Mass.), Mar. 1, 1984, at 1.

205. Clendinen, *supra* note 192; Friendly, *supra* note 199; *Bartender Testifying in Rape Case Says*

drunk and asleep during the crime.²⁰⁶ Also present was a bartender, Carlos Machado.²⁰⁷ He testified that the Medeiroses encouraged Cordeiro, Raposo, Silvia, and Vieira,²⁰⁸ and that Virgilio Medeiros prevented Machado from calling the police, blocked him from leaving the bar, and ordered him to lock the bar's door from inside.²⁰⁹ Machado further testified that the Medeiroses threatened him.²¹⁰ Machado did not immediately report the crime.²¹¹ The ninth man was a patron (Vladimiro Pacheco), whom Machado told to summon the police.²¹² Initially, Pacheco refused, replying to Machado: "Why don't you go? I'm not in charge here."²¹³ Later explaining his inaction, Pacheco stated that he "didn't want to get into problems."²¹⁴ He testified that he then did try calling the police but dialed a wrong number and then refused to try again.²¹⁵ A witness testified that Silvia threatened one of the patrons with death if he told the police Silvia was involved.²¹⁶

Eventually, Araujo made her way outside the bar, where three men in a truck (Bobby Silva and brothers Daniel and Michael O'Neill) saw her crying and called the police.²¹⁷ Michael O'Neill later stated that several men came out of the bar after Araujo but then retreated back in after seeing him and his two companions. When four men reemerged from the bar and approached their cars, Michael O'Neill picked up a rod on the street and moved towards them.²¹⁸ He then left Araujo and his brother temporarily to unsuccessfully chase the men in his truck.²¹⁹ Afterwards, a police officer picked Araujo up, finding her naked from the waist down.²²⁰ According to the judge who presided over the Big Dan's rape case trial, Silva and the O'Neills' testimony

He Sensed Trouble at Tavern, *supra* note 202.

206. Friendly, *supra* note 199; Levin, *supra* note 200.

207. Friendly, *supra* note 199; Jesus Rangel, *Rape Trial Keeps Massachusetts Area on an Emotional Edge*, N.Y. TIMES, Mar. 4, 1984, § 1, at 22 [hereinafter Rangel, *Trial*].

208. Transcript of Record at vol. 6, 17–19, *Commonwealth v. Vieira*, Nos. 12265, 12266 (Bristol Cty. Super. Ct. 1984).

209. Levin & Charig, *supra* note 204; Rangel, *Trial*, *supra* note 207; Jesus Rangel, *Thousands March to Protest Bar Rape Convictions*, N.Y. TIMES, Mar. 24, 1984, § 1, at 7 [hereinafter Rangel, *March*].

210. Rangel, *Trial*, *supra* note 207.

211. Rangel, *March*, *supra* note 209.

212. Friendly, *supra* note 199; *Failed Call*, *supra* note 6.

213. *Failed Call*, *supra* note 6.

214. *Id.*

215. *Id.*

216. Jesus Rangel, *2 Are Convicted in New England Rape Case*, N.Y. TIMES, Mar. 18, 1984, § 1, at 1 [hereinafter Rangel, *Convicted*].

217. Pateakos, *supra* note 193; *Witness Continues to Verify Account of Barroom Rape*, N.Y. TIMES, Mar. 6, 1984, at B13 [hereinafter *Witness Continues*].

218. Pateakos, *supra* note 193.

219. *Id.*

220. *Witness Continues*, *supra* note 217.

bolstered Araujo's credibility.²²¹

Four of the suspects (Cordeiro, Raposo, Silvia, and Vieira) were eventually convicted and sentenced to between six and twelve years imprisonment.²²² The remaining two suspects (the Medeiroses) were acquitted of the rape charge.²²³

After the ordeal, Araujo moved to Florida, where she died in a car accident on December 14, 1986, at the age of twenty-five.²²⁴ Her convicted rapists were all released from prison within the following three years.²²⁵

As with Genovese, fewer people actually witnessed the crime against Araujo than initially reported. And, like with Genovese, some people (Machado and Pacheco) did try to intervene, or so they claimed. Three others (Silva and the O'Neills) definitely helped her immediately afterwards by comforting her, warding off the men who came after her, and calling the police. Unlike with Genovese, though, some of the witnesses (the Medeiroses) actually goaded on the attack.

As with Genovese, the attack against Araujo became a case study in popular culture²²⁶ and spurred the development of Bad Samaritan laws.²²⁷ In direct response to Araujo's rape, the same state in which the crime was perpetrated (Massachusetts) introduced a duty-to-report law,²²⁸ a different state (Rhode Island) also introduced a duty-to-report law,²²⁹ and a third state (Minnesota) introduced a duty-to-rescue law.²³⁰ The Massachusetts law imposes a fine of between \$500 and \$2500 on individuals who witness aggravated rape, rape, murder, manslaughter, or armed robbery and fail to report the crime;²³¹ the Rhode Island law imposes a maximum term of six months imprisonment and a fine of between \$500 and \$1000 on individuals who witness sexual assault, murder, manslaughter, or armed robbery and fail

221. Pateakos, *supra* note 193.

222. *Convictions of 4 Are Upheld in New Bedford Rape Case*, N.Y. TIMES, Mar. 12, 1988, § 1, at 10; Rangel, *Convicted*, *supra* note 216; Jesus Rangel, *Fall River Jury Finds 2 More Defendants Guilty of Rape in Bar*, N.Y. TIMES, Mar. 23, 1984, at A1 [hereinafter Rangel, *Jury Finds*].

223. Rangel, *Jury Finds*, *supra* note 222.

224. *Victim in a Noted Rape Case Dies in Automobile Accident*, N.Y. TIMES, Dec. 18, 1986, at B30.

225. Pateakos, *supra* note 193.

226. Araujo's case was the basis of a film in which she is portrayed by Jodie Foster, a role for which Foster won her first Academy Award. *THE ACCUSED* (Paramount Pictures 1988); Frank Bruni, *Her Toughest Role? Being True to Herself*, N.Y. TIMES, May 1, 2016, at AR20.

227. Kiesel, *supra* note 43.

228. Rangel, *March*, *supra* note 209.

229. Clara Germani, *State Laws Seek to Boost the "Good Samaritan" in Citizens*, CHRISTIAN SCI. MONITOR, Sept. 22, 1983, at 3.

230. Austin Wehrwein, *Samaritan*, NAT'L L.J., Aug. 22, 1983, at 2, 2.

231. MASS. GEN. LAWS ch. 268, § 40 (2019).

to report the crime;²³² and the Minnesota law imposes a fine of no more than \$300 on individuals who decline to help someone in danger.²³³

C. THE IVERSON CASE

In the early morning of May 25, 1997, Leroy Iverson left his seven-year-old daughter, Sherrice, and fourteen-year-old son, Harold (Sherrice's half-brother), unsupervised for three-and-a-half hours while Leroy gambled at Primadonna Resort and Casino in Primm, Nevada.²³⁴ (Sherrice's mother, Yolanda Manuel, did not accompany her on this trip from their home in California.) During that time, hotel security guards twice escorted Sherrice to Leroy. At another point, the guards noticed that Sherrice was unattended and paged for someone to collect her, which Harold did before leaving her alone again.²³⁵

When Sherrice later went into the women's restroom, Jeremy Strohmeyer followed her inside.²³⁶ Strohmeyer's friend and fellow eighteen-year-old, David Cash, Jr., in turn, followed Strohmeyer into the restroom. There, he saw Strohmeyer pick Sherrice up, put one hand over her mouth, put his other arm between her legs, carry her into the handicapped stall, and lock the door. Cash entered the adjacent stall and climbed onto the toilet seat so he could look over the divider. According to Cash, Sherrice was struggling and Strohmeyer repeatedly told her: "Shut up or I'll kill you."²³⁷ Cash later claimed to have tapped Strohmeyer on the head and told him to let Sherrice go and leave the restroom, but that Strohmeyer ignored him.

Cash himself left the restroom after less than two minutes.²³⁸ According to a journalist who viewed surveillance footage, Cash "hovered just outside the bathroom door, milling about" while Strohmeyer continued assaulting Iverson inside.²³⁹ It was unclear to the reporter whether Cash knew what was happening inside or whether he was "standing guard outside"²⁴⁰

While outside the restroom, Cash told no one what he had seen despite acknowledging later that he expected "something bad" and "probably feared

232. 11 R.I. GEN. LAWS § 11-1-5.1 (2019).

233. MINN. STAT. § 604A.01, subdiv. 1 (2019); *id.* § 609.02, subdiv. 4a.

234. Zamichow, *supra* note 7.

235. Tom Gorman, *Casino Surveillance Footage Tells Story of Girl's Killing*, L.A. TIMES, May 28, 1997, at A1.

236. Zamichow, *supra* note 7.

237. *Id.* (quoting David Cash).

238. *Id.*

239. Gorman, *supra* note 235.

240. *Id.*

the worst.”²⁴¹ When the police later questioned Cash about whether he was concerned over Sherrice’s safety, he responded: “Um, I’m sure I thought, you know, what would happen to her, what is he going to do to her? Um, I mean she was being, you know, restrained against her will.”²⁴² While in the restroom for a total of almost twenty-five minutes, Strohmeyer raped and strangled Sherrice, smothered her with his body, snapped her neck, and then stuffed her corpse into a toilet bowl.

The two friends reunited immediately afterwards, when Strohmeyer exited the restroom.²⁴³ According to Cash, after he asked Strohmeyer what happened, his friend replied: “I killed her.”²⁴⁴ Cash also asked Strohmeyer if the little girl had been sexually aroused.

Over the next two days, while gambling and drinking, the two friends repeatedly discussed Strohmeyer’s molestation and murder of Sherrice.²⁴⁵ They promised not to tell anyone. They also agreed that, if caught, they would state that they were in the restroom playing hide-and-seek, Sherrice locked herself in a stall, and then the two men left.²⁴⁶

When a reporter later asked Cash whether he was appalled that his friend admitted killing a little girl, Cash responded: “I’m not going to get upset over somebody else’s life. I just worry about myself first. I’m not going to lose sleep over somebody else’s problems.”²⁴⁷ When the journalist asked Cash why he did not report Strohmeyer to the police, Cash replied: “I didn’t want to be the person who takes away his last day, his last night of freedom.”²⁴⁸ Cash said that he still considered Strohmeyer a friend because “[h]e didn’t do anything to me.”²⁴⁹ For his conduct during and attitude about this crime, *Time* magazine dubbed Cash “the Bad Samaritan.”²⁵⁰

When Strohmeyer believed the police determined he was the perpetrator from a surveillance video broadcast on TV, he told Cash that he was going to flee. Cash later acknowledged responding: “Do whatever

241. Zamichow, *supra* note 7.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. For additional background on Sherrice Iverson’s rape and murder, see Gorman, *supra* note 235; Don Terry, *Mother Rages Against Indifference*, N.Y. TIMES, Aug. 24, 1998, at A10; Zamichow, *supra* note 7.

247. Zamichow, *supra* note 7 (internal quotation marks omitted).

248. *Id.* (internal quotation marks omitted).

249. *Id.* (internal quotation marks omitted).

250. Cathy Booth, *The Bad Samaritan*, TIME, Sept. 7, 1998, at 59, 59.

you're going to do—but do it now.”²⁵¹ Cash subsequently did go to the police, but only after his father (who knew Strohmeyer and had accompanied the two friends to Primm but was not aware of the crime when it occurred) confronted Cash over surveillance imagery from the scene.²⁵²

Before talking to the police, Cash told a friend, Jeremy Phillips, about the crime. When a journalist asked Phillips why he did not report Strohmeyer to law enforcement, he answered:

Because I didn't want to get [Cash] in trouble. I was waiting for [Cash] to do it. For men, it's like a respect for your male friends. It's like almost an oath, a pact that you take when you become best friends with a guy.

I've talked with a lot of guys about it—what they would do if their best friend killed somebody. Every guy I've asked has said they wouldn't say anything.²⁵³

Before being arrested, Strohmeyer admitted his crime to two friends, Justin Ware and Jordan Wheeler. Ware told a journalist that he did not report Strohmeyer because “I didn't know what to do. I was just so scared.”²⁵⁴ He added: “I wanted to tell someone, but I couldn't, I couldn't live with myself turning Jeremy in, even though I know that was the smart thing to do. I couldn't bear doing that, because he was my best friend.”²⁵⁵ Wheeler did not report Strohmeyer either, he nonsensically explained, because “[a]t the time, I was grounded. My parents had seen the video. I really didn't want to go to them and say, ‘Oh, Mom, my best friend killed someone, so can I go to the police?’”²⁵⁶

Unlike these four men who were aware of the crime but did not report it unprompted (Cash, Phillips, Ware, and Wheeler), four women did proactively identify Strohmeyer to authorities. Two who recognized him from a news report told their high school principal; one (Carmela Rhymer), who also recognized Strohmeyer on TV, reported him directly to the police; and a fourth (Strohmeyer's ex-girlfriend, Agnes Lee), to whom Strohmeyer admitted his crime, alerted her father, who then called the police to have her speak directly to them.²⁵⁷

That fall, Cash enrolled at the University of California at Berkeley

251. Zamichow, *supra* note 7.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

(“UC-Berkeley”).²⁵⁸ He said that his notoriety from the case helped him get dates with women and, he hoped, a movie deal.²⁵⁹ He also said that he planned to “get money out of this.”²⁶⁰ In addition, he stated: “The simple fact remains that I do not know this little girl, . . . I do not know starving children in Panama. I do not know people that die of disease in Egypt. [I feel sad only] that I lost a best friend.”²⁶¹

The following year, on August 26, 1998, Manuel (Sherrice’s mother) and hundreds of others protested on UC-Berkeley’s campus to demand Cash’s expulsion on the ground that he lacked the moral character to attend the university.²⁶² They were outraged over his callousness and the fact that there was no law in Nevada (or California) penalizing an individual who witnesses a crime but does not intervene in or report it.²⁶³ Some of them believed that Cash “ha[d] the blood of a little child on his hands.”²⁶⁴ Manuel stated that Cash was “an accomplice to the murder” of her daughter.²⁶⁵ Others agreed.²⁶⁶ Some UC-Berkeley students expressed discomfort at sharing a dorm and campus with Cash and disappointment in the university for allowing him to remain enrolled.²⁶⁷ One speaker at the protest remarked: “Fate gave David Cash the opportunity to be heroic, and he turned his back on that opportunity. . . . He was in the singular position of being able to save a seven-year-old child, and he chose to do nothing.”²⁶⁸ In his defense, Cash wrote in an email to two newspapers: “Most people seem to be under the impression that I was in a position to stop the heinous crime. . . . I did not witness the alleged molestation and murder.”²⁶⁹ Three weeks after the protest, Cash sustained his first physical assault, when a person was arrested for misdemeanor battery after spitting in Cash’s face.²⁷⁰ During his time as

258. *Id.*

259. Steve Chapman, *Should Doing Nothing About a Crime Be a Crime?*, CHI. TRIB., Aug. 27, 1998, § 1, at 23; Zamichow, *supra* note 7.

260. Fiona Morgan, *Shunning and Shaming*, SALON (Aug. 28, 1998, 6:17 PM), https://www.salon.com/1998/08/28/28hot_2 [<https://perma.cc/FB6Z-WPWP>].

261. *Id.* (brackets in original).

262. Sam Diaz, *Protest Targets Man Who Didn’t Halt Rape, Killing*, SAN JOSE MERCURY NEWS, Aug. 20, 1998, at 1A.

263. *Id.*

264. *Id.*

265. Morgan, *supra* note 260.

266. *Id.*

267. *Id.*

268. Booth, *supra* note 250, at 60.

269. *Id.*

270. *Casino Killing Witness Spit On*, ASSOCIATED PRESS (Sept. 18, 1998), <http://www.apnewsarchive.com/1998/Casino-Killing-Witness-Spit-On/id-8b25edec1e85f74950cb0a14386df850> [<https://perma.cc/KH72-WDVN>].

an undergraduate, the student government unsuccessfully lobbied the university administration twice for his expulsion.²⁷¹ In 1999, Cash was interviewed on “60 Minutes,” during which he acknowledged that “technically, I could have stopped” the assault of Iverson.²⁷²

UC-Berkeley’s spokesperson said that the university had no provision for expelling students who have not been charged with or convicted of a crime.²⁷³ (Cash would go on to graduate from UC-Berkeley in December 2001 with a bachelor’s degree in nuclear engineering.²⁷⁴) Prosecutors in Clark County, Nevada, stated that Cash could not be charged with any crime because he did not commit one.²⁷⁵ A prosecutor said that Cash was investigated as a possible accessory to Strohmeyer’s crimes, but that Cash’s conduct did not meet the necessary criteria.²⁷⁶ The prosecutor added that Cash could have been charged with helping Strohmeyer flee the state except that it was Cash’s father who drove them back to California.²⁷⁷

Also, in 1998, a diverse group of outraged individuals, led by Manuel, began circulating two petitions.²⁷⁸ The first petition—aimed at prosecutors in Clark County, Nevada, and supported by a coalition of blacks, whites, Christians, Muslims, Jews, radio talk-show hosts, conservatives, and liberals—called for charges against Cash.²⁷⁹ Their stated goal of this petition was ten thousand signatures, but they collected double that number.²⁸⁰ The second petition—aimed at the Nevada legislature—proposed a law, the “Sherrice Iverson Memorial Act,” that would make it a crime for anyone knowledgeable of a sexual assault on a child to fail to report it.²⁸¹ The group also intended to campaign for a similar law at the federal level.²⁸²

Strohmeyer initially confessed to kidnapping, sexually assaulting, and murdering Sherrice but then recanted.²⁸³ Ultimately, on September 8, 1998, Strohmeyer pleaded guilty to first-degree murder in exchange for avoiding

271. Rachel Crosby, *In Strohmeyer Case, ‘Bad Samaritan’ David Cash Led to New Law*, L.V. REV.-J. (May 19, 2017, 6:42 PM), <https://www.reviewjournal.com/crime/homicides/in-strohmeyer-case-bad-samaritan-david-cash-led-to-new-law> [<https://perma.cc/8QY9-K4KA>] [hereinafter Crosby, *Case*].

272. *60 Minutes: The Bad Samaritan?* (CBS television broadcast Sept. 27, 1998).

273. Diaz, *supra* note 262.

274. Crosby, *Case*, *supra* note 271.

275. Diaz, *supra* note 262.

276. *Id.*

277. *Id.*

278. Terry, *supra* note 246.

279. *Id.*

280. Chapman, *supra* note 259; Terry, *supra* note 246; Morgan, *supra* note 260.

281. Chapman, *supra* note 259; Diaz, *supra* note 262; Terry, *supra* note 246.

282. Chapman, *supra* note 259; Terry, *supra* note 246.

283. Terry, *supra* note 246; Zamichow, *supra* note 7.

capital punishment.²⁸⁴ At his plea hearing Strohmeyer said of Cash: “He makes me sick. [He] was offering me praise for what had happened.”²⁸⁵ The following month, Strohmeyer was sentenced to life imprisonment without the possibility of parole.²⁸⁶ In 2000, he appealed, and, six years later, a federal judge upheld his conviction.²⁸⁷

Inspired by Sherrice Iverson’s murder, legislators at both the federal and state levels introduced Bad Samaritan bills named after her.²⁸⁸ The day after Strohmeyer pleaded guilty, Congressperson Nick Lampson of Texas and Senator Barbara Boxer of California introduced identical bills named the “Sherrice Iverson Act.”²⁸⁹ The legislation sought to amend the Child Abuse Prevention and Treatment Act to require any state receiving grants for such programs to certify 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.²⁹⁰

The House bill garnered twenty-five cosponsors, the plurality of which was from California, and none of which was from Nevada.²⁹¹ No Senators cosponsored the Senate bill.²⁹² Neither bill made it out of the committee to which it was referred.²⁹³ Boxer reintroduced her bill the following year, which again elicited no cosponsors and never made it out of the relevant committee.²⁹⁴

Soon thereafter, both Nevada and California were more successful than

284. Tim Dahlberg, *Teen Pleads Guilty to Killing 7-Year-Old: Casino Slaying Yields Life Sentence*, WASH. POST, Sept. 9, 1998, at A2; Michael Kelly, Opinion, ‘Somebody Else’s Problems,’ WASH. POST, Sept. 9, 1998, at A19.

285. *Casino Murderer Gets Life*, CBS NEWS (Oct. 14, 1998, 1:15 PM), <https://www.cbsnews.com/news/casino-murderer-gets-life> [<https://perma.cc/7UKA-5RDD>].

286. *Id.*; *Killer of Girl in Casino Gets Life Term*, N.Y. TIMES, Oct. 15, 1998, at A24.

287. Rachel Crosby, *7-Year-Old Girl’s Murder at Nevada Casino Still Haunts 20 Years Later*, L.V. REV.–J. (May 19, 2017, 12:17 PM), <https://www.reviewjournal.com/crime/homicides/7-year-old-girls-murder-at-nevada-casino-still-haunts-20-years-later>.

288. Booth, *supra* note 250, at 59.

289. H.R. 4531, 105th Cong. (1998); S. 2452, 105th Cong. (1998).

290. H.R. 4531, 105th Cong. (1998); S. 2452, 105th Cong. (1998).

291. H.R. 4531, 105th Cong. (1998); *H.R.4531 – Sherrice Iverson Act*, CONGRESS.GOV, <https://www.congress.gov/bill/105th-congress/house-bill/4531/cosponsors> [<https://perma.cc/A6Z3-GNDV>].

292. S. 2452, 105th Cong. (1998); *S.2452 – Sherrice Iverson Act*, CONGRESS.GOV, <https://www.congress.gov/bill/105th-congress/senate-bill/2452/cosponsors> [<https://perma.cc/ZT6L-WSTP>].

293. *H.R.4531 – Sherrice Iverson Act*, *supra* note 291; *S.2452 – Sherrice Iverson Act*, *supra* note 292.

294. S. 793, 106th Cong. (1999); *All Information (Except Text) for S.793 – Sherrice Iverson Act*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/senate-bill/793/all-info?r=1> [<https://perma.cc/XW9K-4C3N>].

Congress in enacting legislation inspired by and named after Sherrice Iverson to promote a duty to report witnessing particular crimes against children. On March 17, 1999, Nevada Assemblyperson Richard Perkins sponsored “The Child Protection Act,” also known as “The Sherrice Iverson Bill.”²⁹⁵ This act was approved on June 11, 1999, and became effective on October 1 of the same year.²⁹⁶ The legislation requires “a person who knows or has reasonable cause to believe that another person has committed a violent or sexual offense against a child who is 12 years of age or younger . . .” to report the offense to a law enforcement agency.²⁹⁷ Violation of the law constitutes a misdemeanor,²⁹⁸ which is punishable by imprisonment in the county jail for not more than six months, by a fine of not more than \$1000, or both.²⁹⁹

On September 18, 2000, California Governor Gray Davis signed into law a bill titled the “Sherrice Iverson Child Victim Protection Act.”³⁰⁰ The legislation requires, with specified exceptions, any person to report to a peace officer the commission of murder, rape, or a lewd or lascivious act, when committed against a child under fourteen years of age.³⁰¹ Per the bill, failure to notify would qualify as “a misdemeanor punishable by a fine of \$1,500, or by imprisonment in a county jail for up to 6 months, or both.”³⁰²

D. THE STEUBENVILLE CASE

Over the course of approximately six hours on the night of August 11, 2012, and early morning of the following day, a sixteen-year-old girl from Weirton, West Virginia, was intermittently raped by two boys her same age, Trent Mays and Ma’lik Richmond, who were football players at Steubenville High School (“SHS”) in Steubenville, Ohio.³⁰³

At the time, Ohio had not just one but two duty-to-report statutes in effect, both of which applied to the situation at hand: rape of a minor. One,

295. Minutes of the J. Committee on Judiciary, 70th Sess. (Nev. 1999), available at <https://www.leg.state.nv.us/Session/70th1999/Minutes/AM-JUD-990317-AB267.html> [<https://perma.cc/9D69-EMNY>].

296. Crosby, *Case*, *supra* note 271.

297. NEV. REV. STAT. § 202.882 (2019).

298. *Id.*

299. *Id.* § 193.150.

300. Assemb. 1422, 1999-2000 Reg. Sess. (Cal. 2000) (enacted); “*Sherrice Iverson*” *Bill Becomes Law*, L.A. TIMES, Sept. 19, 2000, at B4.

301. CAL. PENAL CODE § 152.3 (West 2019).

302. Cal. Assemb. 1422.

303. Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 17, 2012, at D1; Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape That Social Media Brought to Light*, N.Y. TIMES, Mar. 18, 2013, at A10.

a general duty to report, made it a crime for anyone “knowing that a felony has been or is being committed, [to] knowingly fail to report such information to law enforcement authorities” (Ohio’s general duty-to-report law).³⁰⁴ The other, a specific duty to report, made it a crime for particular people (including school teachers, school employees, and school authorities) not to immediately report child abuse or neglect to appropriate authorities (Ohio’s specific duty-to-report law).³⁰⁵ Ohio did not have any duty-to-rescue statutes in effect at the time or since.³⁰⁶

During the evening of the crime, the victim attended several parties in the Steubenville area, at which she drank alcohol and may have been drugged.³⁰⁷ Soon, the victim was stumbling, slurring her speech, and vomiting, and she needed assistance walking. At one point, a witness stated, Mays and Richmond held her hair back while she vomited. Eventually, the victim fell unconscious.³⁰⁸

A witness would later testify that onlookers taunted the victim and cheered as an SHS student, Pat Pizzoferrato, dared the onlookers to urinate on her.³⁰⁹ The victim was so incapacitated that, at one point, Mays and Richmond carried her by her wrists and ankles.³¹⁰

While in a car owned by SHS football player Mark Cole II driving to a party at Cole’s home, another SHS football player, Evan Westlake, drove while Richmond sat in the front passenger seat and Cole sat with Mays and the victim in the back.³¹¹ Westlake testified later that he heard who he thought was Mays say “get this,” perhaps meaning that Cole should document what he was doing to the victim.³¹² Cole took a photo and recorded a video on his cell phone of Mays flashing the victim’s breasts and

304. OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2019).

305. *Id.* § 2151.421.

306. See Appendix, *supra* note 41.

307. Alexander Abad-Santos, *Local Leaks Tipsters Allege Steubenville Victim Was Drugged*, THE ATLANTIC (Jan. 4, 2013), <https://www.theatlantic.com/national/archive/2013/01/local-leaks-tipsters-allege-steubenville-victim-was-drugged/319733> [<https://perma.cc/Y7Y8-VA8K>]; Rachel Dissell, *Rape Charges Against High School Players Divide Football Town of Steubenville, Ohio*, CLEVELAND.COM (Sept. 2, 2012), http://www.cleveland.com/metro/index.ssf/2012/09/rape_charges_divide_football_t.html [<https://perma.cc/FJ97-T639>] [hereinafter Dissell, *Rape Charges*].

308. Macur & Schweber, *supra* note 303.

309. Ariel Levy, *Trial by Twitter*, NEW YORKER, Aug. 5, 2013, at 38, 40 [hereinafter Levy, *Trial*]; Macur & Schweber, *supra* note 303; Alexander Abad-Santos, *The Steubenville Rape Suspects May Go Free Because the Girl Wasn't 'So' Drunk*, THE ATLANTIC (Mar. 14, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-rape-drunk/317374> [<https://perma.cc/NF3X-9H44>].

310. See Macur & Schweber, *supra* note 303.

311. Bill Schiller, *Friday Night Shadows: High School Football Stars Accused of Rape*, TORONTO STAR, Mar. 9, 2013, at WD4.

312. Mark Law, *Victim to Testify Today*, WEIRTON DAILY TIMES (W. Va.), Mar. 16, 2013, at 7A.

penetrating her vagina with his fingers.³¹³ Mays wrote the following text message to a friend about the incident: “Yeah dude, she was like a dead body. I just needed some sexual attention.”³¹⁴

When they arrived at Cole’s home, the victim was unable to walk without assistance and vomited multiple times. She fell over and lay naked, motionless, and silent on the ground. Cole showed the video he had taken in the car to at least one person who had arrived separately at his house, SHS wrestler Anthony Craig,³¹⁵ and also admitted he uploaded it to YouTube.³¹⁶ (Cole deleted the video the following morning.³¹⁷) While at Cole’s home, Mays exposed his penis to the victim and tried to coax her into performing oral sex. Richmond penetrated the victim’s vagina with his fingers. Craig took a photo of what Mays and Richmond were doing to the victim and, according to him, showed it to “two or three people” at a party hosted at a different house later that night before deleting it.³¹⁸

Steubenville Police Chief William McCafferty would later state: “That night . . . , not one person stepped up and said something. Whatever happened, not one person stepped in to stop it”³¹⁹

That evening, the victim slept on a couch at Cole’s house. When she woke up, she said she did not know what had occurred the night before.³²⁰

Partygoers from the previous night documented the sexual assault through messages they texted and posted on social media. Others replied to and shared those comments and images. In some of his text messages, Mays wrote that he had sex with the victim and that “[s]he could barely move.”³²¹

313. Alexander Abad-Santos, *Steubenville’s Sudden Immunity Deals Could Break the Defense’s Case*, THE ATLANTIC (Mar. 15, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-rape-trial-witnesses/316265> [<https://perma.cc/H2QX-4BB8>] [hereinafter Abad-Santos, *Sudden*]; Alexander Abad-Santos, *Vanishing Immunity Deal Throws More Steubenville Players Back in Spotlight*, THE ATLANTIC (Jan. 11, 2013), <https://www.theatlantic.com/national/archive/2013/01/steubenville-case-immunity-deal/319611> [<https://perma.cc/VB7V-W5E>] [hereinafter Abad-Santos, *Vanishing*]; Madison Gray, *Steubenville Rape Case: Witness Says He Took Photos of Alleged Victim*, TIME (Mar. 16, 2013), <https://nation.time.com/2013/03/16/steubenville-rape-case-witness-says-he-took-photos-of-alleged-victim> [<https://perma.cc/4JJK-NURR>].

314. *Ohio Teens Convicted of Rape*, *supra* note 8 (quoting text message).

315. Schiller, *supra* note 311.

316. Abad-Santos, *Sudden*, *supra* note 313.

317. *Id.*; Abad-Santos, *Vanishing*, *supra* note 313.

318. Schiller, *supra* note 311.

319. Dissell, *Rape Charges*, *supra* note 307.

320. Macur & Schweber, *supra* note 303.

321. Chelsea J. Carter & Poppy Harlow, *Three Teens Testify in Steubenville Rape Trial to Witnessing Sexual Abuse of Girl*, 16, CNN (Mar. 15, 2013, 9:27 PM), <http://www.cnn.com/2013/03/15/justice/ohio-steubenville-case/index.html> [<https://perma.cc/3TQ3-TD63>] [hereinafter Carter & Harlow, *Three Teens*].

Twitter users wrote “#rape,” “#drunk girl,” and “the dead body” in posts about the victim.³²² Cody Saltsman, the victim’s ex-boyfriend, posted a photo on Instagram of Mays and Richmond carrying the victim by her ankles and wrists.³²³ Pizzoferrato tweeted: “If they’re getting ‘raped’ and don’t resist then to me it’s not rape. I feel bad for her but still.”³²⁴

The most notorious social media post about the incident was a video on YouTube recorded the night of the crime. Michael Nodianos, a former SHS student who was then an undergraduate student at OSU, is the primary speaker in the video, which was over 12 minutes in length.³²⁵ In that video—which Westlake filmed and posted to YouTube³²⁶—Nodianos joked about how “dead” the victim was, that she was “raped,” and that she was urinated on.³²⁷ He also stated: “If that was my daughter, I wouldn’t care. I’d just let her be dead.”³²⁸ During the video, a voice coming from off-camera stated that “Trent and Ma’lik raped someone.”³²⁹ Several other people can be seen and heard speaking and laughing in the video.³³⁰ (The video would eventually attract almost two million views.³³¹) Nodianos also tweeted that night: “Song of the night is definitely Rape Me by Nirvana” and “[s]ome people deserve to be peed on.”³³² Mays was among at least four people who retweeted the latter post.³³³ Nodianos later claimed that the rape occurred at

322. Juliet Macur, *Hackers Demanding Apology in Rape Case*, N.Y. TIMES, Dec. 25, 2012, at B8.

323. Levy, *Trial*, *supra* note 309, at 40; Alexander Abad-Santos, *Everything You Need to Know About Steubenville High’s Football ‘Rape Crew,’* THE ATLANTIC (Jan. 3, 2013), <https://www.theatlantic.com/national/archive/2013/01/steubenville-high-football-rape-crew/317300> [<https://perma.cc/MBZ8-CNAB>] [hereinafter Abad-Santos, *Crew*]; Tom Ley, *How an Alleged Rape Involving Ohio High School Football Players Unfolded on Twitter, Instagram, and YouTube*, DEADSPIN (Dec. 17, 2012, 7:11 PM), <https://deadspin.com/how-an-alleged-rape-involving-ohio-high-school-football-5969103> [<https://perma.cc/EL4W-JDW5>] [hereinafter Ley, *Unfolded*].

324. Levy, *Trial*, *supra* note 309, at 40–41.

325. The actual video remains available on YouTube. Don Carpenter *Leaked Steubenville Big Red Rape Video*, YOUTUBE (Jan. 2, 2013), <https://www.youtube.com/watch?v=W1oahqCzwcY> [<https://perma.cc/FSK5-VJDQ>] [hereinafter Nodianos YouTube Video]; *see also* Tom Ley, “*She Is So Raped Right Now*,” *Partygoer Jokes About the Steubenville Accuser the Night of the Alleged Rape*, DEADSPIN (Jan. 2, 2013, 2:00 PM), <https://deadspin.com/5972527/she-is-so-raped-right-now-former-student-jokes-about-the-steubenville-accuser-the-night-of-the-alleged-rape> [<https://perma.cc/R3H4-NXGG>] [hereinafter Ley, *Raped*].

326. Levy, *Trial*, *supra* note 309, at 41; Alexander Abad-Santos, *Who’s in Trouble Next in Steubenville?*, THE ATLANTIC (Mar. 18, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-grand-jury/317271> [<https://perma.cc/5YY4-A3F6>] [hereinafter Abad-Santos, *Trouble*].

327. Ley, *Raped*, *supra* note 325 (internal quotation marks omitted).

328. *Ohio Teens Convicted of Rape*, *supra* note 8.

329. Ley, *Raped*, *supra* note 325.

330. *Id.*; Nodianos YouTube Video, *supra* note 325.

331. Nodianos YouTube Video, *supra* note 325 (noting, as of Sept. 24, 2019, 1,882,886 views).

332. Ley, *Unfolded*, *supra* note 323.

333. *Id.*

a different location from the one at which he spoke on the recording and that he only learned about the crime second-hand from witnesses who had been present.³³⁴ Subsequent reporting confirmed Nodianos's account of where the film was recorded and how he learned of the rape.³³⁵

Before the victim's parents reported the crime, many of the online posts about it had been deleted.³³⁶ Mays alerted others to potential problems that could arise from the posts and encouraged them to be erased. He texted Craig: "You didn't take pic[tur]e[s] or vid[eo]s, did you?"³³⁷ And Mays also texted Westlake about the video he recorded of Nodianos and posted online: "Delete that off YouTube . . . Seriously you have to delete it."³³⁸

However, a blogger and former Steubenville resident, Alexandria Goddard, took screenshots of messages, photographs, and videos on social media in order to preserve them on her own website and send them to a Steubenville police officer before they could be erased.³³⁹ She also accused several current and former SHS students of playing a criminal role in the sexual assault by failing to halt it and disseminating imagery of it.

According to the *New York Times*, during the first few days of the investigation, McCafferty "begged for witnesses to come forward, but received little response."³⁴⁰ McCafferty stated:

The thing I found most disturbing about this is that there were other people around when this was going on. . . . Nobody had the morals to say, "Hey, stop it, that isn't right."

334. *Attorney Says His Client in Video Didn't Witness Rape in Steubenville*, BLADE (Jan. 7, 2013, 3:27 PM), <http://www.toledoblade.com/Courts/2013/01/07/Attorney-says-his-client-in-video-didn-t-witness-rape-in-Steubenville.html> [<https://perma.cc/4XGX-AP8C>].

335. Alexander Abad-Santos, *The Steubenville Rape Case is Back—Are Parents at Party Houses to Blame?*, THE ATLANTIC (Apr. 8, 2013), <https://www.theatlantic.com/national/archive/2013/04/steubenville-parties-suits/316264> [<https://perma.cc/LXV2-5AQE>]; Cathy Young, *Anonymous Is No Hero*, REAL CLEAR POLITICS (June 9, 2013), https://www.realclearpolitics.com/articles/2013/06/09/anonymous_is_no_hero_118733.html [<https://perma.cc/PMS3-5FCR>].

336. Dissell, *Rape Charges*, *supra* note 307.

337. Levy, *Trial*, *supra* note 309, at 41.

338. *Id.*

339. Kaelyn Forde, *How One Crime Blogger Helped Expose the Steubenville High School Rape*, INSIDE EDITION (Mar. 21, 2019, 10:49 AM), <https://www.insideedition.com/how-one-crime-blogger-helped-expose-steubenville-high-school-rape-51553> [<https://perma.cc/CR28-K79F>]; Alexandria Goddard, *Meet the Blogger Who Allegedly Complicated the Steubenville Gang Rape Case*, GOOD MEN PROJECT (Mar. 20, 2013), <https://goodmenproject.com/ethics-values/meet-the-blogger-who-allegedly-complicated-the-steubenville-gang-rape-case> [<https://perma.cc/3ADX-ZPQR>]; Jennifer Preston, *How Blogger Helped the Steubenville Rape Case Unfold Online*, N.Y. TIMES (Mar. 18, 2013, 9:51 PM), <https://thelede.blogs.nytimes.com/2013/03/18/how-blogger-helped-steubenville-rape-case-unfold-online> [<https://perma.cc/VTJ6-2RSG>].

340. Macur & Schweber, *supra* note 303.

If you could charge people for not being decent human beings, a lot of people could have been charged that night.³⁴¹

Over the course of the next few weeks, the Steubenville police continued trying to obtain information from numerous partygoers, including through an appearance on television in which McCafferty urged adults and children to come forward if they were witnesses or had received photos or videos of the crime. Only two people contacted the police.³⁴² According to the *Cleveland Plain Dealer*, “McCafferty said what bothers him most about the case is the silence—both on the night of the incident and now.”³⁴³

The police seized mobile devices from some of the partygoers.³⁴⁴ A cybercrime expert at the Ohio Bureau of Criminal Investigation analyzed fifteen mobile phones and two iPads but was unable to retrieve deleted materials. The expert was, however, able to recover two photographs of the victim naked, both of which were on Mays’s cell phone.³⁴⁵ In addition, investigators obtained hundreds of text messages about the incident.³⁴⁶ In those text messages, Mays admitted that he had inserted his fingers inside the girl’s vagina and took and circulated a picture of her naked with his semen on her body.³⁴⁷

Ten days after the assault, Mays and Richmond were arrested. They were initially charged with kidnapping and rape.³⁴⁸ Mays was also charged with “illegal use of a minor in nudity-oriented material.”³⁴⁹ The kidnapping charges were subsequently dropped.³⁵⁰

Six weeks later, three SHS students testified for the prosecution at a

341. *Id.*

342. Dissell, *Rape Charges*, *supra* note 307.

343. *Id.*

344. Macur & Schweber, *supra* note 303.

345. *Id.*

346. Opper, *supra* note 303.

347. *Id.*

348. Press Release, Mike DeWine, Ohio Attorney Gen., Attorney General DeWine Issues Statement on Steubenville Rape Investigation (Mar. 17, 2013), <https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2013/Attorney-General-DeWine-Issues-Statement-on-Steube> [https://perma.cc/XSE6-GJUB] [hereinafter Ohio Attorney General Press Release 1]; *High School Football Players in Steubenville, Ohio Charged with Rape and Kidnapping, Reports Say*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2012/08/high_school_football_players_i.html [https://perma.cc/75FX-GZTL].

349. Michael Pearson, *Defense Battles Social Media Blizzard in Ohio Rape Case*, CNN (Jan. 4, 2013, 10:45 PM), <http://www.cnn.com/2013/01/04/justice/ohio-rape-online-video/index.html> [https://perma.cc/5JAE-AXJJ] [hereinafter Pearson, *Defense*]; see also Ohio Attorney General Press Release 1, *supra* note 348.

350. Pearson, *Defense*, *supra* note 349.

probable cause hearing.³⁵¹ One was Cole, who testified about the sexual assault he recorded Mays perpetrating against the victim. The two other students were Craig and Westlake.³⁵² Craig testified that he saw Richmond rape the victim while she was naked and motionless on the floor at a party.³⁵³

Two months later, in December 2012, computer hackers associated with Anonymous and KnightSec hijacked a website related to the SHS football team and threatened to release personal information about players and coaches on the team, as well as school officials, unless those involved in the sexual assault publicly apologized to the victim and her family.³⁵⁴ The hackers also stated through a note posted to the website: “Only 2 members were charged with the actual crimes, when everyone present was guilty.”³⁵⁵ In addition, the hackers posted the names of Cole, Craig, and others the hackers said witnessed the rape, referring to all of those individuals as “targets.”³⁵⁶ The hackers called those involved the “rape crew.”³⁵⁷

On January 5, 2013, more than 1300 people participated in a rally in Steubenville, “Occupy Steubenville,” organized and led by Anonymous to raise awareness about the sexual assault and demand justice.³⁵⁸ At the rally, Jefferson County Sheriff Fred Abdalla said that no one beyond Mays and Richmond would be charged in the case.³⁵⁹

351. Ohio Attorney General Press Release 1, *supra* note 348; Abad-Santos, *Vanishing*, *supra* note 313.

352. Abad-Santos, *Vanishing*, *supra* note 313.

353. For additional background on the Steubenville case, see generally Levy, *Trial*, *supra* note 309; Macur, *supra* note 322; Macur & Schweber, *supra* note 303; Oppel, *supra* note 303; Schiller, *supra* note 311; Abad-Santos, *Crew*, *supra* note 323; Pearson, *Defense*, *supra* note 349; *Ohio Teens Convicted of Rape*, *supra* note 8.

354. Macur, *supra* note 322; Samer Kalaf, *Hackers Take Over Steubenville High School Football Team’s Website, Threaten to Release Personal Information of People Involved in Alleged Rape Case*, DEADSPIN (Dec. 25, 2012, 5:10 PM), <https://deadspin.com/hackers-take-over-steubenville-high-school-football-tea-5971165> [<https://perma.cc/7ZJJ-SGK6>].

355. Kalaf, *supra* note 354; *see also* Macur, *supra* note 322.

356. Kelli Busey, *Anonymous to Release All Steubenville “Rape Squad” Info and Child Porno Found in Emails*, PLANET TRANSGENDER (Dec. 30, 2012), <https://planettransgender.com/anonymous-to-release-all-steubenville-rape-squad-info-and-child-porno-found-in-emails/?cn-reloaded=1> [<https://perma.cc/DVL7-JKYW>]; *see also* Ryan Broderick, *The Definitive Timeline of the Steubenville Rape Scandal*, BUZZFEED (Jan. 4, 2013, 3:12 PM), <https://www.buzzfeed.com/ryanhatesthis/the-definitive-timeline-of-the-steubenville-rape-s> [<https://perma.cc/6MJC-JZDC>].

357. Alexander Abad-Santos, *The Steubenville ‘Rape Crew’ Trial Will Be on Display for the World to See*, THE ATLANTIC (Jan. 30, 2013), <https://www.theatlantic.com/national/archive/2013/01/steubenville-trial-news/318857> [<https://perma.cc/Y38K-ZBDX>].

358. Levy, *Trial*, *supra* note 309, at 44; Connor Simpson, *Occupy Steubenville: Anonymous vs. the Sheriff*, THE ATLANTIC (Jan. 5, 2013), <https://www.theatlantic.com/national/archive/2013/01/occupy-steubenville-anonymous-vs-sheriff/319828> [<https://perma.cc/EGE3-GF4T>].

359. Drew Singer, *Steubenville Rape Case: Ohio Sheriff Confronts Protesters*, HUFFINGTON POST (Mar. 7, 2013), https://www.huffingtonpost.com/2013/01/05/steubenville-rape-protests_n_2416820.html

Abdalla's statement was unsatisfactory to many. The Ohio chapter of the National Organization for Women demanded Nodianos's arrest.³⁶⁰ Members of the public began calling for OSU to expel Nodianos and revoke his academic scholarship.³⁶¹ Two days after the rally, OSU announced that Nodianos was no longer a student at the university.³⁶² He had dropped out, citing concern over threats he had received.³⁶³

The trial of Mays and Richmond commenced on March 13, 2013.³⁶⁴ Two days later, the same three teenagers who had testified at the pretrial hearing—Cole, Craig, and Westlake—were granted immunity from prosecution.³⁶⁵ (Cole, Craig, and Westlake had all failed to report the rape, which violated Ohio's general duty-to-report law, and the first two had recorded the underage girl naked via photo or video, which is also a crime in Ohio.³⁶⁶ All three of them might also have been charged as accomplices to the rapes.³⁶⁷) Afterwards, Cole, Craig, and Westlake testified at the trial that they saw their friends, Mays and Richmond, sexually assault the victim.³⁶⁸ Cole stated that Mays digitally penetrated the victim; Craig and Westlake stated that Richmond did the same.³⁶⁹ Craig also stated about the victim: "She wasn't moving. She wasn't talking. She wasn't participating."³⁷⁰ In addition, Craig admitted taking a photo on his cell phone of the victim naked

[<https://perma.cc/6YSK-ZQZK>].

360. Levy, *Trial*, *supra* note 309, at 42.

361. Alexander Abad-Santos, *Look Who's Already in Trouble over the Steubenville Rape Case*, THE ATLANTIC (Jan. 4, 2013), <https://www.theatlantic.com/national/archive/2013/01/look-whos-already-trouble-over-steubenville-rape-case/319807> [<https://perma.cc/5K37-BJR9>] [hereinafter Abad-Santos, *Look*]; Tyler Klingkade, *Michael Nodianos from Steubenville Rape Video No Longer Enrolled at the Ohio State University*, HUFFINGTON POST (Jan. 7, 2013, 2:34 PM), https://www.huffingtonpost.com/2013/01/07/michael-nodianos-steubenville-ohio-state_n_2425929.html [<https://perma.cc/9EWK-MBS>].

362. Abad-Santos, *Look*, *supra* note 361; Klingkade, *supra* note 361.

363. Winston Ross, *Michael Nodianos, of Steubenville 'Rape' Video Drops Out of OSU, Citing Threats*, DAILY BEAST (July 12, 2017, 1:52 AM), <https://www.thedailybeast.com/michael-nodianos-of-steubenville-rape-video-drops-out-of-osu-citing-threats> [<https://perma.cc/UM74-VRBA>].

364. Alexander Abad-Santos, *America Finally Hears the Case for the Victim on First Day of Steubenville Trial*, THE ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-trial-opening-statement/317436> [<https://perma.cc/JT9Y-7TAD>].

365. Christian Red & Michael O'Keeffe, *Ohio Attorney General Says It's Too Early to Tell if Grand Jury Investigation into Steubenville Rape Case Will Target Football Coach Reno Saccoccia*, N.Y. DAILY NEWS (Mar. 19, 2013), <http://www.nydailynews.com/news/national/steubenville-case-leads-ohio-law-makers-enact-new-legislation-article-1.1292925> [<https://perma.cc/PZ3Q-63B5>].

366. Levy, *Trial*, *supra* note 309, at 41.

367. See *infra* Sections IV.C.2, V.A.6.

368. Abad-Santos, *Sudden*, *supra* note 313; Carter & Harlow, *Three Teens*, *supra* note 322; *Ohio Teens Convicted of Rape*, *supra* note 8.

369. Oppel, *supra* note 303; Abad-Santos, *Sudden*, *supra* note 313; Carter & Harlow, *Three Teens*, *supra* note 322.

370. Carter & Harlow, *Three Teens*, *supra* note 322.

and showing it to friends.³⁷¹

Four days after their trial started, Mays and Richmond were convicted of raping the girl.³⁷² (In Ohio, the legal definition of rape includes nonconsensual digital penetration.³⁷³) Mays was also found guilty of distributing a photograph of a naked minor.³⁷⁴ Mays and Richmond were sentenced to a minimum of two years and one year, respectively, in a juvenile correctional facility.³⁷⁵ In addition, they were both required to undergo treatment while in detention and register as sex offenders.³⁷⁶

Immediately after the trial, then-Ohio Attorney General Mike DeWine said that there could be more charges in the case and that sixteen people (most of whom were students attending the parties on the night of August 11) had refused to speak to investigators.³⁷⁷ Specifically, he said that prosecutors might charge others with obstruction of justice, tampering with evidence, violating Ohio's general duty-to-report law, and violating Ohio's specific duty-to-report law.³⁷⁸ Reflecting generally on the case, DeWine (now the Governor of Ohio) stated: "One of the lessons of life is we have to take care of each other, and we have to try to help people and we have to do what's right. . . . And there were precious few people that night that were doing what was right."³⁷⁹

Prosecutors eventually focused on school officials for not doing what

371. *Id.*

372. Oppel, *supra* note 300; *Ohio Teens Convicted of Rape*, *supra* note 8; Connor Simpson, *The Steubenville Verdict Is In, and These Boys Are Guilty*, THE ATLANTIC (Mar. 17, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-verdict-guilty/317295> [<https://perma.cc/7R8C-VFLT>] [hereinafter Simpson, *Verdict*].

373. OHIO REV. CODE ANN. §§ 2907.01–.02 (LexisNexis 2019) (defining rape to include digital penetration); Oppel, *supra* note 303.

374. Oppel, *supra* note 303; *Ohio Teens Convicted of Rape*, *supra* note 8; Simpson, *Verdict*, *supra* note 372.

375. Oppel, *supra* note 303; *Ohio Teens Convicted of Rape*, *supra* note 8; Simpson, *Verdict*, *supra* note 372.

376. *Ohio Teens Convicted of Rape*, *supra* note 8; Kisa Mlela Santiago & Greg Botelho, *Steubenville Rape Case: 2nd Convicted Teen Classified as Sex Offender*, CNN, <http://edition.cnn.com/2013/08/16/justice/ohio-steubenville-sex-offender/index.html> [<https://perma.cc/387X-VKG3>].

377. Oppel, *supra* note 303; Ohio Attorney General Press Release 1, *supra* note 348; Abad-Santos, *Trouble*, *supra* note 323; *Ohio Teens Convicted of Rape*, *supra* note 8; *Ohio Attorney General Mike DeWine to Look into More Steubenville Charges*, CBS NEWS (Mar. 17, 2013, 9:24 PM), <https://www.cbsnews.com/news/ohio-attorney-general-mike-dewine-to-look-into-more-steubenville-charges> [<https://perma.cc/7HV7-2M8L>] [hereinafter *Look Into*]; Simpson, *Verdict*, *supra* note 372.

378. Oppel, *supra* note 303; Abad-Santos, *Trouble*, *supra* note 326; *Look Into*, *supra* note 377; Simpson, *Verdict*, *supra* note 372.

379. Michael Pearson, *Steubenville, Weary of Investigation, Faces New Probe*, CNN (Mar. 19, 2013), <http://edition.cnn.com/2013/03/18/justice/ohio-steubenville-case/index.html> [<https://perma.cc/MY9X-4XLG>].

was right. Between October 7 and November 25, 2013, DeWine made three announcements that a special grand jury reviewing whether additional crimes were committed had issued indictments.³⁸⁰ The special grand jury indicted William Rhinaman, an employee of Steubenville City Schools (“SCS”), for tampering with evidence, obstructing justice, obstructing official business, and perjury;³⁸¹ Michael McVey, the SCS superintendent, for tampering with evidence, obstructing justice, falsification, and obstructing official business;³⁸² Matthew Belardine, a former SCS volunteer high school football coach, for underage persons offenses concerning beer or intoxicating liquor, obstructing official business, falsification, and contributing to the unruliness or delinquency of a child;³⁸³ Seth Fluharty, an SCS assistant wrestling coach and special education teacher, for failure to report child abuse or neglect;³⁸⁴ and Lynnett Gorman, the principal of West Elementary in Steubenville, also for failure to report child abuse or neglect.³⁸⁵ Each of these individuals struck deals with DeWine’s office. Rhinaman pleaded guilty and was sentenced to ten days in jail.³⁸⁶ DeWine

380. Michael Muskal, *School Officials Charged in Ohio Football Rape Case*, L.A. TIMES, Nov. 26, 2013, at A11; Press Release, Mike DeWine, Ohio Attorney Gen., First Indictment Issued by Steubenville Special Grand Jury (Oct. 7, 2013), <http://www.ohioattorneygeneral.gov/media/News-Releases/October-2013/First-Indictment-Issued-by-Steubenville-Special-Gr> [<https://perma.cc/VZF9-DVMP>] [hereinafter First Indictment]; Press Release, Mike DeWine, Ohio Attorney Gen., Indictments Issued by Steubenville Grand Jury (Nov. 25, 2013), <http://www.ohioattorneygeneral.gov/Media/News-Releases/November-2013/Indictments-Issued-by-Steubenville-Special-Grand-J> [<https://perma.cc/53CS-PNZR>] [hereinafter Indictments Issued]; Press Release, Mike DeWine, Ohio Attorney Gen., Second Indictment Issued by Steubenville Special Grand Jury (Oct. 23, 2013); Press Release, Mike DeWine, Ohio Attorney Gen., Statement as Prepared Ohio Attorney General Mike DeWine Steubenville Special Grand Jury (Nov. 25, 2013), <http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Special-Prosecutions/Mike-DeWine-Statement-As-Prepared-Steubenville.aspx> [<https://perma.cc/572T-C25Q>] [hereinafter DeWine Statement]; Rachel Dissell, *Four Indicted by Grand Jury in Steubenville, Including School District Superintendent*, CLEVELAND.COM, http://www.cleveland.com/steubenville-rape-case/index.ssf/2013/11/four_indicted_by_grand_jury_in.html [<https://perma.cc/2W4P-TT5E>] [hereinafter Dissell, *Four Indicted*].

381. First Indictment, *supra* note 380.

382. Indictment at 1–2, Ohio v. McVey, No. 13-CR-228 (Ohio Ct. C.P., Jefferson Cty., Nov. 25, 2013) (on file with author); DeWine Statement, *supra* note 380; Indictments Issued, *supra* note 380.

383. Indictment at 1–2, Ohio v. Belardine, No. 13-CR-229 (Ohio Ct. C.P., Jefferson Cty., Nov. 25, 2013) (on file with author); DeWine Statement, *supra* note 380; Indictments Issued, *supra* note 380. Belardine was the only adult present at that party at which Mays, Richmond, and other underage people were drinking the night of August 11–12, 2012. *Steubenville Coach Going to Jail for Alcohol-Infused Party*, USA TODAY (Apr. 22, 2014, 4:44 PM), <https://www.usatoday.com/story/news/nation/2014/04/22/steubenville-rape-case-ohio/8017979> [<https://perma.cc/9XCW-HPAR>].

384. Indictment at 1, Ohio v. Fluharty, No. 13-CR-231 (Ohio Ct. C.P., Jefferson Cty. Nov. 25, 2013) (on file with author).

385. Indictment at 1, Ohio v. Gorman, No. 13-CR-230 (Ohio Ct. C.P., Jefferson Cty., Nov. 25, 2013) (on file with author); DeWine Statement, *supra* note 380; Indictments Issued, *supra* note 380.

386. *Rhinaman Enters a Guilty Plea*, HERALD STAR (Feb. 28, 2015), <http://www.timesleaderonline.com/news/local-news/2015/03/rhinaman-pleads-guilty> [<https://perma.cc/NZ59-FKA5>].

agreed to dismiss all pending charges against McVey following his resignation.³⁸⁷ Belardine pleaded no contest to one count each of underage persons offenses concerning beer or intoxicating liquor and falsification, resulting in a sentence of ten days in jail, one year of community control, forty hours of community service, and a fine of \$1000.³⁸⁸ In exchange for having the charges against him dropped, Fluharty agreed to perform community service, attend a sexual violence prevention training session, and co-facilitate programming for SHS and Steubenville middle school on such training.³⁸⁹ Similarly, in exchange for having the charges against her dropped, Gorman agreed to perform community service at a rape crisis center or victim assistance facility, speak to other SCS district teachers and administrators on the importance of reporting child abuse and child neglect, and encourage the SCS board to host a speaker from the Ohio Alliance Against Sexual Violence at SHS and middle school.³⁹⁰

IV. TYPOLOGIES OF BYSTANDERS AND UPSTANDERS

This Part draws upon the case studies described in the previous Part to propose original typologies of bystanders and upstanders. These typologies are designed to maximize generalizability to crimes and crises beyond sexual abuse. The next Part offers legal and social prescriptions based on the elucidations in these typologies.

I divide bystanders and upstanders into “third parties” and “fourth parties” and also “corroborated” and “uncorroborated” actors. Among bystanders, I distinguish between two main types: “excused bystanders” (including six sub-types: survivors, “confidants,” “unaware bystanders,” children, “endangered bystanders,” and “self-incriminators”) and “unexcused bystanders” (including three sub-types: “abstainers,” “engagers,” and “enablers”). Among upstanders, I distinguish among seven types: “risk-accepting upstanders,” “risk-free upstanders,” “altruistic

387. Ray Jablonski, *Steubenville Superintendent Mike McVey Resigns After Charges Against Him Dismissed*, CLEVELAND.COM (Jan. 12, 2015), http://www.cleveland.com/metro/index.ssf/2015/01/steubenville_superintendent_mi.html [https://perma.cc/YLR9-4RDZ].

388. Press Release, Mike DeWine, Ohio Attorney Gen., *Volunteer Coach Indicted by Steubenville Grand Jury Found Guilty, Will Serve Jail Time* (Apr. 22, 2014), <https://www.ohioattorneygeneral.gov/Media/News-Releases/April-2014/Volunteer-Coach-Indicted-by-Steubenville-Grand-Jur> [https://perma.cc/K5RN-8PY4].

389. Press Release, Mike DeWine, Ohio Attorney Gen., *Resolution Reached in Case Involving Steubenville Wrestling Coach* (Apr. 11, 2014), <https://www.ohioattorneygeneral.gov/Media/News-Releases/April-2014/Resolution-Reached-in-Case-Involving-Steubenville> [https://perma.cc/KKH2-DU9Z].

390. Press Release, Mike DeWine, Ohio Attorney Gen., *Statement on Resolution in Lynnett Gorman Case* (Jan. 8, 2014), <https://www.ohioattorneygeneral.gov/Media/News-Releases/January-2014/Statement-on-Resolution-in-Lynnett-Gorman-Case> [https://perma.cc/FML8-E9S5].

upstanders,” “required upstanders,” “lured upstanders,” “attempted upstanders,” and “successful upstanders.” This Part’s next sections provide definitions of each of these actors.

Generally speaking, while some of these classifications are mutually exclusive, others are not. Typically, for example, an individual cannot be both a bystander and upstander, a third and fourth party, a corroborated and uncorroborated actor, an excused and unexcused bystander, a risk-accepting and risk-free upstander, an altruistic and required or lured upstander, or an attempted and successful upstander. On the other hand, a bystander could be, for instance, both a confidant and endangered, and an upstander could be, for example, risk-accepting, altruistic, and attempted.

However, in some contexts, fluidity within or among typologies is possible. While third or fourth parties in some situations may qualify as just one type of either bystander or upstander, in other contexts individuals may qualify as more than one type of either bystander, upstander, or both. For instance, when a crime (for example, genocide) or crisis (for example, a natural disaster) occurs over days, weeks, months, or even years—during which the situations, motivations, and conduct of bystanders, upstanders, and, when relevant, perpetrators evolve—some individuals could be identified as more than one of these categories or their sub-categories.

Tables 1, 3, and 4 present applications of my typologies to the case studies in Part III, noting the actors who do or could qualify. Table 1 applies the typologies for both bystanders and upstanders (“third parties,” “fourth parties,” “corroborated” actors, and “uncorroborated” actors), Table 3 applies the bystander typology, and Table 4 applies the upstander typology. Table 2 presents my bystander typology, listing the various categories, subcategories, and their corresponding definitions. (Since my upstander typology features only categories, not subcategories, a similar table for those actors is unnecessary.)

A. “THIRD PARTIES” VERSUS “FOURTH PARTIES”

“Third parties” differ from “fourth parties” depending on their location. Third parties are physically present at the crime or crisis, whereas fourth parties are not.

In the Digital Age, as information about crimes and crises is broadcast over social media and mobile devices, individuals who are not even physically present could be aware of—and report—such emergencies contemporaneously or near-contemporaneously. As such, the line between third and fourth parties can be blurred in certain contexts.

In the Genovese case, Farrar, Fink, Hoffman, Mozer, and Ross are third parties. In the Araujo case, third parties include the Medeiroses, Machado, and Pacheco. In the Iverson case, Cash is a third party. In the Steubenville case, examples of third parties are Cole, Craig, Westlake, and anyone else who viewed the victim being raped in Cole's car or at his house. All of these third parties in the Genovese, Araujo, Iverson, and Steubenville cases possessed first-hand knowledge of the crime as it occurred and could have interceded by, for example, calling the police—and some did.

In the Iverson case, Phillips, Ware, and Wheeler are fourth parties, as they did not personally witness the crime but received direct information about it from either Cash or Strohmeyer shortly thereafter and while the police were still searching for Strohmeyer. In the Steubenville case, Nodianos is an example of a fourth party, as he did not personally witness the crime but knew about it immediately after it was perpetrated and possibly while it continued. He possessed such reliable second-hand knowledge of the crime that Westlake recorded and posted to YouTube a lengthy video of Nodianos discussing the crime and mocking the victim. Additional fourth parties in the same case include individuals who directly received or viewed text messages about or photos or videos of the crime via cell phone or social media and additional people who otherwise learned of the crime from Mays and Richmond or third parties. Like Cole, Craig, and Westlake, Nodianos and other fourth parties could have intervened by reporting the crime to law enforcement. Another fourth party in the Steubenville case is Goddard, who viewed, preserved, and publicized imagery and textual evidence of the crime, and, unlike Nodianos, notified authorities.

B. "CORROBORATED" VERSUS "UNCORROBORATED" ACTORS

Both bystanders and upstanders can also be divided into "corroborated" and "uncorroborated" actors, depending on verification of their conduct. Evidence supports claims of or about "corroborated" actors, whereas no such proof is available or presented concerning "uncorroborated" actors. For example, if no evidence supports the claim that a person intervened, then that person would be an "uncorroborated upstander," and if no proof is presented that a person passively observed, then that person would be an "uncorroborated bystander." "Uncorroborated" actors present challenges for correctly identifying bystanders and upstanders, applying Bad Samaritan laws to the former, and doling out the rewards I propose in the next Part to the latter.

In the Genovese case, Farrar, Hoffman, and Mozer are all corroborated upstanders. Witnesses of Farrar's heroism include Ross, her husband, and

possibly her son;³⁹¹ Hoffman's son gave a sworn statement detailing, among other things, his father's call to the police;³⁹² and Moseley himself admitted hearing Mozer's shouting.³⁹³ In the same case, corroborated bystanders include Ross, Fink, and several other neighbors home that night, as established by media coverage. In the Araujo case, Silva and the O'Neills are all corroborated upstanders, as Araujo herself and the police could attest to the three men's intervention; Pacheco is an uncorroborated upstander, as he claimed, without evidence, to have tried calling the police. In the Iverson case, Cash is a corroborated bystander, as he admitted, and surveillance footage illustrated, his conduct. In the Steubenville case, Cole, Craig, Westlake, and Nodianos are all corroborated bystanders by admission and evidence from social media and mobile devices; Goddard is a corroborated upstander by evidence from her website at the time as well as media coverage.

391. COOK, *supra* note 175, at 218–19.

392. *Id.* at 207.

393. Getlen, *supra* note 177.

TABLE 1. Application of Typology of Both Bystanders and Upstanders

Type	Genovese case	Araujo case	Iverson case	Stuebenville case
Third Parties	<ul style="list-style-type: none"> • Sophia Farrar • Joseph Fink • Samuel Hoffman • Robert Mozer • Karl Ross 	<ul style="list-style-type: none"> • Virgilio Medeiros • Jose Medeiros • Carlos Machado • Vladimiro Pacheco 	<ul style="list-style-type: none"> • David Cash 	<ul style="list-style-type: none"> • Mark Cole II • Anthony Craig • Evan Westlake • Anyone else who viewed rape
Fourth Parties	...	...	<ul style="list-style-type: none"> • Jeremy Phillips • Justin Ware • Jordan Wheeler 	<ul style="list-style-type: none"> • Michael Nodianos • Alexandria Goddard • Anyone who received / viewed text messages, photos, videos • Additional people who learned of crimes from perpetrators or third parties
Corroborated Actors	<p><u>Upstanders:</u></p> <ul style="list-style-type: none"> • Sophia Farrar • Samuel Hoffman • Robert Mozer <p><u>Bystanders:</u></p> <ul style="list-style-type: none"> • Joseph Fink • Karl Ross • Other neighbors 	<p><u>Upstanders:</u></p> <ul style="list-style-type: none"> • Bobby Silva • Daniel O'Neill • Michael O'Neill 	<p><u>Bystander:</u></p> <ul style="list-style-type: none"> • David Cash 	<p><u>Upstander:</u></p> <ul style="list-style-type: none"> • Alexandria Goddard <p><u>Bystanders:</u></p> <ul style="list-style-type: none"> • Mark Cole II • Anthony Craig • Evan Westlake • Michael Nodianos
Uncorroborated Actors	...	<p><u>Upstander:</u></p> <ul style="list-style-type: none"> • Vladimiro Pacheco	...	...

C. TYPES OF BYSTANDERS

TABLE 2. Typology and Definitions of Bystanders

Type	Definition	Sub-Type	Sub-Definition
Excused Bystanders	Excused from intervening.	Survivors	Living victims of crimes or crises.
		Confidants	Asked by survivor not to report. (Qualify if survivor competent adult.)
		Unaware Bystanders	Do not perceive true nature of situation. (Reasonable person standard.)
		Children	Age cut-off at lawmakers' discretion. (Age may vary by jurisdiction.)
		Endangered Bystanders	Would fear for well-being of selves or others if intervened. (Reasonable person standard.)
		Self-Incriminator	Would unconstitutionally incriminate selves in a crime if intervened.
Unexcused Bystanders	Not excused from intervening.	Abstainers	Passively observe.
		Engagers	Actively engage in unhelpful, but not illegal, conduct (for example, mocking victim).
		Enablers	Actively engage in harmful conduct (for example, deliberately facilitating crime or crisis).

1. "Excused Bystanders" (Including Survivors, "Confidants," "Unaware Bystanders," Children, "Endangered Bystanders," and "Self-Incriminator")

Individuals may have reasonable excuses for not intervening and thus be justified in not acting as upstanders.³⁹⁴ These individuals are "excused bystanders." I identify six sub-types of such bystanders: survivors, "confidants," "unaware bystanders," children, "endangered bystanders," and "self-incriminators."

394. For a discussion of excuses and justifications in criminal law, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213-29 (1982).

Survivors are individuals who live through a crime or crisis. Such individuals could theoretically qualify as bystanders where others were also victimized. But survivors may not want or could be too traumatized to report the emergency themselves. Sexual violence survivors, in particular, sometimes prefer to keep such crimes private.³⁹⁵ Examples of survivors include Araujo and the unnamed sixteen-year-old in the Steubenville case, although neither was victimized alongside others about whom they could have reported the crime.

Survivors may also ask anyone present during or otherwise knowledgeable of the assault not to report it. These individuals are “confidants.” The case studies in Part III do not include any “confidants.”

Individuals who do not perceive the true nature of a situation as a crime or crisis qualify as “unaware bystanders.” Such misperception may be caused by, for example, mental illness, poor vision or hearing, intoxication, drowsiness, sleep, or unconsciousness. The seriousness of their conditions may qualify certain incapacitated and incompetent adults as unaware bystanders. Genovese’s neighbors who claimed confusion about or ignorance of the crime could be unaware bystanders. So, too, could be Vultao in the Araujo case, if indeed he was inebriated and asleep throughout the gang rape.

Like “unaware bystanders,” children may not understand the nature of a crime or crisis or have sufficient capacity to exercise sound judgment to act in such circumstances. Children also may not know what they could do to help or may be under parental (or other guardian) control. In the Genovese case, Farrar’s son, Mike, who was twelve or thirteen years old when he was awakened by the commotion of that tragic night and told by his father to return to bed,³⁹⁶ would qualify as such an excused bystander.

Individuals who would fear for the well-being of themselves or others if they interfered may be “endangered bystanders.” Genovese’s neighbors who claimed they were too afraid to become involved and Machado in the Araujo case, who claimed he was threatened if he called the police, could qualify as “endangered bystanders.”

Third or fourth parties who would incriminate themselves in a crime if they reported it or otherwise intervened could qualify as “self-

395. See *supra* note 97 and accompanying text.

396. Sources differ as to the exact age of Mike Farrar at the time of Genovese’s murder. COOK, *supra* note 175, at 110 (stating that Mike Farrar was twelve years old at the time); *id.* at 219 (stating the Mike Farrar was thirteen years old at the time); THE WITNESS, *supra* note 172 (also stating that Mike Farrar was thirteen years old at the time).

incriminators.” Such bystanders would be excused to uphold their constitutional right afforded by the Fifth Amendment.³⁹⁷ The Medeiroses in the Araujo case; Cash in the Iverson case; and Cole, Craig, and Westlake in the Steubenville case might all qualify as potential “self-incriminators” because, in reporting the crimes, they might have implicated themselves as accomplices.

2. “Unexcused Bystanders” (Including “Abstainers,” “Engagers,” and “Enablers”)

Compared to “excused bystanders,” some individuals may not have reasonable excuses for remaining passive and thus not be justified in refraining from acting as upstanders. These individuals are “unexcused bystanders.” I identify three sub-types of such bystanders: “abstainers,” “engagers,” and “enablers.”

Third or fourth parties who passively observe a crime or crisis are “abstainers.” Fink and Ross in the Genovese case could qualify, particularly because they were safely in their apartments when they passively witnessed and understood the nature of the crime and had no reason to believe that Moseley would know who they were if they called the police. In the Steubenville case, anyone who was aware of the rapes, especially the fourth parties whom Mays and Richmond would not have been able to identify if they had called the police, could also qualify as “abstainers.”

Other individuals may initiate or participate in unhelpful, but not illegal, conduct during a crime or crisis. These individuals are “engagers.” In the Steubenville case, Nodianos, Pizzoferrato, and others who mocked the victim may qualify.

A subset of “unexcused bystanders” is the most morally repugnant of all bystanders. These individuals, whom I call “enablers,” actively engage in harmful conduct, deliberately abetting a crime or crisis. Examples abound. In the Araujo case, the Medeiroses encouraged the perpetrators during the gang rape, and at least one of them (Virgilio) also blocked and threatened Machado when he considered contacting the police. In the Steubenville case,

397. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself . . .”).

Anonymous referred to multiple bystanders as “rape enablers.”³⁹⁸ Included in that description are probably the following individuals who arguably encouraged Mays and Richmond through their conduct: Cole and Craig, who recorded and shared evidence of the crime, and Westlake, who drove Cole’s car while one of the rapes was perpetrated inside. In the Iverson case, Cash may have served as a lookout at the entrance to the restroom for the approximately twenty minutes during which Strohmeyer raped and murdered Iverson inside. In addition, after Strohmeyer confessed his crime to Cash, Cash promised to keep the rape and murder a secret, helped Strohmeyer formulate a false alibi, and encouraged his friend to flee. Emphasizing Cash’s active involvement in the crime, Iverson’s mother and others called him Strohmeyer’s “accomplice.”

398. Alexander Abad-Santos, *Inside the Search for the Truth About Steubenville—1,000 Tips at a Time*, THE ATLANTIC (Jan. 8, 2013), <https://www.theatlantic.com/national/archive/2013/01/local-leaks-steubenville-files/319729> [<https://perma.cc/3DGZ-TXSP>]; Kim LaCapria, *Steubenville Rape Case Divides Social Media Again [Twitter Reacts]*, SOC. NEWS DAILY (Mar. 18, 2013), <https://socialnewsdaily.com/10940/steubenville-rape-case-divides-social-media-again-twitter-reacts> [<https://perma.cc/X8E3-4A2J>].

TABLE 3. Application of Bystander Typology

Type	Sub-Type	Genovese case	Araujo case	Iverson case	Steuenville case
Excused Bystanders	Survivors	...	• Cheryl Araujo	...	• Unnamed victim
	Confidants	...	...	...	...
	Unaware Bystanders	• Neighbors who claimed confusion, ignorance	• Sylvester Vultao	...	...
	Children	• Mike Farrar	...	...	...
	Endangered Bystanders	• Neighbors who claimed fear	• Carlos Machado	...	...
	Self-Incriminator	...	• Virgilio Medeiros • Jose Medeiros	• David Cash	• Mark Cole II • Anthony Craig • Evan Westlake
Unexcused Bystanders	Abstainers	• Joseph Fink • Karl Ross	...	• People aware of crime (including fourth parties)	...
	Engagers	...	...	...	• Michael Nodianos • Pat Pizzoferrato • Others who mocked victim
	Enablers	...	• Virgilio Medeiros • Jose Medeiros	• David Cash	• Mark Cole II • Anthony Craig • Evan Westlake

D. TYPES OF UPSTANDERS

1. "Risk-Accepting Upstanders"

Some upstanders intervene despite known risk to themselves, their families, their friends, or their fortunes. These individuals are "risk-accepting upstanders." Because of the extreme peril she consciously but

selflessly faced, Farrar in the Genovese case is an example of such an upstander. So, too, are Silva and the O'Neill brothers in the Araujo case, for the danger they faced when several men emerged from the bar and one of the brothers gave chase. Mozer in the Genovese case may also qualify, as Moseley heard his shout and might have been able to locate—and break into Mozer's apartment to pursue—the source.

2. “Risk-Free Upstanders”

Other upstanders intervene without suspecting or knowing of hazards in doing so. Hoffman in the Genovese case likely qualifies, as he called the police from the safety of his apartment and without drawing Moseley's attention.

3. “Altruistic Upstanders”

Some upstanders selflessly intervene without apparent knowledge or at least consideration of carrots (money, fame, or other possible reward) or sticks (Bad Samaritan laws). These “altruistic upstanders,” or “altruistic intermeddlers” (as legal historian John Dawson called them³⁹⁹), include Mozer, Hoffman, and Farrar in the Genovese case; Silva and the O'Neills in the Araujo case; Rhymer, Lee, and two other female high school students in the Iverson case; and Goddard in the Steubenville case.

4. “Required Upstanders”

Other upstanders intervene precisely because of carrots, sticks, or both. Upstanders who are induced by Bad Samaritan laws are “required upstanders.” Eugene Volokh calls such upstanders “Legally Swayable Samaritans,” individuals who “would be Bad in the absence of the duty-to-rescue/report law, but would be swayed by such a law's coercive or normative effect.”⁴⁰⁰ No actors in Part III's case studies appear to qualify. Of course, fewer or no Bad Samaritan laws existed at the time in most of these incidents' jurisdictions, so the individuals who did intercede could not have been induced by such statutes. Even then, such inducement is dependent not only on the existence of such laws but also on the awareness of them.⁴⁰¹

399. John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 817 (1961).

400. Volokh, *supra* note 31, at 106.

401. See *infra* Section V.B.3.iii.

5. "Lured Upstanders"

Another set of upstanders that intervene because of an inducement are those compelled by potential reward. I call these individuals "lured upstanders." As with "required upstanders," no actors in Part III's case studies appear to qualify as "lured upstanders."

6. "Attempted Upstanders"

Some upstanders are more successful than others in achieving the objective of their assistance. Those who fail are "attempted upstanders." Examples include Hoffman in the Genovese case, as the police did not respond to his phone call, and Machado in the Araujo case, as the Medeiroses thwarted his efforts to summon law enforcement.

7. "Successful Upstanders"

Upstanders who accomplish their goal are "successful upstanders." Examples include Silva and the O'Neills in the Araujo case, as they embraced Araujo when she fled the bar, warded off the men pursuing her, and called the police; Rhymer, Lee, and two other women in the Iverson case, as they reported Strohmeier to authorities; and Goddard in the Steubenville case, as she identified, preserved, and called attention to evidence of the crime.

Some upstanders achieve only part of their objectives. Examples include Farrar in the Genovese case, as she directly aided Genovese and indirectly summoned law enforcement but was ultimately unable to save her, and Mozer in the same case, as he scared off Moseley, but only temporarily. Where the line between attempted and successful upstanders is unclear, categorizing such individuals as the latter is reasonable.

TABLE 4. Application of Upstander Typology

Type	Genovese case	Araujo case	Iverson case	Steubenville case
Risk-Accepting Upstanders	<ul style="list-style-type: none"> • Sophia Farrar • Robert Mozer 	<ul style="list-style-type: none"> • Bobby Silva • Daniel O’Neill • Michael O’Neill	...	...
Risk-Free Upstanders	<ul style="list-style-type: none"> • Samuel Hoffman	...	...	...
Altruistic Upstanders	<ul style="list-style-type: none"> • Robert Mozer • Samuel Hoffman • Sophia Farrar 	<ul style="list-style-type: none"> • Bobby Silva • Daniel O’Neill • Michael O’Neill 	<ul style="list-style-type: none"> • Carmela Rhymer • Agnes Lee • Two unnamed women 	<ul style="list-style-type: none"> • Alexandria Goddard
Required Upstanders	...	...	...	...
Lured Upstanders	...	...	...	...
Attempted Upstanders	<ul style="list-style-type: none"> • Samuel Hoffman 	<ul style="list-style-type: none"> • Carlos Machado	...	...
Successful Upstanders	<ul style="list-style-type: none"> • Sophia Farrar • Robert Mozer 	<ul style="list-style-type: none"> • Bobby Silva • Daniel O’Neill • Michael O’Neill 	<ul style="list-style-type: none"> • Carmela Rhymer • Agnes Lee • Two unnamed women 	<ul style="list-style-type: none"> • Alexandria Goddard

V. PRESCRIPTIONS

This Part draws on the typologies of bystanders and upstanders in the previous Part as well as other insights to offer innovative legal and social prescriptions for mitigating sexual violence and other serious crimes and crises.

A. LEGAL PRESCRIPTIONS

This section proposes strengthening, spreading, and standardizing duty-to-report laws by amending or introducing them in all fifty U.S. states, in U.S. territories, and at the federal level. Such laws would exempt excused bystanders, apply to unexcused bystanders, and require notifying authorities

as soon as reasonably practicable. In addition, this section proposes applying only noncarceral punishment to at least abstainers and charging enablers with additional crimes.

1. Exempt Excused Bystanders

Before offering prescriptions for how to apply duty-to-report laws more widely, more often, and at an appropriate level of severity, it is imperative to distinguish situations in which such laws should *not* be applied. Overly broad duty-to-report laws raise the possibility of legal, logical, and logistical problems, which undermine such statutes. This section identifies scenarios in which duty-to-report laws should not apply for reasons of pragmatism and principle.

The six sub-types of excused bystanders—survivors, confidants, unaware bystanders, children, endangered bystanders, and self-incriminators—should either not be charged with violating duty-to-report laws or should be able to use their classification as an affirmative defense. These individuals are not or should not be guilty of failing to intervene because they had a legitimate justification for not acting as upstanders.

To honor their wishes and not to exacerbate their suffering by prosecuting and punishing them for failing to report a crime they themselves bore alone or alongside others, sexual violence survivors should be exempt from a duty to report. Currently, only two states (Alaska and Florida) contain such an explicit provision.⁴⁰²

Confidants of competent adult victims should be excused out of a similar deference to such victims, to protect these victims' privacy, and to promote a culture in which such victims feel comfortable confiding in others.⁴⁰³ In contrast, confidants of *child* victims and *incompetent* adult victims should *not* be excused. The wishes of children and incompetent adults who have suffered sexual abuse are generally not accorded deference because such individuals may not comprehend that certain sexual conduct is criminal, may therefore not be able to make an informed decision about whether to notify authorities, and may believe that they themselves would be penalized, rather than protected, if the conduct is reported.⁴⁰⁴

402. ALASKA STAT. § 11.56.765(a) (2019) (imposing a duty to report on “[a] person, other than the victim”); *id.* § 11.56.767; FLA. STAT. § 794.027 (2019) (imposing a duty to report on “[a] person who . . . is not the victim”).

403. Telephone Interview with Regina Yau, President, Pixel Project (Jan. 19, 2018).

404. E-mail from Regina Yau, President, Pixel Project, to author (Oct. 23, 2018) (on file with author); *If You Suspect a Child is Being Harmed*, RAINN, <https://www.rainn.org/articles/if-you-suspect-child-being-harmed> [<https://perma.cc/8M9M-7K2L>].

(Acknowledgement that the wishes of children and at least some incompetent adults should not dictate whether sexual abuse they suffer is reported is reflected in the fact that mandatory reporting laws for certain professionals who confront child and elder abuse are widespread.⁴⁰⁵) For similar reasons, children as well as dependent and incompetent adults (the latter as a subtype of unaware bystanders) themselves—not just their confidants—should be exempt from duty-to-report laws.⁴⁰⁶ The exact cut-off age of children and the particular qualification of dependence or incompetence for adults could be determined by lawmakers and may vary by jurisdiction. For example, the federal “Sherrice Iverson Act” unsuccessfully introduced by Senator Boxer and Congressperson Lampson implicitly acknowledged limitations of child witnesses by proposing a duty to report only for “individual[s] 18 years of age or older.”⁴⁰⁷

A reasonable person standard could be used to evaluate the perception and fear of unaware bystanders and endangered bystanders, respectively. Such a standard is already common in U.S. law, including tort and criminal law.⁴⁰⁸ An exemption for endangered bystanders is already recognized in many Bad Samaritan laws.⁴⁰⁹

The importance of excusing self-incriminators from duty-to-report laws is underscored by the scant U.S. jurisprudence on such Bad Samaritan statutes. In *State v. Wardlow*, the Ohio Court of Appeals in 1985 reversed Wardlow’s conviction for violating the state’s duty-to-report statute because, the court ruled, the statute infringed upon her right against self-incrimination.⁴¹⁰ The court reasoned that, if Wardlow had reported her live-in boyfriend’s sexual assaults of her daughter, Wardlow herself would likely have been prosecuted for child endangerment and welfare fraud.⁴¹¹ In *State v. La Plante* and its companion case, *State v. Brooks*—both decided in

405. See *supra* notes 139–41.

406. See *supra* Section IV.C.1.

407. See *supra* note 292.

408. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965); Robert Unikel, “Reasonable” Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326, 327 (1992) (“[R]easonableness’ has gained a prominent position in almost every area of American law. A general survey reveals that the concept of ‘reasonableness’ is a standard of decision-making in administrative law, bailment law, constitutional law, contract law, criminal law, tort law, and the law of trusts.” (footnotes omitted)).

409. See *infra* note 430 and accompanying text. However, some such exemptions are restricted. California’s Bad Samaritan law excuses only a narrow type of endangered bystander. See Zachary D. Kaufman, Opinion, *No Cover for Abusers; California Must Close Gap in its Duty-to-Report Law*, S.F. CHRON., June 23, 2019, at A15 [hereinafter Kaufman, *California’s Bad Samaritan Law*].

410. *State v. Wardlow*, 484 N.E.2d 276, 277–79 (Ohio Ct. App. 1985).

411. *Id.* at 279.

1994—the Wisconsin Court of Appeals affirmed the appellants’ convictions for violating the state’s duty-to-report statute.⁴¹² The *La Plante* court,⁴¹³ on which the *Brooks* court relied,⁴¹⁴ distinguished the Ohio statute from the one at issue in Wisconsin by detailing how the latter’s text and application avoided self-incrimination. Specifically, whereas the Ohio statute required reporting to law enforcement, the Wisconsin statute obligated either of two options as alternatives to that one: “summon . . . other assistance” or “provide assistance to the victim.”⁴¹⁵ Furthermore, the *La Plante* court observed:

Governmental compulsion of information is not present in any of these alternative forms of action. The statute is simply devoid of any mandate that an individual identify oneself when fulfilling the statute’s requirements. By calling for help, LaPlante would have been under no obligation to provide her name, nor would she have been required to provide any information as to why the victim was harmed. She simply had to call for assistance or render it herself.⁴¹⁶

Drawing from the *Wardlow* and *La Plante* cases, Bad Samaritan laws could be drafted or amended in three ways to avoid self-incrimination. First, as with the Wisconsin statute, they could require actions, at least one of which would not necessarily cause self-incrimination (such as summoning non-police assistance or providing direct assistance to a victim). Second, Bad Samaritan laws could state that self-incriminating information is not required to be disclosed when summoning or providing assistance. Third, such statutes could immunize individuals from being charged with crimes that only would have come to the attention of law enforcement from complying with the statutes. Such offenses may relate to the crime reported (like child endangerment or welfare fraud in *Wardlow*) or be unrelated (like prostitution or undocumented immigration in other cases).⁴¹⁷

Exemptions from duty-to-report laws for these six subtypes of excused bystanders come at a cost, however. Studies have found as high as a twenty-four percent recidivism rate among sex offenders.⁴¹⁸ The more individuals

412. *State v. La Plante*, 521 N.W.2d 448, 449 (Wis. Ct. App. 1994); *State v. Brooks*, No. 93-26996-CR, 1994 Wisc. App. LEXIS 942, at *1 (Wis. Ct. App. Aug. 2, 1994).

413. *La Plante*, 521 N.W.2d at 452 (citation omitted).

414. *Brooks*, 1994 Wisc. App. LEXIS 942, at *1.

415. *La Plante*, 521 N.W.2d at 450; *see also* WIS. STAT. § 940.34 (2017).

416. *La Plante*, 521 N.W.2d at 452.

417. *See, e.g.*, Suzan M. Pritchett, *Shielding the Deportable Outsider: Exploring the Rape Shield Law as Model Evidentiary Rule for Protecting U Visa Applicants as Witnesses in Criminal Proceedings*, 40 HARV. J.L. & GENDER 365, 369–70 (2017); Volokh, *supra* note 31, at 113 (“[T]he anticooperative effect of laws that make it dangerous for illegal aliens and prostitutes to talk to the police.”).

418. U.S. DEP’T OF JUSTICE, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE 107 (2017), https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf [<https://per>

exempted from reporting such crimes, the more likely these offenses are to recur.

2. Ensure the Broadest Reasonable Scope of Subject Matter and Victims

At a minimum, because of the particular dynamics of preventing and prosecuting sexual crimes,⁴¹⁹ duty-to-report laws should relate to such abuse. However, it is difficult to justify excluding other serious crimes and crises from such Bad Samaritan statutes.⁴²⁰ Legislatures should thus draft or amend duty-to-report laws to include the broadest reasonable subject matter. States that currently have duty-to-report laws vary in terms of the situations to which those statutes apply.⁴²¹ The broadest duty-to-report laws are like those in Ohio, which apply to all felonies,⁴²² and like those in Alaska, which apply to multiple specified violent crimes, whether attempted or completed: murder, kidnapping, and nonconsensual sexual penetration.⁴²³

Legislatures should thus consider the desired scope of duty-to-report laws. Lawmakers could even adopt multiple duty-to-report statutes. Indeed, six states already have several such laws in effect.⁴²⁴

First, legislatures should determine whether such statutes should apply only to certain crimes (for example, sexual abuse) or all crimes of a particular type (for example, felonies or specified violent crimes). The Alaska law applies to a subset of felonies and thus would be less onerous than the Ohio law to enforce.

Second, legislatures should consider whether duty-to-report laws should extend to noncriminal crises. Lawmakers in at least two states recently contemplated such bills, both stemming from an incident in 2017. That year, five teenagers in Florida mocked and recorded the drowning of a man, Jamel Dunn, after which they posted the video to YouTube.⁴²⁵ The teens subsequently neglected to alert police to the man's death, resulting in his body not being found until five days later.⁴²⁶ Because Florida's duty-to-

ma.cc/PZ46-PF8U].

419. See *supra* notes 32–37 and accompanying text.

420. See *supra* Section II.A.2.

421. See *supra* Section II.B.

422. OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2019).

423. ALASKA STAT. § 11.56.767 (2019).

424. See *supra* note 156 and accompanying text.

425. Faith Karimi, *Teens Who Laughed and Recorded a Drowning Man in His Final Moments Won't Face Charges*, CNN (June 26, 2018, 6:27 PM), <https://www.cnn.com/2018/06/26/us/florida-teens-no-charges-drowning-man/index.html> [<https://perma.cc/3AVV-6VRC>].

426. Nick Valencia & Devon Sayers, *Florida Teens Who Recorded Drowning Man Will Not Be Charged in His Death*, CNN (July 21, 2017, 7:04 PM), <http://www.cnn.com/2017/07/20/us/florida-teens->

report laws apply only to sexual battery and child abuse⁴²⁷ the teens could not be charged for their inaction.⁴²⁸ In the wake of Dunn's death, thousands of Florida residents signed petitions calling for a Bad Samaritan law that would apply to noncriminal emergencies. Legislators in both Florida and Arizona then considered introducing such laws in their states.⁴²⁹ If successful, these states would join Minnesota, Rhode Island, and Vermont in featuring Bad Samaritan laws that apply to situations beyond crimes.⁴³⁰ Florida's initiative has failed so far.⁴³¹

Third, legislatures should introduce or amend duty-to-report laws to apply to all sexual violence victims, regardless of age.⁴³² Narrow age restrictions can result in perverse and probably unintended consequences. In 2009, a sixteen-year-old girl was gang raped in Richmond, California, for at least two hours in the presence of ten to fourteen people.⁴³³ Because California's duty-to-report law, introduced in response to the Iverson case, applies only to victims who are under the age of fourteen,⁴³⁴ bystanders to the crime could not be charged with a violation or offered immunity from such a charge in exchange for testimony. Some California legislators then unsuccessfully attempted to amend the statute to remove its age threshold.⁴³⁵ Such age restrictions are unhelpful in preventing and responding to sexual

drowning-man/index.html [https://perma.cc/9QZU-J755].

427. FLA. STAT. §§ 39.205, 794.027 (2019).

428. Karimi, *supra* note 425.

429. Fifield, *supra* note 160; Gil Smart, *After Cocoa Drowning Case, Do We Need 'Duty to Rescue' Law?*, TC PALM (July 24, 2017, 12:46 PM), <https://www.tcpalm.com/story/opinion/editorials/2017/07/24/after-cocoa-drowning-case-do-we-need-duty-rescue-law-trending/504171001> [https://perma.cc/T5UZ-GU44].

430. *See supra* note 146 and accompanying text.

431. On January 2, 2019, and February 6, 2019, respectively, the Florida House of Representatives and the Florida Senate each introduced a bill "requiring certain persons under specified circumstances to provide reasonable assistance to another person who is exposed to or has suffered serious bodily injury . . ." H.R. 147, 2019 Leg., Reg. Sess. (Fla. 2019); S. 800, 2019 Leg., Reg. Sess. (Fla. 2019); *see also* Krystal Knowles, *New Bills Could Change Florida's Good Samaritan Law*, SPECTRUM NEWS 13 (Mar. 6, 2019, 9:17 PM), <https://www.mynews13.com/fl/orlando/news/2019/03/07/new-bills-could-change-florida-s-good-samaritan-law> [https://perma.cc/6YW6-JNSE]. Both bills died on May 3, 2019. *HB 147: Duty to Assist*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2019/00147/Category/?Tab=BillHistory> [https://perma.cc/M6GL-CP8J] (indicating that the bill died in the House Criminal Justice Subcommittee on May 3, 2019); *SB 800: Duty to Assist*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2019/00800/?Tab=BillHistory> [https://perma.cc/E8DC-C69F] (indicating that the bill died in the Senate Judiciary Committee on May 3, 2019).

432. *See also* Kaufman, *California's Bad Samaritan Law*, *supra* note 409; Kaufman, *Speaking Up*, *supra* note 45.

433. Robert J. Lopez, *Crime Reporting Law Is Proposed*, L.A. TIMES, Dec. 18, 2009, at A26.

434. CAL. PENAL CODE § 152.3 (West 2019).

435. *Hearing on AB 984 Before the S. Comm. on Pub. Safety*, 2010 Leg., Reg. Sess. (Cal. June 29, 2010).

violence, which observes no such limitations. Adolescents and adults need and deserve protection, too.

While a more comprehensive duty-to-report law may be appealing in principle, it may be unworkable or undesirable in practice. Lawmakers should evaluate whether law enforcement would have the resources to handle a potentially increased caseload that a broad subject matter or victim scope could bring. Expanded duty-to-report laws would also necessarily entail a greater amount of prosecutorial discretion, which some scholars argue is already too susceptible to abuse, including racial discrimination.⁴³⁶

3. Specify Temporal Triggering

Duty-to-report laws vary in terms of the post-emergency time window during which a witness might trigger a violation. Some such laws do not state any particular time (for example, Ohio's general duty-to-report law⁴³⁷), others state a pressing yet imprecise timeframe (for example, "immediately" in Ohio's specific duty-to-report law⁴³⁸ and "as soon as reasonably practicable" in Massachusetts⁴³⁹), and still others feature an explicit timeframe (for example, "not later than 24 hours" in Nevada⁴⁴⁰).

To avoid legal and practical criticisms of vagueness, legislators should provide guidance on when a violation of a duty to report is committed. Massachusetts's approach seems most appropriate. Its "reasonableness" standard, which does not include a specified time limit, reflects sensitivity to witnesses, who can be traumatized by the crimes they observe.⁴⁴¹ Such individuals may not feel capable of reporting crimes and crises "immediately" or within a particular time limit. However, this

436. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 869 (2009); David Alan Sklansky, *The Problems with Prosecutors*, 1 *ANN. REV. CRIMINOLOGY* 451, 456 (2018); see also *supra* note 121 and accompanying text.

437. OHIO REV. CODE ANN. § 2921.22(A)(1) (LexisNexis 2019) (applying to any person who "knowingly fail[s] to report" a felony "that has been or is being committed" without specifying a particular time by which the person must report the felony).

438. *Id.* § 2151.421(A)(1)(a) (LexisNexis 2019) (applying to any person who fails to "immediately" report knowledge of or reasonable cause to suspect child abuse or neglect).

439. MASS. GEN. LAWS ch. 268, § 40 (2019) (applying to any person who fails to report enumerated crimes "as soon as reasonably practicable").

440. NEV. REV. STAT. § 432B.220(1)(b) (2019) (applying to any person who fails to report child abuse or neglect "as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the child has been abused or neglected").

441. Louise Ellison & Vanessa E. Munro, *Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process*, 21 *INT'L J. EVIDENCE & PROOF* 183, 185 (2017); Gerald M. Streets, *The Homicide Witness and Victimization: PTSD in Civilian Populations: A Literature Review*, 8 *JEFFERSON J. PSYCHIATRY* 59, 59 (1990).

“reasonableness” construct still conveys urgency. Quick reporting could help reduce the likelihood of perpetrators fleeing, as Cash encouraged Strohmeier to do in the Iverson case, and minimize the destruction of evidence, as occurred in the Steubenville case. Ultimately, lawmakers must balance the public interest in rapidly addressing crimes and crises with the well-being of witnesses.

4. Consider Treating Third and Fourth Parties Similarly

Third parties should arguably shoulder more responsibility than fourth parties for reporting, given the former’s proximity to and firsthand knowledge of the incident. Due to the advent of social media and mobile devices, however, fourth parties also should carry an obligation to report, perhaps as much of a responsibility as third parties. Precisely because of their physical distance from the incident, it may be even more reasonable for fourth parties to report a crime or crisis than third parties. Seven states’ general duty-to-report statutes require reporting only where doing so is not risky.⁴⁴² Fourth parties typically face less immediate danger reporting a crime since their farther remove decreases the likelihood that the perpetrator will know their identities or that the fourth parties would otherwise be drawn into a perilous situation. On the other hand, fourth parties, again precisely because of their distance from the emergency, face challenges in verifying the veracity, nature, location, time, and other details of the incident.⁴⁴³

Not all extant state law on the duty to report reflects the reality and context of fourth parties to sexual violence. Existing state duties to report differ on whether the law’s subjects must be physically near the crime. Some laws—such as in Hawai’i,⁴⁴⁴ Massachusetts,⁴⁴⁵ and Washington⁴⁴⁶—apply only to individuals *present at* the crime (what I call “third parties”). Other laws—such as in California⁴⁴⁷ and Florida⁴⁴⁸—apply to individuals who

442. ALASKA STAT. § 11.56.765 (2019); HAW. REV. STAT. § 663-1.6 (2019); MASS. GEN. LAWS ch. 268, § 40; 11 R.I. GEN. LAWS § 11-1-5.1 (2019); TEX. PENAL CODE ANN. § 38.171 (West 2019); WASH. REV. CODE § 9.69.100(1) (2019); WIS. STAT. § 940.34 (2019).

443. Interview with Ruchika Budhraj, Pub. Policy & Commc’ns, and Neil Potts, Pub. Policy Manager, Facebook (June 22, 2018); Telephone Interview with Marcy Scott Lynn, Dir., Glob. Policy Programs, Social Good, Facebook (July 6, 2018); Telephone Interview with Jessica Mason, Policy & Copyright Commc’ns Lead, YouTube, Google (July 25, 2018); Telephone Interview with Gavin Corn, Dir. Cyber Sec. Law & Investigations Team & Assoc. Gen. Counsel, Facebook (Aug. 2, 2018).

444. HAW. REV. STAT. § 663-1.6(a) (applying only to a person “at the scene of a crime”).

445. MASS. GEN. LAWS ch. 268, § 40 (applying only to a person who “is at the scene of said crime”).

446. WASH. REV. CODE § 9A.36.160(1) (applying only to a person who “was present when a crime was committed against another person”).

447. CAL. PENAL CODE § 152.3(a) (West 2019) (applying only to people “who reasonably [believe] that he or she has observed the commission” of the crime).

448. FLA. STAT. § 794.027 (2019) (applying only to a person “who observes the commission of the

observe the crime. Still other laws—such as in Ohio⁴⁴⁹ and Wisconsin⁴⁵⁰—apply to individuals who *know of* the crime.

Given technological advancements that enable even fourth parties to learn reliably of crimes or crises contemporaneously or near-contemporaneously, physical presence should not be an element of the crime of failing to report. Such laws—as in Hawai’i, Massachusetts, and Washington—should be revised to eliminate this element. Moreover, where, as in California and Florida, one element of the law requires observation, either that element should be amended to require mere knowledge or it should be interpreted to include observation through visual and audio communication (for example, texts, photos, videos, voices, and other images and sounds transmitted through mobile devices or social media). The laws, as in Ohio and Wisconsin, which merely require knowledge of the crime, should be used as models because they encompass both third and fourth parties.

Of course, duty-to-report statutes that do not require physical presence at the emergency could cause complications. One such issue is numerical. Given the large number of potential social media viewers on online platforms (like Facebook Live, Instagram Live Video, YouTube Live, Periscope Produce, and YouNow) and recipients of visual and audio communication through mobile devices, it is possible that anywhere from dozens to millions of people could witness a crime or crisis.⁴⁵¹ Prosecutors would, of course, need to exercise discretion in whom to charge with a violation of a duty-to-report law in such a case. Again, though, such discretion can lead to abuse.⁴⁵²

A second issue is jurisdictional. Some people who observe a crime or crisis through a mobile device or social media may reside outside the state in which the emergency is occurring or occurred and where a duty to report is in effect. Such situations call for solutions at both the state and federal levels, as discussed below.

5. Apply Only Noncarceral Punishment to at Least Abstainers

Some Bad Samaritan laws carry jail time. For example, violations of both Ohio’s general duty-to-report law (under which, I argue above, Cole,

crime”).

449. OHIO REV. CODE ANN. § 2921.22(A)(1) (LexisNexis 2019) (applying to people “knowing that a felony has been or is being committed”).

450. WIS. STAT. § 940.34(2)(a) (2019) (applying to a person “who knows that a crime is being committed”).

451. See *supra* note 443.

452. See *supra* note 111 and accompanying text; *supra* note 436 and accompanying text.

Craig, Westlake, and Nodianos could have been charged in the Steubenville case) and Ohio's specific duty-to-report law (under which Fluharty and Gorman actually were charged in the same case) constitute misdemeanors of the fourth degree,⁴⁵³ which carry a maximum jail term of thirty days.⁴⁵⁴ Duty-to-report laws in Alaska,⁴⁵⁵ Florida,⁴⁵⁶ Texas,⁴⁵⁷ and Washington⁴⁵⁸ are the most punitive, potentially imposing imprisonment of up to one year. Other Bad Samaritan laws carry no jail time and only token financial penalties. For example, Massachusetts's duty-to-report law (enacted after the Araujo case) punishes violators with a fine between \$500 and \$2500.⁴⁵⁹

Given the analysis of the controversy over Bad Samaritan laws in Part II, penalties for violating a duty-to-report law should be severe enough to achieve the objectives of the law, including compliance and expression of moral revulsion towards unexcused bystanders, but should not exacerbate the problem of mass incarceration. Mirroring the growing nationwide call for decriminalizing misdemeanors,⁴⁶⁰ legislators should thus consider amending or introducing duty-to-report statutes such that they omit any jail time and include only alternative punishments. Such sanctions could include a fine, a citation, probation, training, or community service.⁴⁶¹ Of course, convictions for even nonjailable offenses can still impose significant burdens on offenders, including, ironically, incarceration itself.⁴⁶²

453. OHIO REV. CODE ANN. § 2921.22(I).

454. *Id.* § 2929.24(A).

455. ALASKA STAT. § 11.56.765(d) (2019) (categorizing a violation as a class A misdemeanor); *id.* § 12.55.135(a) (providing that a defendant convicted of a class A misdemeanor faces imprisonment of up to one year).

456. FLA. STAT. § 794.027 (2019) (categorizing a violation as a misdemeanor of the first degree); *id.* § 775.082 (providing that a defendant convicted of a misdemeanor of the first degree faces imprisonment of up to one year).

457. TEX. PENAL CODE ANN. § 38.17 (West 2019) (categorizing a violation as a Class A misdemeanor); *id.* § 38.171 (same); *id.* § 12.21 (providing that a defendant convicted of a Class A misdemeanor faces confinement in jail of up to one year).

458. WASH. REV. CODE § 9.69.100 (2019) (categorizing violation as a gross misdemeanor); *id.* § 9.92.020 (providing that defendant convicted of a gross misdemeanor when not fixed by statute faces imprisonment in county jail of up to 364 days).

459. MASS. GEN. LAWS ch. 268, § 40 (2019).

460. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1069–70 (2015).

461. For discussions of optimal sanctions, see Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205–14 (1985); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1241–46 (1985).

462. Natapoff, *supra* note 460, at 1089–91 (documenting the wide range of potential consequences for nonjailable offenses, including adverse impact on an offender's employment, immigration, licenses, loans, and public housing); *id.* at 1055 (stating that decriminalization "impose[s] fines and supervision on an ever-widening population, a population that ironically often ends up incarcerated anyway when [it] cannot afford fines or comply with supervisory conditions"); *id.* at 1081–86 (describing incarceration for

Alternatively, legislators could create a tiered system of punishment to reflect the aggravated nature of certain unexcused bystanderism. Abstainers could receive only noncarceral punishment whereas jail time could be imposed on enablers (and possibly engagers).

At least a portion of fines for failing to report sexual violence could be directed towards programs that assist sexual assault victims, educate the public on sexual violence prevention, and treat sex offenders. Such funds could be created (where they do not already exist) at the local, state, and national levels. However, some scholars caution envisioning fines as revenue sources.⁴⁶³ Such funds can be ineffective, in that jurisdictions may lack processes for collecting restitution.⁴⁶⁴ In addition, these revenue sources could create perverse incentives to charge, convict, and impose fines on suspected bystanders.

Training or community service sanctions could be relevant to the unreported crime. For instance, in the Steubenville case, Fluharty agreed to attend a sexual violence prevention training session and Gorman agreed to perform community service at a rape crisis center or victim assistance facility.⁴⁶⁵ Lawmakers should evaluate the intended and unintended consequences of various punishments before imposing them.

6. Actually Charge or Leverage Duty-to-Report Laws and Charge Enablers with Additional Crimes

Charges of violating Bad Samaritan laws are rare.⁴⁶⁶ Unless prosecutors find it necessary to strike a deal with unexcused bystanders to obtain their testimony or other evidence, abstainers, engagers, and enablers should be charged with such violations. Prosecutors should thus apply Bad Samaritan laws more consistently when appropriate.⁴⁶⁷ Some sexual violence survivors believe that doing so could help mitigate the crimes they have suffered. For instance, Rachael Denhollander, the first person to file a police complaint against Nassar and to publicly accuse him of sexual abuse, argues that “[t]he first step toward changing the culture that led to” Nassar’s offenses “is to hold enablers of abuse accountable,” including by “strengthening mandatory

failure to pay).

463. David Alan Sklansky, Comment “*Institutional Requirements for Effective Imposition of Fines*,” in *CONTROLLING CRIME: STRATEGIES AND TRADEOFFS* 121, 122–23 (Philip J. Cook et al. eds., 2011).

464. NAT’L CTR. FOR VICTIMS OF CRIME, *MAKING RESTITUTION REAL 3* (2011), https://victimsofcrime.org/docs/Report/2011_RestitutionReport_Intro.pdf [<https://perma.cc/WSV8-TH2H>].

465. See *supra* notes 391–92 and accompanying text.

466. See *supra* note 157 and accompanying text.

467. See *supra* Section II.A.

reporting laws”⁴⁶⁸

Strengthening and actually charging on duty-to-report laws are not the only means to promote accountability for sexual abuse enablers. Enablers also could be charged with committing other crimes that reflect the enhanced role they played beyond serving as passive bystanders. Depending on the jurisdiction, such additional crimes may include principal or accessory liability for aiding and abetting, conspiracy, obstruction of justice, or tampering with evidence.

The Steubenville and Iverson cases present situations in which prosecutors might have charged bystanders under existing state law with one or more crimes other than violating a Bad Samaritan statute. In the Steubenville case, bystanders may have deliberately deleted messages, photos, or videos to conceal the rapes Mays and Richmond perpetrated. If investigators had gathered sufficient evidence of that conduct and intent, then they presumably could have charged such bystanders with violating Ohio’s laws on tampering with evidence⁴⁶⁹ or obstructing justice.⁴⁷⁰

In the Iverson case, Cash may have served as a lookout in front of the restroom while Strohmeyer raped and killed Iverson inside. Cash then promised Strohmeyer he would keep the latter’s deadly sexual assault a secret, helped him formulate a false alibi, and encouraged him to flee. Nevada classifies parties to crimes as either principals or accessories.⁴⁷¹ Principals under Nevada law include parties who aid or abet the commission of a felony, gross misdemeanor, or misdemeanor.⁴⁷² Accessories to felonies under Nevada law are those who, after the commission and with knowledge of the crime, destroy, conceal, or aid in the destruction or concealment of material evidence or harbor or conceal the offender intending that the offender avoids or escapes arrest, trial, conviction, or punishment.⁴⁷³ If investigators had gathered sufficient evidence of Cash’s service as a lookout, then they could have charged him as a principal. As previously noted, a Nevada prosecutor stated that Cash’s conduct did not meet the necessary criteria to be charged as an accessory to Strohmeyer’s crimes. The Nevada legislator who successfully introduced The Sherrice Iverson Bill agreed with this assessment, observing that, although Cash knew Strohmeyer had

468. Denhollander, *supra* note 22.

469. *See* OHIO REV. CODE ANN. § 2921.12 (LexisNexis 2019).

470. *See id.* § 2921.32.

471. NEV. REV. STAT. § 195.010 (2019).

472. *Id.* § 195.020.

473. *Id.* § 195.030(1).

committed a crime, he did not try to conceal the crime or Strohmeier.⁴⁷⁴ However, if investigators had gathered sufficient evidence of Cash's knowledge of the crime, promise of secrecy, assistance in brainstorming a false alibi, and encouragement to flee, then perhaps they could have charged Cash as an accessory for knowing of and trying to conceal the crime with the intent of helping Strohmeier evade accountability.

The same case also presents a situation in which the relevant state legislature should amend existing state law to encompass a greater range of enablers' misdeeds, as is already the case in federal law and other states' laws. Under Nevada law, accessories to gross misdemeanors, rather than felonies, are those who, after the commission and with knowledge of a gross misdemeanor, harbor, conceal, *or aid* the offender intending that the offender avoids or escapes arrest, trial, conviction or punishment.⁴⁷⁵ As such, while the Nevada laws pertaining to accessories to felonies and gross misdemeanors include those who harbor or conceal the offender, only accessories to gross misdemeanors include those who, more broadly, *aid* the offender.⁴⁷⁶ The law in Nevada pertaining to accessories to felonies should be amended to include such generalized assistance, thus aligning it with existing federal law⁴⁷⁷ and the law in other states (such as California,⁴⁷⁸ Florida,⁴⁷⁹ and Massachusetts⁴⁸⁰). If so, perhaps an enabler like Cash could be charged under such a law.

7. Proliferate State and Territory Duty-to-Report Laws as Both Criminal and Civil Offenses

In deciding whether to amend or adopt duty-to-report laws, legislatures should consider whether violations of such statutes should constitute criminal or civil offenses, or both.⁴⁸¹ Monetary damages could assist victims of unreported crimes.

Hawai'i's duty-to-report law could serve as a model. This broad statute classifies violations as a petty misdemeanor and outlines liability for civil

474. Minutes of the J. Comm. on Judiciary, Nevada Legislature, 70th Sess. (Nev. 1999), available at <https://www.leg.state.nv.us/Session/70th1999/Minutes/AM-JUD-990317-AB267.html> [<https://perma.cc/9D69-EMNY>].

475. NEV. REV. STAT. § 195.030.

476. *Id.*

477. 18 U.S.C. § 3 (2018).

478. CAL. PENAL CODE § 32 (West 2019).

479. FLA. STAT. § 777.03(1)(a) (2019).

480. MASS. GEN. LAWS ch. 274, § 4 (2019).

481. For an argument to address the failure to report sexual crimes in tort law, see generally Chamallas, *supra* note 30.

damages.⁴⁸²

8. Introduce First General Federal Duty-to-Report Law

Sexual assault in the United States is a nationwide epidemic.⁴⁸³ Some assailants commit crimes within a single state whereas others perpetrate offenses in multiple regions.⁴⁸⁴ In addition, as discussed above, the advent of mobile devices and social media makes it possible for people in one state to be aware of crimes or crises in other jurisdictions. The introduction of broader federal legislation could produce a more coordinated, beneficial approach than the current patchwork of state and territory duty-to-report laws and the narrow federal Protecting Young Victims Act.

Given recent revelations about how widespread sexual misconduct is, including within Congress itself, federal lawmakers should leverage the momentum built by the recent passage of the Protecting Young Victims Act to consider introducing broader legislation. This legislation could take one or both of two forms. First, as with the proposal after the Iverson case,⁴⁸⁵ legislation could require any state receiving certain federal grants to certify that they have in effect and are enforcing a duty-to-report law. Second, based on prescription two above, instead of focusing just on sexual abuse of children (as occurred with the unsuccessful proposal after the Iverson case and the recently enacted Protecting Young Victims Act), legislation could feature a duty-to-report law at the federal level that applies to sexual violence against any person, regardless of age. Congress could also decide that knowledge of certain federal crimes—such as sexual assault aboard aircraft and in federal prison⁴⁸⁶ as well as human trafficking⁴⁸⁷—merits mandated reporting to federal authorities.

B. SOCIAL PRESCRIPTIONS

In all four of the case studies detailed in Part III, third parties certainly or supposedly sought to help during the crime or soon thereafter. In varying degrees of risk to themselves and benefit for victims, the following people attempted to or successfully did intervene in different ways: Mozer, Hoffman, and Farrar in the Genovese case; Machado, Pacheco, Silva, and

482. HAW. REV. STAT. § 663-1.6 (2019).

483. *See supra* Introduction; Part I.

484. For example, Weinstein is accused of sexual misconduct in multiple states and countries. *See supra* note 11.

485. *See supra* note 294 and accompanying text.

486. 18 U.S.C. §§ 7, 2241–44 (2018).

487. *Id.* §§ 2421–29.

the O'Neills in the Araujo case; Rhymer, Lee, and two other women in the Iverson case; and Goddard in the Steubenville case. As a result of some of these individuals' efforts, either a victim was comforted, law enforcement was notified, a perpetrator was temporarily scared away or ultimately identified and captured, or evidence of the crime was preserved and obtained by police.

In addition to strengthening, spreading, and standardizing duty-to-report laws, other means of promoting upstanderism should be pursued. This Part first considers the potential benefits and drawbacks of identifying and incentivizing upstanders. These factors are retrospective, prospective, principled, pragmatic, or some combination. Drawing on models and lessons from domestic and foreign contexts, this Part then offers prescriptions: creating and proliferating what I call "upstander prizes" and "upstander commissions"; increasing accurate media coverage and public awareness of sexual misconduct, bystanders, upstanders, Bad Samaritan laws, and upstander prizes and commissions; training upstanderism and identification of sexual violence; and improving reporting tools. These social prescription "carrots" would complement the legal prescription "sticks" discussed in Section V.A.

1. Potential Benefits

There are numerous potential benefits to identifying and incentivizing upstanderism. First, such documentation and celebration could inspire and induce would-be bystanders to act instead as upstanders. Consequently, future crimes and crises could be prevented or at least mitigated. In the Genovese case, for example, some bystanders may not have known how to help.⁴⁸⁸ Raising public awareness about Mozer's shout to Moseley, Hoffman's call to the police, and Farrar's direct assistance to Genovese would offer concrete examples of behavior future upstanders could emulate.

Second, upstander prizes could prod perpetrators to act later as upstanders. While politically and ethically controversial, offering inducements to bad people for good behavior may be effective.⁴⁸⁹

Third, identification of upstanders would generate a database for

488. See, e.g., Dowd, *supra* note 185.

489. See MADELEINE K. ALBRIGHT & WILLIAM S. COHEN, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS 70 (2008), available at <https://www.usmmm.org/m/pdfs/20081124-genocide-prevention-report.pdf> ("[A]lthough it is likely to be distasteful if not morally hazardous, policymakers should not dismiss the potential benefits of rewarding 'bad people' for 'good behavior' if it is likely to have the ultimate effect of preventing an outbreak of mass violence. Halting and reversing crisis escalation may require negotiating with—and even offering inducements to—unsavory people.").

studying these individuals and groups. Research on upstanderism could help ascertain and foster conditions that lead to such conduct. Indeed, some scholarship in social psychology and history is focused precisely on determining whether opportunities and situational factors promote upstanderism.⁴⁹⁰

Fourth, upstander identification could facilitate a more correct, complete account of a crime or crisis. The establishment of an accurate, extensive legal and historical record can serve as its own legitimate end.⁴⁹¹

Fifth, upstander identification could promote reconciliation and healing after the crime or crisis. Such identification could demonstrate to a victimized individual or group that some members of a supposed perpetrator group were actually upstanders. This reconciliation could help combat what Martha Minow has identified as cycles of enmity and violence.⁴⁹² Such identification could also promote healing among members of the offending group by demonstrating that they are not genetically or culturally predisposed to being perpetrators (for example, rapists or murderers). And documenting and rewarding upstanders could offer a healthy, welcome psychological break for members of the post-crime or post-crisis community. Awareness of positive, inspiring upstanderism would balance what may otherwise be an exclusive focus on the negative and macabre.

Sixth, identifying and honoring upstanders could bolster the legitimacy of accountability for wrongdoers. Commending upstanders who were members of the same group would convey that not all members of the group are considered complicit.

Finally, rewarding upstanders would express a community's gratitude to them for their good deeds. Such prizes and any related ceremonies may be as meaningful for the awardee as they are for the awardee.

2. Potential Drawbacks

Potential drawbacks of identifying and rewarding upstanders are as numerous and nuanced as the potential benefits. First, focusing even partially on benevolence may obscure the nature and scope of malevolence. For example, some Rwandans (roughly hundreds to a few thousand) acted as

490. See, e.g., LARISSA MACFARQUHAR, STRANGERS DROWNING *passim* (2015); SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY 113–41 (1988); ERVIN STAUB, THE PSYCHOLOGY OF GOOD AND EVIL: WHY CHILDREN, ADULTS, AND GROUPS HELP AND HARM OTHERS 103–39 (2003); Federico Varese & Meir Yaish, *The Importance of Being Asked: The Rescue of Jews in Nazi Europe*, 12 RATIONALITY & SOC'Y 307, 318–27 (2000).

491. KAUFMAN, *supra* note 23, at 36.

492. MARTHA MINOW, BREAKING THE CYCLES OF HATRED 15 (2002).

upstanders during the “Genocide against the Tutsi”⁴⁹³ in 1994,⁴⁹⁴ which featured rape as a tool of violence.⁴⁹⁵ However, the number of upstanders paled in comparison to the number of perpetrators. Some researchers estimate that approximately as many people participated in the genocide as were victims of it:⁴⁹⁶ over one million.⁴⁹⁷

Second, rewarding upstanders incentivizes undeserving individuals to misrepresent their actions. Heroic claims, however fraudulent, may qualify as protected speech, as the U.S. Supreme Court has ruled.⁴⁹⁸ However, if such false statements are made to the police, they could be prosecuted as obstruction of justice.⁴⁹⁹ Even without the carrots and sticks described in this Part, the uncorroborated upstander identified in this Article (Pacheco in the Araujo case) may not have told the truth.

Third, identifying certain upstanders may inaccurately suggest that they were the only or even most significant individuals who attempted to help. Fourth, identifying rescuers may lead to reprisals against them. Fifth, honoring upstanders could create perverse incentives for individuals to foment or participate in crimes or crises so that they may claim renown and rewards.

Finally, celebrating individuals as upstanders while they are still alive may make it difficult or impossible to retract or qualify such recognition if their subsequent actions are dishonorable. For example, Nobel Peace Prize winner Aung San Suu Kyi is accused of facilitating genocide in Myanmar, a country in which she previously promoted democracy and human rights.⁵⁰⁰ The Norwegian Nobel Institute has stated that it has no authority or procedure to revoke her award.⁵⁰¹

493. For discussion of the term “Genocide against the Tutsi in Rwanda,” see Zachary D. Kaufman, *Lessons from Rwanda: Post-Genocide Law and Policy*, 31 STAN. L. & POL’Y REV. ONLINE 1, 1 n.1 (2019) [hereinafter Kaufman, *Lessons from Rwanda*].

494. *Id.* at 20–21.

495. *Id.* at 11.

496. Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 93–95 (2004).

497. Kaufman, *Lessons from Rwanda*, *supra* note 493, at 1.

498. In 2012, the U.S. Supreme Court ruled that the Stolen Valor Act, 18 U.S.C. § 704 (2018), which criminalized falsely claiming receipt of a U.S. military award, unconstitutionally abridged the First Amendment’s Free Speech Clause. *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

499. John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 99–101 (2004).

500. Zachary D. Kaufman, *Give the Nobel Peace Prize Posthumously*, FOREIGN POL’Y (Oct. 5, 2017, 7:00 AM), <http://www.foreignpolicy.com/2017/10/05/give-the-nobel-peace-prize-posthumously> [<https://perma.cc/5R39-C6Q5>].

501. *Id.*

3. Prescriptions

i. Create and Proliferate “Upstander Prizes”

Upstanders—particularly those who are altruistic—should be rewarded for their efforts. Such “upstander prizes,” as I call them, would provide a ceremonial, financial, or other award.

In bestowing such prizes, corroborated upstanders—whether risk-accepting or risk-free; altruistic, required, or lured; or attempted or successful—should all be treated similarly. It may be difficult to determine an upstander’s assessment of risk. The intervenor’s motivation may also be ambiguous, particularly if duty-to-report laws and upstander prizes proliferate. In a context of carrots or sticks, it could be challenging to assess whether upstanders would have rendered aid without such inducements, as “altruistic upstanders.” It would need to be determined whether the upstander (1) knew of the carrots or sticks and (2) intervened only because of them. Regardless, upstanderism could be encouraged through rewards, even if it is legally required. Furthermore, *a priori*, upstanders cannot know whether the assistance they provide will achieve its objective. What matters is that they tried. And so society should reward the effort, not the outcome. Such a focus on undertaking, rather than accomplishing, intervention is similarly reflected in Bad Samaritan laws, which do not require actual prevention of harm.⁵⁰²

Especially when rewards for assisting victims in distress are known, individuals face incentives to misrepresent their conduct. Uncorroborated upstanders should thus not receive honors, as it is unclear whether or how they sought to help. Supporting evidence should be required for such awards.

At present, few prizes exist for upstanders and even fewer focus exclusively on such individuals or groups. To be sure, some upstanders have received awards not necessarily dedicated exclusively to such actors. For example, the White Helmets (a civilian organization that has reportedly saved more than 100,000 people during the ongoing conflict in Syria⁵⁰³) have received numerous recognitions.⁵⁰⁴ Outstanding upstanders like the White

502. Dressler, *supra* note 43, at 985–86.

503. THE WHITE HELMETS, <https://www.whitehelmets.org/en> [<https://perma.cc/R7ZS-L7U6>] (“[T]he rescue workers . . . have saved more than 100,000 lives over the past five years.”).

504. Some honors have been bestowed on the White Helmets as a group, such as nominations for the 2016, 2017, and 2018 Nobel Peace Prizes; an award in 2019 of the U.S. Holocaust Memorial Museum’s Elie Wiesel Award; and the receipt in 2016 of both the Rising Global Peace Forum prize and the Right Livelihood Award. *See, e.g.*, Press Release, U.S. Holocaust Mem’l Museum, Serge and Beate Klarsfeld and the Syria Civil Defence to Receive Museum’s 2019 Elie Wiesel Award (Apr. 15, 2019), <https://www.ushmm.org/information/press/press-releases/serge-and-beate-klarsfeld-and-the-syria-civil-defence-to-receive-museums-20> [<https://perma.cc/Z5NA-TGGY>]; Tom Embury-Dennis, *Nobel Peace*

Helmets should continue to be candidates for and recipients of such honors. However, given how widespread crimes and crises are, the potential for upstanders to make a meaningful difference, and the competition upstanders face from other types of candidates for these non-specific honors, more prizes focused wholly on upstanders should still be created.

Some countries do feature prominent examples of dedicated upstander prizes. Yad Vashem, Israel's official memorial, research institution, and education center for the Holocaust, conveys the country's gratitude to individuals who saved Jews during the Holocaust (which featured sexual violence⁵⁰⁵) by honoring them as "Righteous Among the Nations."⁵⁰⁶ To date, Yad Vashem has celebrated 27,362 such individuals.⁵⁰⁷ Recognized persons receive rewards in prominent ceremonies attended by government representatives.⁵⁰⁸ Honorees (or their next of kin) are awarded a certificate as well as a medal inscribed with their name and a quotation from the Talmud: "Whosoever saves a single life, saves an entire universe."⁵⁰⁹ The honoree's name is also added to the Wall of Honor in Yad Vashem's Garden of the Righteous in Jerusalem and details about his or her efforts are included

Prize Nominees: Pope Francis, White Helmets and Iran Nuclear Deal Negotiators Among Favourites, INDEPENDENT (London) (Oct. 5, 2017, 7:09 PM), <http://www.independent.co.uk/news/world/nobel-peace-prize-nominees-list-pope-francis-white-helmets-iran-deal-trump-a7985126.html> [<https://perma.cc/C7DJ-LZ8W>]; Kim Hjelmgaard, *Anti-Rape Activists Denis Mukwege, Nadia Murad Win 2018 Nobel Peace Prize*, USA TODAY (Oct. 5, 2018, 12:53 PM), <https://www.usatoday.com/story/news/world/2018/10/05/nobel-peace-prize-denis-mukwege-nadia-murad/1531727002> [<https://perma.cc/5SN4-BK3>]; Tracy McVeigh, *Jo Cox to Share Peace Prize with the Syrian Group She Championed*, THE GUARDIAN (London) (Nov. 12, 2016, 7:46 AM), <https://www.theguardian.com/uk-news/2016/nov/12/jo-cox-white-helmets-peace-prize-coventry> [<https://perma.cc/V657-TG72>]; *Syria's White Helmets Win 'Alternative Nobel Prize'*, BBC NEWS (Sept. 22, 2016), <http://www.bbc.com/news/world-middle-east-37442277> [<https://perma.cc/MWD8-UQTJ>];.

Sub-groups of the White Helmets, such as female members, have also been recognized for their particular contributions. *See, e.g., White Helmets' Female Volunteers Honoured for Bravery*, ITV NEWS (Mar. 7, 2017, 10:22 PM), <http://www.itv.com/news/2017-03-07/white-helmets-female-volunteers-honoured-for-bravery> [<https://perma.cc/CS5E-BDUQ>]. Individual members of the White Helmets have received recognitions as well; the group's leader, Raed Saleh, was named one of *Time's* 100 Most Influential People in 2017. Katie Reilly, *Syrian Civil Defense Leader Raed Saley at the TIME 100 Gala: 'We're Happy to be that Hope,'* TIME (Apr. 26, 2017), <http://time.com/4752462/time-100-gala-raed-saleh-syria-toast> [<https://perma.cc/NBV9-6AF5>].

505. SEXUAL VIOLENCE AGAINST JEWISH WOMEN DURING THE HOLOCAUST *passim* (Sonja M. Hedgepeth & Rochelle G. Saidel eds., 2010).

506. *The Righteous Among the Nations*, YAD VASHEM, <https://www.yadvashem.org/righteous.html> [<https://perma.cc/6NKZ-QVN7>].

507. *Names of Righteous by Country*, YAD VASHEM, <https://www.yadvashem.org/righteous/statistics.html> [<https://perma.cc/E6GX-LGBA>].

508. *Honoring the Righteous*, YAD VASHEM, <https://www.yadvashem.org/righteous/about-the-program/honoring-the-righteous.html> [<https://perma.cc/QMW3-JKE6>].

509. *Id.* (citation omitted).

in an online database.⁵¹⁰ In addition, Israel confers honorary citizenship on the honoree if he or she is still living or commemorative citizenship if not.⁵¹¹ Rwanda has begun awarding prizes for upstanders from the 1994 genocide in a program that is based in part on Yad Vashem's "Righteous Among the Nations."⁵¹²

Upstander prizes also exist in the United States and Canada, though they are typically focused on smaller scale crimes and crises than genocide.⁵¹³ The Carnegie Hero Fund Commission awards the "Carnegie Medal" to individuals in the United States and Canada who risk their lives "to an extraordinary degree" to save or attempt to save the lives of others.⁵¹⁴ As of June 2019, the Commission had honored 10,099 individuals and distributed \$40.9 million in one-time grants, scholarship aid, death benefits, and continuing assistance.⁵¹⁵ In 2018, the Commission honored a man who thwarted the attempted rape of a woman in Massachusetts two years earlier.⁵¹⁶ The Calgary police chief presents "Awards of Exceptional Recognition" at an annual black-tie gala. Awardees receive a framed certificate with their name inscribed and signed by the police chief.⁵¹⁷ During the 2016 ceremony, four young men were honored for having stopped the sexual assault of a teenage girl.⁵¹⁸

The "Righteous Among the Nations," Rwanda's program, the "Carnegie Medal," and "Awards of Exceptional Recognition" honors could serve as models for other upstander prizes. What upstander prizes should entail is debatable and may vary by context, depending on available resources, considerations of appropriateness, and political will. Such prizes

510. *Id.*

511. *Id.*

512. JEAN-MARIE KAYISEHMA & FRANÇOIS MASABO, THE RWANDAN RIGHTEOUS 13–16 (2010); Interview with Martin Niwenshuti, Data Collection, Aegis Trust (Apr. 9, 2014); Interview with Naphtal Ahishakiye, Executive Dir., IBUKA (Apr. 11, 2014).

513. For a select list of upstander prizes in the United States, see Hyman, *supra* note 43, at 666–68, 720–37.

514. CARNEGIE HERO FUND COMM'N, <https://www.carnegiehero.org> [<https://perma.cc/R3ZP-W6D2>].

515. Press Release, Carnegie Hero Fund Comm'n, 18 Named Carnegie Heroes for Acts of Extraordinary Heroism (June 24, 2019), <https://www.carnegiehero.org/carnegie-medal-awardees-june-2019-heroism> [<https://perma.cc/T6FK-XS75>].

516. Tréa Lavery, *Plymouth Man Presented with Carnegie Medal for 2016 Rescue*, PATRIOT LEDGER (May 9, 2018, 8:54 AM), <http://www.patriotledger.com/news/20180508/plymouth-man-presented-with-carnegie-medal-for-2016-rescue> [<https://perma.cc/LNC7-P66S>].

517. Interview with Lindsay Nykoluk, Commc'ns Strategist, Calgary Police Serv. (Feb. 14, 2018) [hereinafter Nykoluk interview].

518. Tricia Lo, *Skateboarders Who Stopped Sex Assault Among Calgarians Honoured for Bravery at Chief's Awards Gala*, CBC NEWS (Mar. 10, 2017), <http://www.cbc.ca/news/canada/calgary/2016-chief-awards-gala-calgary-1.3611207> [<https://perma.cc/FQF8-67UN>].

could include a ceremony, certificate, citizenship, medal, money, publication, publicity, or some combination.

ii. Create and Proliferate “Upstander Commissions”

For upstander prizes to succeed, they need governing bodies to create, design, and administer them. Such “upstander commissions,” as I call them, could also exercise other duties. Yad Vashem, for example, not only operates the Righteous Among the Nations program but also sponsors and conducts research on such individuals and groups.⁵¹⁹ Upstander commissions should be created throughout the world to manage prizes and both support and pursue research on upstanders.

Like upstander prizes, the design and operation of upstander commissions remain open questions and may vary by context. They could be sponsored and staffed by governments, civil society, or some combination. For example, the “Awards of Exceptional Recognition” bestowed by the Calgary police chief is administered by the “Chief’s Awards Board,” a committee comprised of a dozen sworn and civilian members of the Calgary Police Service that evaluates nominations before submitting them to the police chief for approval.⁵²⁰ Upstander commissions could only manage upstander prizes or also sponsor and conduct research. Like war crimes tribunals, upstander commissions could be ad hoc (to respond to a particular situation) or permanent, and they could be local, national, international, or some hybrid.⁵²¹

iii. Increase Accurate Media Coverage and Public Awareness of Sexual Misconduct, Bystanders, Upstanders, Carrots, and Sticks

On the one hand, media coverage of sexual misconduct is sometimes flawed. The media initially reported multiple erroneous details in the Genovese case, overstated the number of perpetrators and bystanders in the Araujo case, and neglected to report on the role upstanders played in both

519. For example, Yad Vashem publishes the *Search and Rescue* series, which features research on the Righteous. See *Search and Rescue*, YAD VASHEM, <https://www.yadvashem.org/research/about/research.html> [<https://perma.cc/NY7B-KWZS>]. In addition, Yad Vashem staff members—including Mordecai Paldiel, the then-director of the Department for the Righteous Among the Nations—have published their own research on the Righteous. See generally, e.g., MORDECAI PALDIEL, *DIPLOMAT HEROES OF THE HOLOCAUST* (2007); MORDECAI PALDIEL, *SAVING THE JEWS: AMAZING STORIES MEN AND WOMEN WHO DEFIED THE “FINAL SOLUTION”* (2000); MORDECAI PALDIEL, *SHELTERING THE JEWS: STORIES OF HOLOCAUST RESCUERS* (1996); MORDECAI PALDIEL, *THE PATH OF THE RIGHTEOUS: GENTILE RESCUERS OF JEWS DURING THE HOLOCAUST* (1993); MORDECAI PALDIEL, *THE RIGHTEOUS AMONG THE NATIONS* (2007).

520. Nykoluk interview, *supra* note 517.

521. See KAUFMAN, *supra* note 23, at 36–38 (describing the variation in war crimes tribunal sponsors and designs).

cases.⁵²² Accurate illustrations of sexual violence dynamics requires comprehensive, precise attention to detail.

On the other hand, media coverage of sexual misconduct can serve as an effective means to raise awareness and prompt urgency in investigations and prosecutions of perpetrators. For example, law enforcement and other authorities were slow to respond to the Nassar case until the press reported the allegations.⁵²³

The media, law enforcement, and NGOs should raise public awareness about sexual misconduct as well as the role bystanders and upstanders play in it. Some scholars believe that Bad Samaritan laws—with their low probability of application and light punishments—are less likely to promote upstanderism than the threat of public scorn following publicity of bystanderism.⁵²⁴ And it is possible that, by raising public awareness about upstanders, others will be inspired to emulate their conduct.

The government and other stakeholders should also raise public awareness about Bad Samaritan laws and upstander prizes and commissions. These carrots and sticks are ineffective if unknown. Publicity efforts could be similar to, modeled after, and possibly even tied to the U.S. Department of Homeland Security's "If You See Something, Say Something" campaign.⁵²⁵

iv. Train Upstanderism and Identification of Sexual Violence

In the Steubenville case, Westlake explained that he did not interfere in the rape because "[i]t wasn't violent. I didn't know exactly what rape was. I thought it was forcing yourself on someone."⁵²⁶ After the Steubenville case, the director of the Ohio Alliance to End Sexual Violence, Katie Hanna, stated: "[W]e all play a role in preventing sexual violence . . ."⁵²⁷ Unfortunately, she added, no funding was available to teach athletes and other students to intervene when they witness such an assault.⁵²⁸

522. See *supra* Part III.

523. Barry et al., *supra* note 35.

524. Dressler, *supra* note 43, at 985.

525. See generally *If You See Something, Say Something*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/see-something-say-something> [<https://perma.cc/MRG8-FM8P>].

526. Chelsea J. Carter & Poppy Harlow, *Alleged Victim in Steubenville Rape Case Says She Woke Up Naked*, CNN (Mar. 18, 2013, 11:36 AM) (quoting Westlake), <https://www.cnn.com/2013/03/16/justice/ohio-steubenville-case/index.html> [<https://perma.cc/4ERC-VDKS>].

527. Sandra Henriquez, *Steubenville Grand Jury Indictments: Time to Create Change to End Sexual Violence*, CAL. COALITION TO END SEXUAL VIOLENCE (Nov. 26, 2013), <http://www.calcasa.org/2013/11/steubenville-grand-jury-indictments-time-create-change-end-sexual-violence> [<https://perma.cc/ZNT4-QPUN>]; see also Dissell, *Four Indicted*, *supra* note 380.

528. Red & O'Keefe, *supra* note 365.

Such funding should be provided by the state and federal governments and donated by corporations, including those that have been mired in sexual abuse scandals. In some areas, individuals are even paying to learn upstander techniques. The Upstander Project, headquartered in Boston, was founded in 2009 and has trained more than two thousand educators.⁵²⁹ Hollaback!,⁵³⁰ based in New York, has conducted such programs since 2011 and typically trains approximately 250 people per year.⁵³¹ Upstander training could even be required in high-risk communities, such as university fraternities.⁵³² And such training should include not just intervention strategies but also, to respond to Westlake's possibly insincere defense, what sexual crimes entail.

v. Improve Reporting Tools

Given the ubiquity of mobile devices and social media—and the fact that they can be used to share and view crimes and crises—such technologies should include tools to report emergencies. These tools should be available within social media applications and should be easily and immediately accessible on mobile devices. If possible and appropriate, these reporting tools should use global positioning systems to identify the location of emergencies and directly connect the reporter to the closest police station. When responding, law enforcement should bear in mind the possibility of false reports by swatters and others.⁵³³

CONCLUSION

Few issues in the United States today are more prominent or require more urgent attention than sexual crimes. The statistics and stories are staggering. Recent revelations of sexual abuse across industries—including at the highest levels of government—have further raised public awareness about this epidemic and demands to address it.

While continuing to focus on perpetrators and survivors, the time has now come to shine a spotlight on what this Article calls third and fourth parties: witnesses and others who are knowledgeable about such heinous offenses. As with bystanders in the Genovese, Araujo, Iverson, and

529. *Team*, UPSTANDER PROJECT, <https://upstanderproject.org/team> [https://perma.cc/4GSJ-8A62]. Among other things, the Upstander Project runs an Upstander Academy and teacher workshops. *See* UPSTANDER PROJECT, <https://upstanderproject.org> [https://perma.cc/4N87-57Z6]; *see also* *Upstander Academy*, UPSTANDER PROJECT, <https://upstanderproject.org/academy> [https://perma.cc/B4SV-NDJ3].

530. *Trainings and Presentations*, HOLLABACK!, <https://www.ihollaback.org/trainings-and-presentations> [https://perma.cc/K5WM-R7E6].

531. Kay Lazar, *Bystanders Learn to Interrupt Hate*, BOS. GLOBE, May 31, 2017, at A1.

532. Laurel A. Mazar & Anne Kirkner, *Fraternities and Campus Sexual Violence: Risk, Protection, and Prevention*, 3 VIOLENCE & GENDER 132, 132–35 (2016).

533. *See supra* Section II.A.3.

Steubenville cases, many of these individuals face opportunities to prevent or halt sexual crimes. And yet many of them not only fail to provide assistance with minimal risk or burden, but also, as this Article has identified, some even facilitate the assaults or serve as accessories afterwards. We must now think creatively and boldly about how to compel such individuals to serve not as bystanders or enablers but as upstanders.

But the Genovese, Araujo, Iverson, and Steubenville cases do not just showcase bystanders. They also provide powerful examples of upstanders. Such actors can and should serve as models for ideal conduct during emergencies. These heroic individuals demonstrate that, even—and perhaps especially—amid the worst of humanity, we also can sometimes find the best.

This Article has proposed original typologies of bystanders and upstanders to increase nuance in terminology about and understanding of their roles in crimes and crises. This Article has also offered legal and social prescriptions, including strengthening, spreading, and standardizing Bad Samaritan laws at the state, territory, and federal levels as well as creating upstander commissions and prizes. This combination of carrots and sticks may help mitigate the sexual crime calamity and more closely align law with decency.

This Article is just a first step in developing such innovative proposals. The time is ripe for further study of sexual crime interventions, especially given the technological advances of the Digital Age. Future research should include quantitative and qualitative analyses to test the efficacy of my prescriptions, add robustness and refinement, and consider other crimes and crises beyond sexual abuse to which these proposals could—and should—be applied. As this Article has focused on the duty to report, future research should also concentrate on the other type of Bad Samaritan law: the duty to rescue.

The beginning of this Article quotes bystanders from the horrific Genovese, Araujo, Iverson, and Steubenville cases who explained that they were not upstanders because they did not want to get involved or did not care. Addressing sexual crimes requires us to become involved. We should care. To paraphrase Dante⁵³⁴: In this time of great moral crisis, we must resist neutrality.

534. See *supra* note 2 and accompanying text.