

Indiana Law Review

Volume 33

2000

Number 2

NOTES

JUSTIFICATIONS FOR STATE BYSTANDER INTERVENTION STATUTES: WHY CRIME WITNESSES SHOULD BE REQUIRED TO CALL FOR HELP

JENNIFER BAGBY*

INTRODUCTION

In the series finale of the television show *Seinfeld*, Jerry, Elaine, George, and Kramer served time in prison for violating Massachusetts' new Duty to Assist Statute. The fictional foursome had not only stood by passively and watched the mugging of a stranger, but also found the crime amusing. *Seinfeld* saw humor in a tragic situation.

The need for a statute creating a duty to report a crime or assist a crime victim enters into the debate through highly publicized tales of failure to render assistance. The first high profile incident of a failure to intervene occurred in 1964. On March 13, 1964, twenty-eight-year-old Catherine "Kitty" Genovese was stabbed to death outside of her Queens, New York apartment at three in the morning.¹ Thirty-eight of Ms. Genovese's neighbors witnessed the attack, but none called the police or intervened to stop the criminal. Ms. Genovese's assailant left her at one point when a neighbor yelled out of his window, but he later returned to continue his attack. Only one neighbor stepped forward to call the police, though even he waited to seek advice from a friend. By the time the police arrived at the scene, it was too late. Ms. Genovese had died.²

In 1983, six patrons of a New Bedford, Massachusetts tavern raped a twenty-two-year-old woman while the other customers cheered. No one intervened or called the police. The victim received help only when she escaped, ran into the street and hailed a passing truck.³

More recently, in May 1997, seven-year-old Sherrice Iverson was sexually assaulted and strangled to death in the women's restroom of a Primm, Nevada

* J.D. Candidate, 2000, Indiana University School of Law—Indianapolis; B.S., 1993, University of Kansas. The author wishes to thank her family and friends for their patience, support, and insight in the writing of this Note.

1. See A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES 30 (1964).

2. See *id.* at 30.

3. See Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 21 (1993). This attack served as the basis for the 1988 film *The Accused*. THE ACCUSED (Paramount Pictures 1988).

hotel and casino.⁴ Sherrice's murderer was eighteen year-old Jeremy Strohmeier. Jeremy's best friend, David Cash, followed Jeremy into the women's restroom, peered over the toilet stall and witnessed Jeremy in the stall with Sherrice. David tapped Jeremy on the head, but Jeremy did not stop his attack on Sherrice. David then left the restroom and waited outside⁵ without attempting to alert security guards to physically intervene to aid Sherrice. When Jeremy emerged, he confessed to molesting and killing Sherrice. After hearing the confession, David's only response was to ask whether the girl had been aroused.⁶ The two young men then left the casino and played video games at a nearby arcade. As a result of David's failure to intervene, Sherrice Iverson's mother and others are advocating a law requiring witnesses to intervene and report cases of sexual assault against children. They have vowed to take their case to the federal level.⁷

This Note, in part, addresses whether a statute, either state or federal, should impose upon a crime witness both the duty to intervene⁸ and criminal liability for failure to do so. Part I provides background on the legal duty to assist another and existing legislation in the area. Part II discusses sociological/societal and psychological justifications for an affirmative duty statute that would require intervention on behalf of the victim of a crime. Part III proposes a statute requiring intervention on behalf of the victim and considers possible penalties for the violation of such a statute. Part IV examines the federalization of such a statute and concludes that, while states are justified in enacting intervention statutes, the federal government does not have the power to pass such legislation.

I. BACKGROUND

A. History

Traditionally, American law has not imposed liability, either civil or criminal, for the failure to render assistance or rescue, absent a specific legal duty to do so.⁹ Instead, within the law of torts, a distinction has generally been made

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

5. See *id.*

6. See *id.* Jeremy Strohmeier pled guilty to avoid the death penalty. Jeremy's attorney proposed that David should be punished for not stopping Jeremy. See *id.* The duty proposed by this Note would not provide a means of reducing the guilt or culpability of the assailant. Rather, it would serve to assist the victims of crime.

7. See *id.*

8. Intervention may mean reporting or providing direct assistance. See Robert F. Kidd, *'Impulsive' Bystanders: Why Do They Intervene*, in REACTIONS TO CRIME: THE PUBLIC, THE POLICE, COURTS, AND PRISONS 20, 23-24 (David P. Farrington & John Gunn eds., 1985).

9. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 56 (5th ed. 1984). Because of this reluctance to countenance "nonfeasance" as a basis of liability, the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is

between "misfeasance" (active misconduct), and "nonfeasance" (passive inaction).¹⁰ In order for liability to be imposed, the law has typically required active rather than passive conduct. Thus the law has created restraints on affirmative acts of harm while avoiding turning the courts into a means of forcing people to help each other.¹¹

Affirmative duties and subsequent liability for omissions, however, are imposed upon persons standing in certain personal relationships to others.¹² Within the law of torts, a specific relationship is required for the imposition of liability for a failure to act.¹³ Criminal liability for omissions may also be imposed when the parties involved stand in personal relationships with each other.¹⁴ For example, parents are under a duty to aid their children; a spouse is under a duty to aid his or her spouse; ship captains are under a duty to aid their crews; and masters are under a duty to aid their servants.¹⁵ These relational duties are similar to those required in the law of torts. Thus, while criminal liability will not usually be imposed upon a bystander who fails to summon the authorities for a stranger, a parent may be held criminally liable for failing to summon the authorities to assist his or her child.

In addition to duties created by special relationships, many other situations also give rise to an affirmative duty. Often, an affirmative duty may be created by statute. Examples include a duty to help another in distress, a duty to provide safety measures, and a duty to provide necessities.¹⁶ In addition, an affirmative duty may also arise out of a contract. Failure to act according to the contract may result in criminal liability even if the victim is not one of the contracting parties.¹⁷

in danger of losing his life.

Id. at 375. "Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself." WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 3.3, at 203 (2d ed. 1986).

10. KEETON ET AL., *supra* note 9, at 373.

11. *See id.*

12. *See id.* at 376.

13. "[D]ifficulties of setting any standards . . . ha[ve] limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty. . . ." *Id.*

14. *See* LAFAVE & SCOTT, *supra* note 9.

15. *See id.*

16. *See, e.g.*, IND. CODE § 35-46-1-4 (1998) (neglect of a dependent; child selling); KAN. STAT. ANN. § 21-3605 (1995) (non-support of a child or spouse); KAN. STAT. ANN. § 21-3608 (1995) (endangering a child); N.Y. PENAL LAW § 260.05 (McKinney 1989) (non-support of a child); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.07, at 82 (1987); *infra* Part I.B (discussing statutes imposing a duty to rescue).

17. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 54, at 663 (3d ed. 1982). For example, where a mother enters into a contractual relationship with a babysitter to watch her children, the babysitter could face liability for failing to assist one of the children even though the child was not a party to the contract. *See* DRESSLER, *supra* note 16, at 83; LAFAVE & SCOTT, *supra* note 9, at 205.

Further, once someone undertakes to rescue another, a duty is subsequently imposed to complete the rescue.¹⁸ When a party creates a danger, he or she is under a duty to safeguard others against that danger.¹⁹ A duty to act also exists where a party is under a duty to control the conduct of others.²⁰ Finally, landowners may be under a duty to provide for the safety of those "present on their property."²¹

B. Current Legislation

While in common law no general duty to rescue existed, many states have now enacted affirmative duty statutes in response to outrageous crimes and the failure of witnesses to intervene. These affirmative duty statutes require a bystander to intervene to assist a crime victim or impose criminal liability for the failure to do so. These statutes require either the rescue of one in peril in the absence of danger or the immediate reporting of crimes to the authorities.

Four states have each enacted statutes requiring rescue by a bystander when no danger is imminent: Minnesota,²² Rhode Island,²³ Vermont,²⁴ and

18. See DRESSLER, *supra* note 16, at 83.

19. See *id.*

20. See LAFAYE & SCOTT, *supra* note 9, at 206.

21. *Id.*

22. See MINN. STAT. ANN. § 604A.01(1) (West Supp. 1999).

Duty to assist.

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Id.

23. See R.I. GEN. LAWS § 11-56-1 (1994).

Duty to assist.

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars (\$500), or both.

Id.

24. See VT. STAT. ANN. tit. 12, § 519 (1973).

Emergency medical care

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others. . . .

Wisconsin.²⁵ Minnesota enacted its statute in response to the gang rape in New Bedford, Massachusetts.²⁶

Colorado,²⁷ Florida,²⁸ Hawaii,²⁹ Massachusetts,³⁰ Nevada,³¹ Ohio,³² Rhode Island,³³ and Washington³⁴ have each enacted statutes requiring witnesses to report the crimes they witnessed to the authorities. These state statutes that create a duty to report crime appear to fall within two distinct types: those that require the reporting of certain, specifically enumerated crimes and those that require reporting of all general criminal acts. Massachusetts,³⁵ Rhode Island,³⁶

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

Id.

25. See WIS. STAT. ANN. § 940.34 (West 1996).

Duty to aid victim or report crime.

(1)(a) Whoever violates sub. (2)(a) is guilty of a Class C misdemeanor . . .

(2)(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

Id.

26. See *supra* note 3 and accompanying text. “[T]he ‘bill’s sponsor . . . said he was moved to introduce the bill by reports of the gang rape earlier this year of a woman in a New Bedford, Mass., barroom who was hoisted onto a pool table and repeatedly assaulted while spectators stood by and some shouted ‘go for it!’” LAFAVE & SCOTT, *supra* note 9, at 212 n.70 (quoting NAT’L L.J., Aug. 22, 1983, at 5).

27. See COLO. REV. STAT. ANN. § 18-8-115 (West 1999).

28. See FLA. STAT. ANN. § 794.027 (West 1992).

29. See HAW. REV. STAT. ANN. § 663-1.6(a) (Michie 1995).

30. See MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

31. See NEV. REV. STAT. ANN. § 202.882 (Michie 1999).

32. See OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

33. See R.I. GEN. LAWS §§ 11-1-5.1; 11-37-3.1 (1994).

34. See WASH. REV. CODE ANN. § 9.69.100 (West 1998).

35. See MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

Reports of crimes to law enforcement officials

Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Id.

36. See R.I. GEN. LAWS § 11-1-5.1 (1994).

Reports of crimes to law enforcement officials.

A person who knows that another person is a victim of sexual assault, murder, manslaughter, or armed robbery and who is at the scene of the crime shall, to the extent that the person can do so without danger of peril to the person or others, report the

Washington,³⁷ and Florida³⁸ fall into the first class of statutes, while Colorado,³⁹

crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates the provisions of this section shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000).

Id.

R.I. GEN. LAWS § 11-37-3.1 (1994) states:

Duty to report sexual assault.

Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence shall immediately notify the state police or the police department of the city or town in which the assault or attempted assault is taking place of the crime.

Id.

37. See WASH. REV. CODE ANN. § 9.69.100 (West 1998).

Duty of witness of offense against child or any violent offense—Penalty

(1) A person who witnesses the actual commission of:

(a) A violent offense as defined in RCW 9.94A.030 or preparations for the commission of such an offense;

(b) A sexual offense against a child or an attempt to commit such a sexual offense; or

(c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child, shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials. . . .

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm.

Id.

38. See FLA. STAT. ANN. § 794.027 (West 1992).

Duty to report sexual battery; penalties

A person who observes the commission of the crime of sexual battery and who:

(1) Has reasonable grounds to believe that he or she has observed the commission of a sexual battery;

(2) Has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer;

(3) Fails to seek such assistance;

(4) Would not be exposed to any threat of physical violence for seeking such assistance;

(5) Is not the husband, wife, parent, grandparent, child, grandchild, brother, or sister of the offender or victim, by consanguinity or affinity; and

(6) Is not the victim of such sexual battery

is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

Id.

39. See COLO. REV. STAT. ANN. § 18-8-115 (West 1994).

Duty to report a crime—liability for disclosure

It is the duty of every corporation or person who has reasonable grounds to believe that

Hawaii,⁴⁰ Nevada,⁴¹ and Ohio⁴² represent the second.

In January 1998, a bill was introduced into the Mississippi House of Representatives that would have required a person to summon law enforcement officers or other assistance when he or she knew that a victim was being exposed to bodily harm during the commission of a crime.⁴³ However, the bill was not carried over when the regular session ended in May 1998. A bill requiring one to summon assistance when he or she knows that another person has suffered

a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law.

Id.

40. See HAW. REV. STAT. § 663-1.6(1) (Michie 1995).

Duty to Assist

(a) Any person at the scene of a crime who knows that a victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanor.

Id.

41. See NEV. REV. STAT. ANN. § 202.882 (Michie 1999).

Duty to report violent or sexual offenses against child 12 years of age or younger; penalty for failure to report; contents of report

1. [A] person who knows or has reasonable cause to believe that another has committed a violent or sexual offense against a child who is 12 years of age or younger shall:

(a) Report the commission of the violent or sexual offense against the child to a law enforcement agency; . . .

2. A person who knowingly and willfully violates the provisions of subsection 1 is guilty of a misdemeanor.

Id. The Nevada statute was inspired, in part, by the attack on Sherrice Iverson. See *60 Minutes* (CBS television broadcast, Aug. 29, 1999), available in 1999 WL 16209104.

42. See OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

Reporting Felony; Medical Personnel to Report Gunshot, Stabbing, and Burn Injuries and Suspected Domestic Violence

(A) No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities. . . .

(I) Whoever violates division (A) or (B) of this section is guilty of failure to report a crime. Violation of division (A) of this section is a misdemeanor of the fourth degree.

Id.

43. See H.R. 604, 1998 Reg. Sess. (Miss. 1998).

substantial bodily harm was also introduced in Washington in 1997.⁴⁴ The bill was never codified and was re-introduced on January 22, 1999.⁴⁵

At the federal level, the Misprision of Felony⁴⁶ statute has long been "on the books," although it has seldom been used. The Misprision of Felony statute is likely not to apply in situations of bystander intervention. The statute states that

[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.⁴⁷

"Felony" is a much more technical requirement than knowing that someone is in danger or the victim of crime. A further requirement read into the statute in order to obtain a conviction is an affirmative act of concealment.⁴⁸ In order for the Misprision of Felony statute to serve as a bystander intervention statute, the bystander would have to know that a felony is being committed and engage in some affirmative act of concealment. Therefore, the federal Misprision of Felony statute does not serve the role of a bystander intervention statute.

II. JUSTIFYING BAD SAMARITAN STATUTES

The bystander intervention duty has its origins in biblical tradition. Intervention statutes, such as those discussed above,⁴⁹ are often referred to as "Good Samaritan" statutes based on the parable of the same name. In the "Good Samaritan,"⁵⁰ a man, though he was not obligated to do so, rescues a stranger

44. See 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, 416 (1998).

45. See H.R. 1429, 56th Leg., 1st Reg. Sess. (Wash. 1999).

46. 18 U.S.C. § 4 (1994).

47. *Id.*

48. See Jack Wenik, *Forcing Bystanders to Get Involved: Case for Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1792 (1985).

49. See *supra* notes 22-42 and accompanying text.

50. The Christian parable of the Good Samaritan illustrates the moral duty to render assistance to those in need. The parable states:

A man fell victim to robbers as he went down from Jerusalem to Jericho. They stripped and beat him and went off leaving him half-dead. A priest happened to be going down that road, but when he saw him, he passed by on the opposite side. Likewise a Levite came to the place, and when he saw him, he passed by on the opposite side. But a Samaritan traveler who came upon him was moved with compassion at the sight. He approached the victim, poured oil and wine over his wounds and bandaged them. Then he lifted him up on his own animal, took him to an inn and cared for him. The next day he took out two silver coins and gave them to the innkeeper with the instructions, "Take care of him. If you spend more than what I have given you, I shall repay you on my way back."

who had been beaten and left on the side of a road. Unlike the priest and the Levite who passed the stranger by, the Samaritan offered assistance.

Bad Samaritan statutes, however, provide a better description. According to professor and author Joel Feinberg in *Harm to Others*, the Bad Samaritan is:

1. [A] stranger standing in no "special relationship" to the endangered party,
2. [W]ho omits to do something—warn of unperceived peril, undertake rescue, seek aid, notify police, protect against further injury, etc.—for the endangered party,
3. [W]hich he could have done without unreasonable cost or risk to himself or others,
4. [A]s a result of which the other party suffers harm, or an increased degree of harm,
5. [A]nd for these reasons the ommitter is "bad" (morally blameworthy).⁵¹

Tales of outrageous omissions, such as those described above,⁵² indicate the need for "Bad Samaritan" legislation. Aside from existing legislation in a few states, sociological and psychological justifications exist in support of enacting "Bad Samaritan" statutes in the states. Bystander intervention statutes prevent harm and protect public interests by motivating and requiring bystanders to intervene to aid crime victims.

A. Sociological Justifications

Sociological justifications exist for bystander intervention statutes because they serve both current societal requirements and benefit society as a whole. Moral obligation, civic duty, harm prevention, and public interest each provide sociological justifications for bystander intervention legislation.

1. *Moral Justifications*.—"Bad Samaritan" legislation is supported by the moral obligation to render assistance to others. Moral obligation in itself is often criticized as a justification for "Bad Samaritan" statutes based on the belief that such statutes (wrongfully) legislate charity.⁵³ Because other justifications exist for "Bad Samaritan" statutes, it is not necessary that these criticisms be addressed.

However, even if morality served as the only justification, "Bad Samaritan" legislation should not be automatically dismissed. Lord Patrick Devlin of England wrote, "I think it is clear that the criminal law as we know it is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else."⁵⁴ He went on to state that "without shared

Luke 10:30-36.

51. JOEL FEINBERG, *HARM TO OTHERS* 126 (1984).

52. See *supra* notes 1-6 and accompanying text.

53. See FEINBERG, *supra* note 51, at 129.

54. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 7 (1975). Examples of such crimes

ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live."⁵⁵ That we share the ideals inherent in the morality of "Bad Samaritan" legislation is evident in the teachings of various world religions.⁵⁶ Legislation in this area "would give legal effect to a moral principle that we are our brother's keeper."⁵⁷

Because the moral principle behind "Bad Samaritan" statutes is shared almost universally by the world's many religions and because laws are often based, to some degree, on moral principle, moral obligation supports enactment of a bystander intervention statute. Creation of such a statute would give legal effect to an already existing shared principle that we should help those in distress.

2. *Civic Duty as a Justification.*—The enactment of "Bad Samaritan" legislation is further supported by existing civic duty. While few jurisdictions have mandated a duty to report crime, a civic duty to assist in the criminal justice system by notifying the police with information concerning crimes is as old as our nation. "For our political system . . . clearly imposes a *civic duty*, a duty of citizenship, to cooperate with law enforcement, even when that duty is not specifically enforced by the criminal or civil law."⁵⁸ Notification is vital to the criminal justice system.⁵⁹

include bans on euthanasia, incest between siblings, and suicide. *See id.*

55. *Id.* at 10.

56. In addition to the Christian parable of the Good Samaritan stated above, a story in the Jewish Talmud states that "whoever saves one life is as though he had saved the whole world." REV. DR. A. COHEN, *EVERYMAN'S TALMUD* 222 (E.P. Dutton & Co. 1949). *See also* B.T. *Sanhedrin* 37(A); Plater Robinson, *Schindler's List Teaching Guide* (June 1995) (visited Aug. 9, 1999) <<http://www.tulane.edu/~so-inst/schind.html>>.

In Buddha's Sermon on Charity:

The charitable man has found the path of salvation. He is like the man who plants a sapling, securing thereby the shade, the flowers, and the fruit in future years. Even so is the result of charity, even so is the joy of him who helps those that are in need of assistance; even so is the great Nirvana.

We reach the immortal path only by continuous acts of kindness and we perfect our souls by compassion and charity.

PAUL CARUS, *THE GOSPEL OF BUDDHA* 76 (1915).

The Hindus believe that God is unselfishness. *See generally* Vivekananda, *VIVEKANANDA: THE YOGAS AND OTHER WORKS* (1953). "Gandhi showed the world that the love of one's people need not be inconsistent with the love of humanity. He strove to free the downtrodden from the shackles of injustice, slavery and deprivation." YOGESH CHADHA, *GANDHI—A LIFE* at vii (John Wiley & Sons 1997).

57. Diane Kiesel, *Who Saw This Happen? States Move to Make Crime Bystanders Responsible*, 69 A.B.A. J. 1208, 1208 (1983) (quoting Arthur Miller).

58. JOEL FEINBERG, *HARMLESS WRONGDOING* 244 (1988).

59. *See* FEINBERG, *supra* note 51, at 171.

The duty proposed by this Note,⁶⁰ bystander intervention by summoning the authorities, would serve the civic duty of assisting law enforcement. By requiring bystanders to notify the authorities, the criminal justice system is able to fulfill its role in aiding the victims of crime and stopping criminal acts. Because all citizens share in the responsibility of maintaining the criminal justice system and because notification is a vitally important factor in its efficient administration, civic duty justifies the enactment of bystander intervention statutes.

3. *Prevent Harm*.—“Bad Samaritan” legislation is further justified because it serves to prevent harm by requiring either a rescue or the immediate reporting of a crime in order to assist the victim. Without any intervention, a crime victim is certain to suffer some type of harm; bystander intervention statutes serve to prevent harm or alleviate this harm in order to create a better result for the victim. Bystander intervention statutes serve to prevent harm to the victim that is connected and causally relevant to the bystander’s failure to intervene.

Criminal laws exist, in part, to prevent harm.⁶¹ The law regulates personal freedom by imposing duties and extending liberties. The law also confers rights against one’s fellow citizens; it protects citizens by prohibiting one from exercising their personal liberties to the detriment of others.⁶² While a presumption in favor of liberty exists, certain societal interests justify limiting personal liberty.⁶³

The Harm Principle is a common liberty-limiting principle. It holds that penal law is permissible because it is an effective means of preventing harm to people.⁶⁴ A harm is defined as a wrongful setback of interest.⁶⁵ Omissions, under some circumstances, can be the cause of harms.⁶⁶ “Preventing people from causing harm is noncontroversially a legitimate function of criminal law, and prohibiting people from allowing harm has precisely the same point, namely *to prevent harms*.”⁶⁷

60. See discussion *infra* Part III.A.

61. See FEINBERG, *supra* note 51, at 131. “[T]he criminal law system is the primary instrumentality for preventing people from intentionally or recklessly harming one another.” *Id.*

62. See *id.* at 8.

63. See *id.* at 10.

64. See *id.* at 26.

65. See *id.* at 33.

66. See *supra* Part I.A.

67. FEINBERG, *supra* note 51, at 129. “Both statutes prohibiting persons from causing harm and statutes requiring persons to prevent harm have as their rationales the need to prevent harm, precisely the rationale whose legitimacy is endorsed by the harm principle as initially formulated.” *Id.* at 186. “Where minimal effort is required of a [S]amaritan there seems to be no morally significant difference between his allowing an imperiled person to suffer severe harm and his causing that harm by direct action, other things (intention, motive) being the same.” *Id.* at 171. The duty to intervene on behalf of the victim proposed by this Note would only be imposed where the harm to be prevented or stopped is extreme and the effort or risk required to prevent it is minimal. The duty would only be imposed when a bystander witnesses specific criminal acts and where the

One argument against “Bad Samaritan” legislation is the distinction between misfeasance and nonfeasance.⁶⁸ However, “Bad Samaritan” legislation is justified as it serves to prevent harm, regardless of misfeasance or nonfeasance. Under the Harm Principle, the distinction between preventing people from causing harm and prohibiting people from allowing harm is irrelevant, because the victim ultimately suffers harm. Regardless of whether there is a bystander witnessing a crime or not, the crime victim suffers harm. The bystander intervention statute proposed by this Note⁶⁹ would require the bystander to intervene by reporting the crime and summoning the authorities. By summoning the authorities, the victim’s injury would be mitigated or avoided all together. The police may be able to stop the crime and rescue the victim. Because harm to the crime victim is either mitigated or completely avoided by the enactment of “Bad Samaritan” legislation, it serves the harm principle, thereby providing support for the enactment of “Bad Samaritan” legislation.

“Bad Samaritan” legislation serves to prevent harm. The harms prevented by such statutes are connected to the bystander’s failure to intervene.⁷⁰ A bystander who witnesses a crime upon a victim has the power to affect the situation and the crime in progress by notifying the authorities or directly assisting the victim. If the bystander does nothing, the resulting harm to the victim is a consequence of the bystander’s decision not to use this power to intervene.

Not only is the harm that results to the victim connected to the bystander’s failure to intervene, but the bystander’s failure to intervene is also a “causally relevant factor”⁷¹ in the resulting harm to the victim. Failing to summon the authorities on behalf of the victim is not the sole cause for the resulting harm—the bystander is not directly attacking the victim. However, the bystander’s failure to summon the authorities or to provide direct assistance plays a relevant role in the harm that results. This causal connection supports the enactment of “Bad Samaritan” legislation. If the bystander intervenes, the victim will not be harmed as severely. If, for example, the victim was assaulted, the bystander’s direct intervention or immediate crime reporting may avoid commission of a rape or a murder. This connection indicates that the bystander is a casual factor in the victim’s harm if he or she fails to intervene.

Requiring a bystander to intervene, either directly or by summoning the authorities, could reduce or prevent any harm done to the victim. The harm that is avoided is causally connected to the bystander’s failure to intervene. Because it prevents harm and therefore serves the Harm Principle, justification exists for enactment of “Bad Samaritan” legislation.

duty may be executed without harm to the bystander. See discussion *infra* Part III.A.

68. See *supra* notes 9-11 and accompanying text.

69. See discussion *infra* Part III.A.

70. “[W]hen one has the power to affect events one way or another depending on one’s choice, then the way events are subsequently affected is a consequence of the way that power was exercised.” FEINBERG, *supra* note 51, at 174.

71. *Id.* at 175.

4. *Protect Public Interests.*—Related to the Harm Prevention Principle, which protects people from harm, “Bad Samaritan” legislation is further justified because it would protect public interests. A statute imposing the duty to intervene on behalf of crime victims and imposing criminal liability for the failure to do so would serve to deter antisocial behavior. Criminal legislation exists to protect societal interests, including the protection of public harm.⁷² Antisocial behavior can appropriately be made the subject of a criminal statute because it constitutes a public wrong.⁷³

Witnessing a crime and ignoring the plight of the victim is antisocial behavior and therefore a public wrong. A witness to a crime who fails to intervene ignores societal expectations to aid one’s neighbor, despite the absence of a legal duty.⁷⁴ A statute that requires intervention would allow the criminal justice system to punish the failure to intervene. Such a criminal statute would therefore serve to deter antisocial behavior on the part of the witness/bystander.

Moral justifications and existing civic duty serve as societal justifications for “Bad Samaritan” legislation. In addition, such legislation would serve to prevent harm to others and would serve to deter antisocial behavior.

B. *Psychological Justifications*

In addition to sociological justifications, psychological justifications also exist for the enactment of “Bad Samaritan” legislation. Psychological justifications include creating an expectation of intervention, creating a prior personal decision on behalf of the bystander, drawing the bystander to the suffering of the victim, equalizing expectations, and fulfilling the need for personal gratification. Each of these serves to motivate the bystander to intervene and, in doing so, justifies the enactment of “Bad Samaritan” legislation.

1. *Societal Expectation of Intervention.*—“Bad Samaritan” statutes would create a societal expectation of intervention. Individual’s behavior is shaped by social norms. One reason people do not render assistance is that they perceive no societal expectation to do so. Bystanders are acting in accordance with the social norm of no intervention.⁷⁵ David Cash, whose best friend Jeremy Strohmeyer sexually assaulted and murdered Sherrice Iverson in a restroom while David waited outside, repeatedly stated, when criticized for failing to stop his friend, that he did nothing wrong and was under no duty to act otherwise.⁷⁶ Based upon David’s statements one could say that he felt no societal expectation to intervene. A statute requiring some form of intervention would change the legal duty from no obligation to assist to a duty of intervention. Laws emphasize

72. See *id.* at 11.

73. See Anthony D’Amato, *The “Bad Samaritan” Paradigm*, 70 NW. U. L. REV. 798, 808 (1976).

74. See *id.*

75. See Wenik, *supra* note 48, at 1803.

76. See Booth, *supra* note 4, at 59; see also *supra* notes 4-6 and accompanying text.

to people that they have a responsibility to help.⁷⁷ Therefore, the creation of an expectation of intervention justifies enactment of "Bad Samaritan" statutes.

2. *Personal Responsibility and Prior Decision to Intervene.*—"Bad Samaritan" legislation would also aid in developing a personal responsibility and a prior decision on behalf of bystanders to help. Bystanders are more likely to intervene if they feel personally obligated to do so and if they made a prior decision to intervene when necessary. A feeling of personal responsibility on the part of the bystander influences their decision whether or not to intervene. Individuals are more likely to act in a prosocial manner when they feel personally responsible or under an obligation to do so.⁷⁸ In a 1972 experiment by professor and psychologist Thomas Moriarty, only twenty percent of bystanders intervened to stop a would-be thief.⁷⁹ However, when the owner of the belongings asked the bystander to watch her things, ninety-five percent of those asked to watch intervened to stop the thief.⁸⁰ Moriarty's study further revealed that when a prior decision to help was made, failure to intervene decreased.⁸¹

If all potential bystanders and witnesses were under a duty to intervene, personal responsibility and a prior decision to help would be created. When faced with a crime in which the victim needs assistance, a bystander may feel a personal responsibility and would know that intervention is required. Further, the obligation of the statute would serve as a prior decision to intervene. Intervention would be increased by this personal responsibility and prior decision. Because it would motivate bystanders to intervene, enactment of "Bad Samaritan" legislation is justified.

3. *Drawing the Bystander to the Victim.*—A statute meant to benefit the victim would draw potential bystanders to the suffering of crime victims. Psychological studies indicate that emotions play an important motivational role in rendering assistance.⁸² Psychologist Robert Kidd believes that intervention is not based on cognitive decision making, but instead on the bystander's impulses and emotional arousal.⁸³ Should the witness experience emotional arousal in witnessing another in distress, intervention will result if the act of intervention

77. See DAVID O. SEARS ET AL., *SOCIAL PSYCHOLOGY* 343 (6th ed. 1988).

Mandatory crime reporting can also serve as a substitute for, or supplement to, the social influence that traditionally came from sources such as the community, family, and religion. By making the failure to report crime a criminal offense, the proposal combats indecision through its provision of an accepted course of action and its explicit determination that a decision to ignore crime is wrong and socially unacceptable.

Id.

78. See *id.* at 348.

79. See *id.*

80. See Thomas Moriarty, *Crime, Commitment, and the Responsive Bystander: Two Field Experiments*, 31 *J. PERSONALITY & SOC. PSYCHOL.* 370, 373 (1975).

81. See *id.* at 371.

82. See, e.g., Bernard Weiner, *Inferences of Responsibility and Social Motivation*, 27 *ADVANCES IN EXPERIMENTAL PSYCHOL.* 1, 26 (1995).

83. See Kidd, *supra* note 8, at 37.

is the bystander's dominant response.⁸⁴ Kidd believes that the bystander's focus of attention—the person on whom the bystander is focused when he or she witnesses a crime—determines the bystander's response.⁸⁵

While Kidd believes that legislation itself will not lead to increased intervention, he does believe that the media's role in increasing awareness of the victims could promote intervention.⁸⁶ Therefore, legislation combined with increased media attention could serve to increase intervention. Rather than focusing on the need to capture criminals, "Bad Samaritan" statutes should direct attention to the plight of the victims of crime and the need to intervene in order to render assistance to those in danger. By focusing on the victim's suffering, "Bad Samaritan" statutes would lead to increased intervention, further justifying their enactment.

4. *Normalizing Responsibility of Bystanders.*—A statute which imposes a duty to intervene by reporting a crime in order to assist the victim requires the same responsibility of all bystanders at the scene of a crime. The presence of other bystanders is often cited as a reason witnesses fail to intervene.⁸⁷ Several reasons for this have been posed. When multiple bystanders are present, the responsibility of intervention is shared among them all and, as a result, no one helps.⁸⁸ Also, the potential blame for failing to intervene may be diffused among all of the bystanders.⁸⁹ Witnesses often believe that others are acting and so their assistance is not needed.⁹⁰ The presence of other on-lookers also creates "evaluation apprehension," the fear of being judged by other witnesses.⁹¹

A duty to intervene would impose the same duty and the same level of responsibility on all bystanders at the crime scene. Each bystander would be equally punishable for the failure to report, and one would know that if they did nothing, they would face the consequences for their omission. Because the only requirement would be a notification of the authorities, evaluation apprehension would be diminished as there is no conduct to be judged by the other bystanders. Normalizing responsibility would increase motivation to intervene, further

84. *See id.* at 31.

85. *See id.* at 33.

If the bystander focuses his attention on the suffering of the victim it is more likely that helpful responses will be evoked On the other hand, if attention is directed towards other aspects of the situation, such as the characteristics of an assailant, or the potential for violence, a bystander is attending to the dangerous elements of the situation. This focus on danger, as opposed to suffering, makes it less likely that helpful or altruistic responses will be produced by the same circumstances.

Id.

86. *See id.* at 37.

87. *See generally* John M. Darley & Bibb Latane, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377, 377 (1968).

88. *See id.* at 378.

89. *See id.*

90. *See id.*

91. Wenik, *supra* note 48, at 1789.

justifying "Bad Samaritan" legislation.

5. *Self-gratification.*—Finally, reporting crime fulfills a personal need for self-gratification. According to a survey conducted by Robert Wuthnow, seventy-three percent of the public said that helping people in need was absolutely essential or very important, twenty-four percent reported that it was fairly important, and only two percent felt that it was not very important.⁹² Other studies indicate that most people believe that helping others is a good way of gaining self-fulfillment.⁹³ The Bad Samaritan Statute would motivate bystanders to intervene thereby increasing assistance to victims. In addition, satisfying the obligation imposed by the Bad Samaritan Statute would offer bystanders a sense of self-fulfillment. This increased motivation and sense of self-fulfillment further support enactment of Bad Samaritan legislation.

III. PROPOSED DUTY AND PROPOSED PENALTIES

As the above discussion demonstrates, sociological and psychological justifications exist for enacting Bad Samaritan intervention statutes. This Part proposes a duty to report crimes and discusses the benefits of a duty to report crime statute. In addition, the absence of constitutional prohibitions on such a duty, possible penalties for breach of such duty, and the challenges of enforcement are addressed.

A. Proposed Duty

As discussed above, intervention means either reporting the crime or providing direct assistance to a crime victim.⁹⁴ This Note proposes bystander intervention by reporting specifically enumerated crimes in order to aid the crime victim.

The proposed statute would require bystander intervention by summoning the authorities in order to assist the victim of specific crimes such as assault, battery, sexual assault, and homicide. In order to provide clarity to bystanders, the proposed legislation should focus on the specific crimes or acts that must be reported rather than a more general duty to report a crime.⁹⁵ The rationale for reporting the crime should be assisting the victim rather than aiding in the apprehension of criminals.⁹⁶ A statute creating a duty to intervene on behalf of the crime victim by summoning the authorities would be easily fulfilled by the bystander, would readily alert a witness to the need for intervention, and would provide a safe means of intervention where the bystander's role is clearly defined.

92. See ROBERT WUTHNOW, ACTS OF COMPASSION: CARING FOR OTHERS AND HELPING OURSELVES 10 (1991).

93. See *id.* at 87.

94. See *supra* note 8.

95. See, e.g., MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990). But see HAW. REV. STAT. 663-1.6(1) (Michie 1995).

96. See discussion *supra* Part II.B.1.

1. *Duty Would Be Easily Fulfilled.*—A statute requiring a bystander to report specific crimes and summon the authorities to assist a victim would clearly set out the bystander's easily fulfilled duty. Competence is a factor influencing responsibility and the obligation to intervene. People feel a greater sense of obligation to intervene where they feel they have the skills to effectively assist.⁹⁷ The proposed statute would require the bystander to notify the authorities in order to assist the crime victim. The proposed duty would not require the bystander to fight off an attacker or provide medical assistance to the crime victims. To fulfill the duty, the bystander need only summon the authorities to the crime scene by dialing 911 or using an alternative method. No special skills, medical or otherwise, are required to notify the authorities. Conversely, if direct assistance were required, a bystander may feel that special skills would be needed. Therefore, by requiring only that bystanders notify the authorities, bystanders would be less likely to feel incompetent to act.

Bystanders often cite fear of doing the wrong thing as a reason why they fail to intervene.⁹⁸ Where only some form of notification is required, the fear of acting inappropriately would be lessened. Little preparation to act would be required because all the bystander must do is call the authorities when a specifically enumerated crime is witnessed. The statute would define the content of the duty, to contact the authorities, and specify when the bystander has the duty.

2. *Creates a Perception of Need.*—When deciding to help a victim, a bystander must first notice the crime and then decide whether or not help is needed. Next, if help is required, the bystander must consider his or her own personal responsibility to act. Third, the bystander may weigh the costs and rewards of helping or not helping. Finally, the bystander must decide what type of help is needed and how to provide it.⁹⁹

By defining specifically when intervention is required, i.e. through specifically enumerated acts, the bystander's perception of a need would be fulfilled. Psychologist David Sears has defined five characteristics that lead to the perception that an event is an emergency, and therefore that intervention may be needed: "(1) [s]omething happens suddenly and unexpectedly, (2) there is a clear threat of harm to a victim, (3) [t]he harm to the victim is likely to increase over time unless someone intervenes, (4) [t]he victim is helpless and needs outside assistance, and (5) [s]ome sort of effective intervention is possible."¹⁰⁰

Requiring intervention when another is the victim of assault, battery, sexual assault, or homicide, for example, would fulfill the above mentioned characteristics. Such situations pose a clear threat of harm to the victim. The harm to the victim would likely increase over time unless someone intervenes. The victim is likely to be helpless in such situations and would need outside assistance. Finally, by fulfilling the duty of summoning the authorities, an

97. See SEARS ET AL., *supra* note 77, at 350.

98. See generally Yeager, *supra* note 3, at 15-16.

99. See SEARS ET AL., *supra* note 77, at 346.

100. *Id.* at 348.

effective intervention would be possible as those trained to intervene would be directed to assist the victim.¹⁰¹

By defining what acts must be reported, bystanders would know that an act is criminal and that notification is required. Crime reporting depends upon the bystander defining an act as a crime. The bystander must recognize a criminal act before he or she will be required to report it.¹⁰²

Once an act of violence has been witnessed, bystanders may or may not define it as a crime.¹⁰³ By knowing that an act is a crime, the bystander will apply a criminal label without hesitation.¹⁰⁴ Non-reporting may be caused in part by a failure to connect the observed behavior with a criminal label.¹⁰⁵ By listing the crimes that require reporting, the statute lays out when a bystander must notify the authorities. The bystander would easily be able to define the conduct as a crime and the criminal label would be attached, making the bystander more likely to intervene.

3. *Safe Intervention.*—Crime reporting, as a means of providing assistance to the victim, allows for intervention, but in a means safer for the bystander than requiring a direct rescue. Even after the criminal label has been attached or an emergency defined,¹⁰⁶ a bystander may not intervene because the cost of doing so outweighs the benefit.¹⁰⁷ Many witnesses fail to become involved because they fear harm or retaliation.¹⁰⁸ The proposed statute would require bystander intervention by summoning the authorities to aid the victim. Like many of the existing intervention statutes, this statute would require intervention by notification only where it may be completed reasonably and without harm to the bystander.¹⁰⁹

A duty to summon the authorities would only arise where the intervention

101. See FEINBERG, *supra* note 51, at 169-71.

102. See Robert F. Kidd, *Crime Reporting: Toward a Social Psychological Model*, 17 CRIMINOLOGY 380, 381 (1979). Kidd provides a model of the psychological process involved with crime reporting. He finds three important questions:

1. Once a possible act of violence or theft has been seen, what aspects of the situation and what characteristics of the bystander lead to its definition as a crime?
2. What are the cognitive processes involved in the decision to report an alleged violation?
3. What possible motivational factors influence the probability of reporting the crime?

Id.

103. See SEARSET AL., *supra* note 77, at 348. "Our interpretation or definition of a situation is a vital factor in whether or not we offer aid." *Id.*

104. See Kidd, *supra* note 102, at 387.

105. See *id.* at 391.

106. See discussion *supra* Part III.A.

107. See Kidd, *supra* note 102, at 392.

108. See Yeager, *supra* note 3, at 15.

109. See, e.g., MINN. STAT. ANN. § 604A.01 (West 1999 Supp.). See *supra* note 22.

may be made without danger to the rescuer. Under the harm principle, intervention is only justified where it may be completed safely.¹¹⁰ Where the bystander is unable to safely summon the authorities, the duty to do so would not arise. Further, notification of the authorities may be made safely where a rescue would not. Under the Duty to Aid the Endangered Act, Vermont requires a person to aid someone known to be exposed to grave physical harm, but only to the extent that aid may be rendered without harm to the one obligated to assist.¹¹¹ The Vermont Supreme Court held in *State v. Joyce*¹¹² that the Duty to Aid the Endangered Act does not create a duty to intervene in a fight because such a situation would present danger or peril to the rescuer which, under the statute, prevents a duty from arising.¹¹³ However, the Vermont statute does not provide that notification of the authorities satisfies the rescue as the Minnesota¹¹⁴ and Wisconsin¹¹⁵ duty to assist statutes.¹¹⁶ A bystander may be able to safely notify the authorities and satisfy the proposed duty where a rescue could not be made. However, as in *Joyce*, intervention would not be required under the proposed statute where it could not be done safely.

This Note proposes a duty of intervention, that would require bystanders to assist, the victims of specific crimes such as assault, batter, sexual assault, and homicide by notifying the authorities. Such a duty would be easily fulfilled, would create a perception of need, and would provide for safe intervention. The proposed duty, requiring bystanders to notify the authorities, would only arise where it may be executed without harm to the bystander.

B. Absence of Constitutional Prohibitions

A statute imposing a duty on bystanders to report crime in order to assist crime victims does not violate the U.S. Constitution. Neither the Fifth Amendment nor the Due Process Clause bar such legislation.

1. *Self-incrimination.*—A statute requiring a bystander to report specifically enumerated crimes would not violate the Fifth Amendment's prohibition on self-incrimination.¹¹⁷ The bystander would not be under a duty to report a crime where notifying the authorities would lead to the bystander's self-incrimination. In response to a prosecution under the Ohio duty to report statute,¹¹⁸ the Ohio Court of Appeals held, in *State v. Wardlow*,¹¹⁹ that the statute was unconstitutionally applied where the defendant would incriminate himself or

110. See FEINBERG, *supra* note 51, at 150-59.

111. See VT. STAT. ANN. tit. 12, § 519 (1973); see also *supra* note 24.

112. 433 A.2d 271 (Vt. 1981).

113. See *id.* at 273.

114. See MINN. STAT. ANN. § 904A.01 (West 1999 Supp.).

115. See WIS. STAT. ANN. § 940.34 (West 1996).

116. See *supra* notes 22, 25.

117. See U.S. CONST. amend. V.

118. OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

119. 484 N.E.2d 276 (Ohio Ct. App. 1985).

herself.¹²⁰ Therefore, where the defendant would incriminate himself or herself by reporting the crime, the duty under the proposed legislation would not arise.

2. *Due Process Clause*.—One potential challenge to a duty to report crime statute is that such a criminal statute is void for vagueness and therefore violates the due process clause of the Fourteenth Amendment. The Due Process Clause states that no State shall “deprive any person of life, liberty, or property, without due process of law. . . .”¹²¹ Vague statutes fail to provide notice of exactly which acts are forbidden¹²² and lead to uncertainty as to the meaning of penal statutes, at the “peril of life, liberty or property.”¹²³ Therefore, everyone is entitled to know what the state requires or prohibits.

The proposed statute, requiring those who witness certain crimes notify the authorities in order to aid the crime victim, specifies what criminal acts must be reported to the authorities by a bystander in order to assist the victim. In *State v. Wardlow*,¹²⁴ the Ohio Court of Appeals held that the Ohio “duty to report” statute was not unconstitutionally void for vagueness.¹²⁵ The statute states in part that “[n]o person, knowing that a felony has been or is being committed, shall knowingly fail to report”¹²⁶ The court found that the statute gives a person of fair intelligence notice that failure to report witnessed crimes is forbidden and is therefore not unconstitutionally void for vagueness.¹²⁷ The proposed statute is more specific than the Ohio statute. The proposed statute would enumerate those specific crimes that must be reported. Because the Ohio statute survived a void for vagueness challenge, the proposed statute would also likely survive any void for vagueness challenge.

Not only would the proposed standard provide a clear duty for bystanders, it would also provide a clear standard for enforcement. Another due process challenge is that vague statutes fail to provide explicit standards for law enforcement, allowing discriminatory and arbitrary enforcement.¹²⁸ Because the proposed statute clearly defines when a bystander must report a crime to the authorities in order to assist the victim, it is also clear to the authorities when the statute has been violated.

120. See *id.* at 279.

121. U.S. CONST. amend. XIV, § 1.

122. See *Parker v. Levy*, 417 U.S. 753, 774-75 (1974) (Stewart, J. dissenting) (“[B]y failing to provide fair notice of precisely what acts are forbidden, a vague statute ‘violates the first essential of due process of law.’” (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926))); see also SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 304 (6th ed. 1995).

123. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

124. 484 N.E.2d 276 (Ohio Ct. App. 1985).

125. See *id.* at 279.

126. OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

127. See *Wardlow*, 484 N.E.2d at 279.

128. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-71 (1972).

C. Penalties and Enforcement

1. *Penalties.*—Penalties for violating current duty to assist or report statutes provide a guide for other such statutes. Existing duty to intervene statutes' penalties range from a fine of \$100 to \$2500 and/or jail time of up to six months.¹²⁹ Implementing existing penalties such as fines and/or jail time for up to six months would serve the purposes of criminal punishment.

The goals of punishment include retribution, deterrence, reform, and incapacitation.¹³⁰ As with other criminal offenses, punishment by either a fine or incarceration would serve the purposes of punishment. Fining and/or jailing would prevent future violations, correct the offender, prevent excessive or arbitrary punishment, and provide a fair warning for punishment of others.

2. *Enforcement.*—One potential argument against the creation of a legal duty to intervene on behalf of the victims of crime is the difficulty in enforcing such a duty. One concern is determining whether the duty to intervene by reporting has been breached. If the witness is still standing at the crime scene when the police finally arrive at the scene, then the breach of the duty would be obvious. However, knowing whether a witness was present would be almost impossible. If the victim dies, it is unlikely that the assailant would later report the bystander's presence, and more unlikely that he or she could identify the witness. If the victim were to live, it would be possible that the victim may not be able to remember the bystander well enough to identify him or her.

The inability to punish all persons who breach the duty should not deter its creation. A statute imposing the duty to notify the authorities in order to aid the

129. See R.I. GEN. LAWS §§11-1-5.1; 11-56-1 (1994); MASS. GEN. LAWS ANN. ch. 268, § 40 (1990); VT. STAT. ANN. tit. 12, § 519 (1973).

130. See KADISH & SCHULHOFER, *supra* note 122, at 102-30.

The general purposes of the provisions governing the sentencing and treatment of offenders are:

- (a) to prevent the commission of offenses;
- (b) to promote the correction and rehabilitation of offenders;
- (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
- (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
- (e) to differentiate among offenders with a view to a just individualization in their treatment;
- (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
- (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
- (h) to integrate responsibility for the administration of the correctional system in a State Department of Correction.

MODEL PENAL CODE § 1.02(2) (Official Draft 1962), *reprinted in* KADISH & SCHULHOFER, *supra* note 122, at 1132.

crime victim would demonstrate the importance of assisting victims even if it is unlikely most will be punished. Little litigation has occurred under any of the current affirmative duty statutes at the state level. However, criminal statutes may have symbolic value even if little litigation occurs. "In some instances, the public is less concerned with the 'tangible deprivations and discomforts that go with punishment' than with 'a symbolic denunciation of what he or she did.'"¹³¹ Creating such a statute would demonstrate that failing to report an offense is unacceptable conduct.¹³²

Authorities would be able to punish violators as they see fit, possibly choosing to punish only serious violations.¹³³ Selective enforcement should not deter enactment of a statute requiring intervention on behalf of the victim. Selective enforcement is permissible and a constitutional violation only when the statute's enforcement is based on invidious discrimination.¹³⁴

IV. STATE VS. FEDERAL LEGISLATION

While justifications for a statute creating a duty to report crime in order to aid the victim exist, such legislation is solely within the states' power. Such a statute at the federal level would infringe on the broad police power provided to the states, exceed the power of Congress to create federal crimes, and exceed the purpose of federal crimes. In addition, such legislation at the federal level would unduly burden the federal judiciary.

A. Broad Police Power Reserved for the States

The creation of a statute imposing a duty to report crime and a criminal penalty for its breach falls within the broad police power reserved for the states. State governments have the power to regulate their affairs for the protection or promotion of public health, welfare, safety, and morals, and they do not need to rely on specific constitutional authorization when criminalizing conduct.¹³⁵ "[O]ne transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light . . . [is] the ordinary administration of criminal and civil justice."¹³⁶ As the Supreme Court has stated, "[u]nder our federal system, the 'states possess primary authority for defining and enforcing the criminal law.'"¹³⁷ Therefore, because the states have authority to define what conduct is criminal, they may

131. Yeager, *supra* note 3, at 34 n.160 (quoting LEO KATZ, *BAD ACTS AND GUILTY MINDS* 28 (1987)).

132. See *supra* notes 44-71 and accompanying text.

133. See Wenik, *supra* note 48, at 1805.

134. See *id.*

135. See LAFAVE & SCOTT, *supra* note 9, at 128; Richard H. McLeese, *Federal Criminal Jurisdiction*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 1.2 (1997).

136. THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (Garry Wills ed., 1982).

137. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

impose a duty to intervene on behalf of victims of crime.

States define criminal conduct and assign appropriate penalties in light of the goals of criminal law that the states have accepted. Because the harm of criminal conduct is localized, the states have a more immediate interest in defining and enforcing criminal statutes.¹³⁸ The individual states should decide what crimes must be reported and how violations should be punished.

B. Federal Criminal Legislation

While the states possess broad police power, the federal government does not possess such a plenary police power.¹³⁹ "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."¹⁴⁰ A bystander intervention statute does not fall within the traditional federalization of crime framework.

1. *Development of Federal Criminal Legislation.*—The development of federal criminal law within the United States has not been systematic. It has developed and evolved "piecemeal."¹⁴¹ Before the Civil War, few federal statutes criminalized conduct already criminal under state law; rather, federal criminal jurisdiction was limited to acts directly injurious to the federal government.¹⁴² Following the Civil War, federal sanctions were created to protect private individuals from invasions of their rights by other private individuals, traditionally a function of state law.¹⁴³ In the Twentieth Century, federal intervention into matters once exclusively the function of state criminal law has increased; federal criminal law is a "[Twentieth] Century phenomenon."¹⁴⁴

Two general categories of federal crimes exist: those criminalizing activities that occur in federal territories and those criminalizing activities that occur within state territories. Where the criminal activity occurs within a federal territory, such as on a military base or in Washington, D.C., the federal government has broad police power similar to the states.¹⁴⁵ However, where the criminal activity occurs within the territory of the states, the federal police power

138. See Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1132-133 (1997).

139. See *Lopez*, 514 U.S. at 566.

140. *Id.* at 561 n.3 (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945)).

141. SARA SUN BEALE, 2 ENCYCLOPEDIA OF CRIME & JUSTICE 779 (Sanford H. Kadish et al. eds., 1983).

142. See *id.* at 776.

143. See McLeese, *supra* note 135, § 1.5.

144. *Id.* Currently, there are more than 3000 federal crimes. See Moohr, *supra* note 138, at 1128 n.5.

145. See LAFAVE & SCOTT, *supra* note 9, at 118.

is less broad, and legislation is permitted only by the Constitution.¹⁴⁶

2. *Functions of Federal Criminal Legislation.*—Federal criminal law serves three functions. It punishes conduct that is injurious to the federal government,¹⁴⁷ it serves to secure compliance with federal administrative regulations,¹⁴⁸ and it is used to punish conduct of a local concern with which the local police are unable or unwilling to cope.¹⁴⁹

A statute requiring bystander intervention does not fall within the first two functions of federal criminal law. It is not directly injurious to the federal government and does not serve to secure compliance with federal administrative regulations. Rather, a bystander intervention statute involves punishing conduct of a purely local concern.¹⁵⁰ However, nothing has indicated that it is a matter with which the local police are unable or unwilling to cope. An example of this would be statutes prohibiting flight across state lines to avoid state criminal prosecution.¹⁵¹ The proposed statute involves conduct that the states have not attempted to legislate, not conduct that they are unable or unwilling to enforce. Therefore, legislation is not justified at the federal level.

3. *Federal Criminal Legislation Must Be Within the Constitution.*—As discussed above,¹⁵² the power of Congress to create federal crimes must be expressed or implied within the Constitution. The Constitution grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁵³ The Necessary and Proper Clause, however, is only applicable where Congress is carrying out other powers vested by the Constitution.¹⁵⁴ While a federal statute creating a duty to intervene may in itself be deemed necessary and proper by Congress, if the power to enact such a statute is not found elsewhere in the Constitution, Congress may not create it.

The Commerce Clause¹⁵⁵ provides Congress with the majority of its power

146. *See id.*

147. *See id.* at 124. Examples include treason, espionage, bribery of federal officials, and murder of federal officials. *See id.*

148. *See id.* An example of federal criminal legislation serving to secure compliance with federal administrative regulations includes 18 U.S.C. §§ 343-44, which “authorize the Secretary of the Treasury to require by rule or regulation that certain information be kept by those who traffic in cigarettes and provide for the imposition of criminal penalties for violations of such rules and regulations.” McLeese, *supra* note 135, § 1.4.

149. *See* LAFAVE & SCOTT, *supra* note 9, at 124.

150. *See id.*

151. *See id.*

152. *See supra* notes 139-46 and accompanying text.

153. U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

154. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.2, at 122 (5th ed. 1995).

155. U.S. CONST. art. I, § 8, cl. 3.

to legislate.¹⁵⁶ The Commerce clause grants Congress the power “[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”¹⁵⁷ Prior to *United States v. Lopez*,¹⁵⁸ Congress had almost unlimited power under the Commerce Clause provided it was related to or affected interstate commerce.¹⁵⁹ After *Lopez*, the Commerce power exists only where: (1) the activity being regulated affects the channels of interstate commerce, i.e. the highways, waterways, airways,¹⁶⁰ (2) the activity affects the instrumentalities of interstate commerce, i.e. machinery used in interstate commerce,¹⁶¹ or (3) the activity has a substantial effect on interstate commerce.¹⁶²

Bystander intervention to assist the victim of crime probably does not fall within the power of the Commerce Clause. Because the channels of interstate commerce and the instrumentalities of interstate commerce are not involved in a bystander intervention statute, Congress may only regulate in this area if the activity under regulation has a substantial affect on interstate commerce. In determining whether an activity substantially affects interstate commerce, a number of factors are considered including (1) whether the activity is commercial; (2) whether it is one traditionally reserved for state regulation; (3) whether the regulation contains a jurisdictional element; and (4) whether Congress has provided legislative findings to support a need for regulation.¹⁶³ Before *Lopez*, only some minimal threshold effect on interstate commerce was required. After *Lopez*, the effect on interstate commerce must be substantial.¹⁶⁴ Criminal acts involving victims are not commercial activities. Further, the activity is one that is traditionally reserved for the states. As discussed above,¹⁶⁵ defining and enforcing crimes are within the broad police power reserved for the states and are therefore activities traditionally reserved for the states. Because bystander intervention is not within the Commerce power, Congress is not

156. “Congress’ authority to enact criminal statutes which are not aimed at protecting direct federal interests has usually been based in the commerce power, and less frequently, in the postal power or the taxing power.” NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 16 (2d ed. 1993).

157. U.S. CONST. art. I, § 8, cl. 3.

158. 514 U.S. 549 (1995).

159. From 1937 to 1995 the Supreme Court would invalidate a federal statute on the grounds that the statute was beyond the commerce power. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Agricultural Adjustment Act of 1935 was within commerce power as local farmers would have a cumulative effect on interstate commerce and that the act was reasonably related to protecting interstate commerce); *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935, based on the conclusion that a labor stoppage would substantially affect interstate commerce).

160. *See Lopez*, 514 U.S. at 558.

161. *See id.*

162. *See id.* at 559.

163. *See id.* at 560-65.

164. *See id.* at 559.

165. *See discussion supra* Part III.C.2.

justified in enacting such a statute.

C. *Burden on the Federal Judicial System*

Enacting a federal duty to intervene statute is further inappropriate because of the burden it would place on the federal judiciary. When more federal crimes are created, the criminal caseload is increased and the resources allocated to criminal cases are shifted. Criminal cases account for only seventeen percent of the total federal judicial docket, but they take up a disproportionate share of judicial resources.¹⁶⁶ By creating a federal statute requiring bystander intervention, enforcement would increase the criminal caseload. As well, judicial resources allocated for criminal prosecutions would be further strained in order to enforce the bystander intervention statute.

Not only would enforcement of a federal bystander intervention statute result in straining already full dockets, it would also logically result in a decline in resources available for civil cases. The Speedy Trial Act requires the dismissal of charges that are not brought within specified time periods;¹⁶⁷ therefore, criminal cases receive top priority. In order to respond to increased pressure from the criminal caseload, the federal courts have reduced the resources available for civil disputes.¹⁶⁸ Civil cases would be even further delayed if federal courts were to enforce a federal bystander intervention statute.

State courts are better equipped to enforce a duty to intervene statute, and enforcement at the state level would not interfere with the primary functions of the federal judiciary. The primary functions of the federal courts are interpreting federal law, declaring federal rights, and providing a neutral forum for interstate disputes.¹⁶⁹ "With less than 650 trial judges nationwide, the federal judicial system performs a distinctive function not shared by the much larger state judicial systems."¹⁷⁰ Because the creation of a federal duty to intervene statute would over burden the federal judicial system, such a statute belongs in the states where it would be more effectively enforced.

D. *Alternatives to Federal Legislation*

Rather than creating a federal duty to intervene statute, Congress may more efficiently act on the subject and motivate the states to enact such statutes by conditioning state funding on the states' enactment of a bystander intervention statute. The Spending Power¹⁷¹ provides Congress the power to spend for the general welfare. "Congress can employ its spending power to supplement state

166. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 985 (1995).

167. See 18 U.S.C. §§ 3161-3174 (1994); see also U.S. CONST. amend. VI, § 1.

168. See Beale, *supra* note 166, at 988.

169. See *id.* at 988-89.

170. *Id.* at 989. The U.S. Code indicates that there are 632 federal district court judges. See 28 U.S.C. § 133 (1994).

171. U.S. CONST. art. I, § 8, cl. 1.

and local resources rather than enlarging either the number of federal prosecutors and investigators or the scope of their jurisdiction.”¹⁷² Such action by Congress would express its concern for a duty to intervene statute, yet avoid strain on the federal judicial system. “Conditioning federal aid upon the acceptance of federal standards formally observes the bounds of federalism while, as a practical matter, moving the federal system towards uniform standards.”¹⁷³

As discussed above,¹⁷⁴ only after demonstrated state failure should the federal government step in to enact and enforce a duty to intervene statute. “The state failure model is based on a rebuttable presumption against expanding the jurisdiction of the federal courts . . . The presumption against federal crimes that duplicate state crimes may be rebutted when state prosecution is demonstrably inadequate and when other important federal interests are not unduly impaired.”¹⁷⁵ There is little evidence that states have failed to enforce bystander intervention statutes. Many states have yet to enact such legislation. Further, there is little evidence of failure to enforce existing statutes. Because states have not started to enact such legislation, there is no evidence that they have failed to enforce a bystander intervention statute. Therefore, bystander intervention legislation belongs within the states.

CONCLUSION

Historically, a duty to rescue has not existed in American jurisprudence. Some states, however, have reacted to serious omissions and enacted “Bad Samaritan” or “Duty to Intervene” statutes. Every state should follow their lead and enact such statutes, requiring a bystander to intervene to assist the victim of specifically enumerated crimes by notifying law enforcement officials. Such statutes are justified by the moral obligation to help others, a civic duty to report crime, and the societal interest in preventing harm. As well, such statutes would create a societal expectation of intervention, serve as a prior, personal decision to intervene, and would serve to publicize the suffering of crime victims. A statute requiring bystander intervention would clearly define the bystander’s role and provide the bystander with a safe means of intervention.

Although Bystander intervention legislation is justified and should be enacted, such legislation belongs in the states, not in the federal government. The federal government does not possess the broad police power of the states and such legislation is not within the enumerated powers of the Constitution. Finally, bystander intervention legislation at the federal level would unduly burden the federal judicial system. Therefore, bystander intervention legislation belongs in the domain of the state legislatures.

172. Beale, *supra* note 166, at 1008.

173. *Id.* at 1010.

174. See discussion *supra* Part IV.B.1.

175. Moohr, *supra* note 138, at 1142.

