

CRIMINAL LAW—NO STITCHES FOR SNITCHES: THE NEED FOR A DUTY-TO-REPORT LAW IN ARKANSAS

I. INTRODUCTION

“We do not have the ability to arrest people who witnessed the crime and did nothing. . . . The law can be very rigid.”¹

Approximately twenty onlookers stopped to watch as a fifteen-year-old California student was brutally gang raped outside of her school’s homecoming dance.² For over two hours, witnesses watched, some even taking pictures and videos of the attack with their cell phones, as multiple males repeatedly kicked the teenage victim in the head while taking turns raping her.³ Not a single witness, however, attempted to notify police.⁴

In Pennsylvania, at least two witnesses separately observed assistant college football coach Jerry Sandusky sexually assaulting young boys in a Penn State locker room; yet, neither witness attempted to stop the assaults or contact law enforcement.⁵ Two years after a custodian had witnessed Sandusky performing oral sex on a young boy in the school’s locker room, graduate assistant Mike McQueary walked in to find Sandusky naked and engaging in a sexual act with a ten-year-old boy in the locker room show-

1. *Police: As Many as 20 Present at Gang Rape Outside School Dance*, CNN (Oct. 27, 2009), http://articles.cnn.com/2009-10-27/justice/california.gang.rape.investigation_1_suspects-arrest-police?_s=PM:CRIME.html (statement by Richmond Police Lieutenant Mark Gagan in response to public outcry after witnesses suffered no legal consequences in connection to Richmond High School gang rape).

2. Authorities believed there were as many as ten different attackers during the October 24, 2009 gang rape. *Id.* Existing laws prevented police from holding any of the witnesses accountable. *Id.* See also CAL. PENAL CODE § 152.3 (West Supp. 2012) (requiring witnesses to report enumerated crimes when “the victim is a child under the age of 14”).

3. Demian Bulwa, *Witness in Richmond Gang Rape Turns Up Safe*, S.F. CHRON. (Dec. 24, 2009), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/12/23/BAQ41B8PSA.DTL>; Emily Friedman, *Gang Rape Witnesses Kept Silent So They Wouldn’t Be Called Snitches*, ABC NEWS (Nov. 11, 2009), <http://abcnews.go.com/WN/Health/witnesses-california-gang-rape-scared-call-police/story?id=9054150#.T33LbWGM-8A.html>.

4. Two witnesses explained to an ABC news station that they did not call police during the attack because they did not want to be labeled snitches. See Friedman, *supra* note 3. In response to this tragedy, the California Legislature proposed a bill that would require witnesses to report crimes where the victim is less than eighteen years of age. S.B. 840, 2009-2010 Leg., Reg. Sess. (Cal. 2010).

5. Complaint ¶ 25–31, at 36, *Doe A v. Second Mile*, No. 111102968 (Pa. Ct. C.P., Sept. 30, 2011), 2011 WL 5976014.

ers.⁶ McQueary looked into the shower several times while the assault was taking place, yet did nothing to stop it and did not notify police.⁷

In Nevada, seven-year-old Sherrice Iverson was sexually assaulted and murdered in a casino bathroom while her attacker's best friend, aware of what was happening, failed to intervene or notify anyone.⁸ After watching from an adjacent bathroom stall as Jeremy Strohmeyer molested the young victim, David Cash, Jr. walked outside the restroom to wait as his friend proceeded to murder her.⁹ Cash declined to report his friend to the authorities.¹⁰

In Massachusetts, spectators stood by and watched, some even cheering,¹¹ as Cheryl Ann Araujo was gang raped on a pool table inside of a local bar.¹² After dragging her across the barroom floor, kicking and screaming, at least four different men took turns raping and restraining the twenty-two-year-old victim, who could hear people "yelling [and] laughing, down near the end of the bar."¹³ After finally escaping, "clothed only in a shirt and one shoe," the victim ran into the street where she waved down a truck whose passengers called the police from a pay phone nearby.¹⁴

In each of the cases described above, bystanders who witnessed the crimes taking place not only failed to assist the victims, but failed to even

6. *McQueary: I Saw Sandusky in a 'Wrong and Sexual' Act with Boy*, MSNBC.COM (Dec. 16, 2011, 6:55 PM), http://www.msnbc.msn.com/id/45695764/ns/us_news-crime_and_courts/mcqueary-i-saw-sandusky-wrong-sexual-act-boy/#.html.

7. *Id.* Later that night, McQueary called his father and told him he had seen Sandusky doing something "wrong and sexual." *Id.* The next day, McQueary also informed head coach Joe Paterno of what he had seen, but he did not give explicit details. *Id.* Neither McQueary's father nor Paterno contacted police with the information McQueary had reported to them. *Id.*

8. Justin T. King, Comment, *Criminal Law: "Am I My Brother's Keeper?" Sherrice's Law: A Balance of American Notions of Duty and Liberty*, 52 OKLA. L. REV. 613, 614 (1999).

9. *Id.*; Cathy Booth Berkeley, *The Bad Samaritan*, TIME MAG., June 24, 2001, <http://www.time.com/time/magazine/article/0,9171,139892,00.html>. See also Andrew D. Kaplan, Comment, "Cash-Ing Out": *Regulating Omissions, Analysis of the Sherrice Iverson Act*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 67 (2000).

10. King, *supra* note 8, at 614 ("[Cash] never mentioned [the incident] to anyone until Strohmeyer was caught."). In fact, Cash had only one question for his friend: "Had the little girl been aroused?" Berkeley, *supra* note 9.

11. Cheering on an attacker is considered aiding and abetting in some states, which could subject witnesses who encouraged criminal conduct to accomplice liability charges. 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, 22 n.105 (1993). Witnesses who watched but never cheered or encouraged the attackers, however, would not be subject to any legal consequences in most states. See *id.* at 21–22.

12. *Id.* at 21.

13. *Id.* See also *Commonwealth v. Cordeiro*, 519 N.E.2d 1328, 1329 (Mass. 1988); *Commonwealth v. Vieira*, 519 N.E.2d 1320, 1321 (Mass. 1988).

14. Jay Pateakos, *Brothers Break Silence in Big Dan's Rape Case*, HERALDNEWS.COM (Oct. 25, 2009), http://www.heraldnews.com/news/local_news/x665149028/After-26-years-brothers-break-silence?zc_p=0.html; *Vieira*, 519 N.E.2d at 1321.

report what they had witnessed to law enforcement. None of those witnesses, however, faced any legal consequences for their lack of assistance, as they had no legal duty to act. In cases such as these, public outrage over the inability to prosecute those witnesses who stood by and did nothing has often led to wide media coverage, which has, in almost every case, resulted in proposed state legislation that would criminalize such inaction in the future.¹⁵

Traditionally, absent a special relationship, individuals have never had a duty to assist a person in need.¹⁶ In response to the heinous crimes depicted above, however, many states have enacted statutes that hold witnesses criminally liable for failing to report crimes to authorities and, in some states, for failing to assist crime victims.¹⁷ Though not quite “Good Samaritan” laws,¹⁸ reporting statutes require a witness to simply notify authorities or emergency personnel when a crime victim is in need.¹⁹

The conduct of inactive witnesses who stand idly by while brutal rapes, sexual assaults, beatings, and murders are occurring is deplorable. The problem of how to get witnesses to step up and act, however, is a difficult one. Every state, including Arkansas, would be well served by implementing laws that would require individuals to notify law enforcement officers when

15. In a matter of days after news broke of the Penn State scandal, Pennsylvania legislators began considering legislation that would mandate child sexual abuse reporting by state employees. See Stacie Rumenap, *Child Abuse Scandal Prompts Lawmakers to Weigh In*, INSIDE ALEC, 16 (Feb. 2012), http://www.alec.org/docs/Feb2012_InsideALEC. See also MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2008); NEV. REV. STAT. ANN. § 202.882 (West 2000); S.B. 840, 2009-2010 Leg., Reg. Sess. (Cal. 2010) (proposed legislation in response to Richmond High gang rape).

16. PROSSER & KEETON ON TORTS § 56 (W. Page Keeton ed., 5th ed. 1984).

17. *E.g.*, ALASKA STAT. §§ 11.56.765, 11.56.767 (2010); CAL. PENAL CODE § 152.3 (West Supp. 2012); COLO. REV. STAT. § 18-8-115 (2011); FLA. STAT. ANN. § 794.027 (West 2007); HAW. REV. STAT. § 663-1.6 (West, Westlaw through 2011 Act 235); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2008); MINN. STAT. ANN. § 604A.01 (West 2010); NEV. REV. STAT. ANN. § 202.882 (West 2000); OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2010); R.I. GEN. LAWS §§ 11-1-5.1, 11-56-1 (2002); TEX. PENAL CODE ANN. § 38.17 (West 2011); VT. STAT. ANN. tit. 12, § 519 (2002); WASH. REV. CODE ANN. § 9.69.100 (West 2010); WIS. STAT. ANN. § 940.34 (West 2005).

18. The common law “Good Samaritan” doctrine typically imposes an affirmative duty on individuals to rescue or provide assistance to a person in need. See King, *supra* note 8, at 619. In many states, however, statutes labeled as “Good Samaritan” laws are actually statutes that provide immunity from liability to rescuers who voluntarily render assistance during an emergency. *E.g.*, ARK. CODE ANN. § 17-95-101 (LEXIS Repl. 2010). For a detailed discussion of Good Samaritan statutes, see Danny R. Veilleux, Annotation, *Construction and Application of “Good Samaritan” Statutes*, 68 A.L.R. 4TH 294 (1989).

19. See Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 35–36 (2002) (“Reporting laws create a variant of Good Samaritan laws by requiring individuals to assist victims—or the general public—by conveying information about possible harms or injuries to the appropriate government agencies.”).

they witness specifically enumerated offenses. It should not take a horrific tragedy like those depicted above for the Arkansas Legislature to enact such a reporting statute.

This note will examine duty-to-report statutes and address their potential for enactment in Arkansas. First, Part II will discuss the common law history of the no-duty-to-aid principle, as well as duty-to-assist laws in other jurisdictions and current Arkansas reporting statutes. Part III will then examine the need for a specifically enumerated duty-to-report law in Arkansas and will propose a statute for consideration by the Arkansas Legislature. Part IV will address the imposition of both civil and criminal liability for violating such a reporting statute, along with potential problems facing the proposed statute's enforceability. Finally, Part V will conclude by discussing the likelihood of such a statute being enacted in Arkansas.

II. HISTORY OF NO-DUTY-TO-AID LAW

A. No Traditional Duty to Rescue

It is a well-settled principle in law that “[t]he fact that [a person] realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”²⁰ Thus, absent a special relationship,²¹ an individual who makes no attempt to help a stranger in need, even at no risk of harm to himself, cannot be punished for failing to assist the stranger, unless the legislature has enacted a duty-to-assist statute.²² The oft-quoted hypothetical of the Olympic swimmer walking by a swimming pool and declining to rescue a drowning baby has illustrated this principle for many years.²³ Additionally, opinions dating

20. RESTATEMENT (SECOND) OF TORTS § 314 (1965). See also James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908).

21. See Yeager, *supra* note 11, at 9–10 (examples of special relationships creating a legal duty to assist include parent-child; husband-wife; and master-servant); PROSSER & KEATON ON TORTS, *supra* note 16, §§ 56–57 (The law imposes a duty to aid on special relationships such as parent-child or employer-employee because one person has control over the other). See generally *Estate of Cilley v. Lane*, 985 A.2d 481, 487 (Me. 2009) (discussing the “affirmative duty to aid or warn another person in peril”). The appellant in *Cilley* urged the Maine Supreme Judicial Court to adopt the witnessing of an injury as a new type of special relationship. *Id.* In declining to do so, the court stated that such a “relationship . . . is unlike any other relationship recognized as sufficient to create a duty of care.” *Id.* at 488.

22. Thompson, *supra* note 19, at 37. See also *Young v. Gastro-Intestinal Ctr., Inc.*, 361 Ark. 209, 225, 205 S.W.3d 741, 752 (2005) (Imber, J., dissenting) (“[I]t is well established in most jurisdictions that a person has no duty to warn or rescue another unless a special relationship between the two creates such a duty.”).

23. See, e.g., DANIEL KATKIN, *THE NATURE OF CRIMINAL LAW: ESSAYS, CASES, AND OTHER MATERIALS* 28 (Henry M. Staat ed., 1982).

back to the 1800s have reiterated the no-duty-to-rescue rule,²⁴ and courts often articulate their reasoning using anecdotes of young children in situations of peril.²⁵

The law has typically been reluctant to punish failures to act, preferring to impose liability on those who act affirmatively rather than on those who merely allow an act to occur.²⁶ As predicted by authors of the Restatement of Torts, however, “such extreme cases of morally outrageous and indefensible conduct” have occurred that some states have ultimately eliminated the traditional no-duty-to-assist rule.²⁷ State legislators have been steadily enacting an increasing number of laws that place upon individuals the duty to assist victims of crime, namely by reporting the crimes they witness to authorities.²⁸

24. *See generally* Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (physician not liable for refusing to treat patient); People v. Beardsley, 113 N.W. 1128, 1131 (Mich. 1907) (quoting United States v. Knowles, 26 F. Cas. 800, 801 (N.D. Cal. 1864)) (“it is undoubtedly the moral duty of every person to extend to others assistance when in danger . . . and, if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society”); Buch v. Amory Mfg. Co., 44 A. 809, 811 (N.H. 1898) (“The situation of the adult in front of secret dangers . . . and that of the infant incapable of comprehending danger, is, in a legal aspect, exactly the same.”); Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (The fact that the defendant merely saw the plaintiff in a position of peril, but was not responsible for placing him in that perilous position, imposed upon the defendant no legal duty of rescue).

25. *See Buch*, 44 A. at 810–11. A stranger is not liable for a young child’s injuries or death if he fails to rescue the child, who lies on a railroad track in the path of an approaching car, even when he can do so without endangering himself. *Id.* at 810. A stranger is also not liable in damages, nor punishable by law, where he does not rescue his neighbor’s two-year-old who is dangerously close to the machinery of a windmill in his yard. *Id.* at 811. *But see* John C. Moorhouse et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 680 (1998) (“[A]lthough first year law students are commonly tormented by hypotheticals concerning the wisdom of imposing a duty to rescue infants toddling in front of speeding trucks on those who could attempt a rescue at no danger to themselves, such cases make up a small minority of actual rescue opinions.”).

26. JOEL SAMAHA, *CRIMINAL LAW* 87 (5th ed. 1996).

27. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965) (noting that extremely morally reprehensible conduct would inevitably take place one day, causing states to reconsider the traditional rule).

28. Thompson, *supra* note 19, at 5. *See also* Estate of Cilley v. Lane, 985 A.2d 481, 488 (Me. 2009) (noting that some states have adopted duty-to-assist laws “[i]n response to a few notorious instances of bystander inaction”).

B. Duties Imposed in Other Jurisdictions

1. *States Imposing a Duty to Rescue*

Only four states have enacted “[t]rue Good Samaritan criminal statutes that impose a duty to rescue another.”²⁹ Minnesota, Rhode Island, Vermont, and Wisconsin require a witness to rescue or to provide assistance to a victim in situations where the witness knows the victim is being exposed to physical harm.³⁰ States mandating that a witness render assistance exempt the witness from this duty where doing so would put the witness in danger.³¹

2. *States Imposing a Duty to Report*

In addition to those states imposing a duty to rescue, legislatures have also gradually “threaded our criminal codes with laws requiring people to assist the police by disclosing their knowledge of certain crimes.”³² General duty-to-rescue laws are notably different from those that mandate the reporting of a witnessed crime. Specifically, reporting statutes require only that a witness contact authorities, as opposed to intervening in an attack to rescue a victim.³³ Pursuant to a duty-to-report statute, upon reporting the crime, a witness can leave the actual intervention to a law enforcement officer.³⁴

29. Thompson, *supra* note 19, at 37 n.188.

30. MINN. STAT. ANN. § 604A.01 (West 2010); R.I. GEN. LAWS § 11-56-1 (2002); VT. STAT. ANN. tit. 12, § 519 (2002); WIS. STAT. ANN. § 940.34 (West 2005) (requiring witness to either provide assistance or summon law enforcement officers or other assistance).

31. *See supra* note 30. *See also, e.g.*, State v. Joyce, 433 A.2d 271, 273 (Vt. 1981) (holding that the Vermont statute does not create a duty to intervene in a fight since doing so would cause danger to the rescuer).

32. Thompson, *supra* note 19, at 9. “The most recent reporting statutes apply to all *eye-witnesses* who might be in a position to aid a crime victim *during or immediately after* the commission of the offense, thus creating a variant of a true ‘duty to rescue’ statute.” *Id.* at 11. *See also* S.B. 840, 2009-2010 Leg., Reg. Sess. (Cal. 2010) (Bill Analysis) (where the California District Attorneys Association recognized that the goal of the proposed legislation, which would have amended California’s current duty-to-report law in order to require reporting in more instances, was to “increase the frequency with which terrible crimes are reported to law enforcement”), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0801-0850/sb_840_cfa_20100803_161326_asm_comm.html.

33. *See, e.g.*, ALASKA STAT. §§ 11.56.765, 11.56.767 (2010); CAL PENAL CODE § 152.3 (West Supp. 2012); COLO. REV. STAT. ANN. § 18-8-115 (2011); FLA. STAT. ANN. § 794.027 (West 2007); HAW. REV. STAT. § 663-1.6 (West, Westlaw through 2011 Act 235); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2008); NEV. REV. STAT. ANN. § 202.882 (West 2000); OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2010); R.I. GEN. LAWS § 11-1-5.1 (2002); TEX. PENAL CODE ANN. § 38.171 (West 2011); WASH. REV. CODE ANN. § 9.69.100 (West 2010).

34. King, *supra* note 8, at 637.

C. Arkansas Reporting Statutes

Unlike the minority of states that have enacted some form of duty-to-assist legislation, Arkansas legislators have not yet adopted a general duty to rescue or to report crimes.³⁵ In keeping with the rest of the nation, however, the Arkansas General Assembly has enacted specific reporting statutes regarding child abuse, elder abuse, knife and gunshot wound treatment, and crimes committed on school grounds.

1. *Child Abuse Reporting*

The Child Maltreatment Act³⁶ codifies thirty-seven types of individuals as mandated reporters³⁷ who are required to immediately report suspected child maltreatment or death as a result of child maltreatment.³⁸ The Arkansas Supreme Court has referred to the Act as “imposing a compelling duty on the classes of persons named therein to act.”³⁹ In addition to mandated reporters, the Act also provides that any person may immediately report to the Child Abuse Hotline if he or she suspects child abuse.⁴⁰ The express purpose behind mandating the reporting of suspected child abuse is the protection of children in Arkansas.⁴¹

2. *Elder Abuse Reporting*

Similar to the Child Maltreatment Act, the Adult and Long-Term Care Facility Resident Maltreatment Act provides a list of twenty-six classes of persons and officials who are required by law to report suspected elder

35. The Arkansas Legislature has, however, codified a statutory duty to render assistance to a law enforcement officer upon the officer’s command. ARK. CODE ANN. § 5-54-109(a) (LEXIS Repl. 2005). “Refusing to assist a law enforcement officer is a Class C misdemeanor.” *Id.* § 5-54-109(b). Arkansas has also statutorily imposed a duty on “[t]he driver of any [motor] vehicle involved in an accident resulting in injury to or death of any person . . . [to] remain at the scene of the accident for a reasonable time” and to render assistance to injured parties if needed. *Id.* § 27-53-103(a)(2), (b)(1) (LEXIS Repl. 2010). Failure to comply with this statute is a Class D felony. *Id.* § 27-53-101(b)(1).

36. *Id.* §§ 12-18-101 to -1108 (LEXIS Repl. 2009 & Supp. 2011).

37. *Id.* § 12-18-402(b) (LEXIS Supp. 2011).

38. *Id.* § 12-18-402(a). The term “child maltreatment” is defined as “abuse, sexual abuse, neglect, sexual exploitation, or abandonment.” *Id.* § 12-18-103(6) (LEXIS Supp. 2011). “Abuse” includes conduct creating a “serious threat of death, . . . disfigurement, or impairment of any bodily organ.” *Id.* § 12-18-103(2)(A)(ii).

39. *Cundiff v. Crider*, 303 Ark. 120, 122, 792 S.W.2d 604, 605 (1990).

40. ARK. CODE ANN. § 12-18-401 (LEXIS Repl. 2009). A mandated reporter’s deliberate failure to comply with the Act and report suspected abuse is a Class A misdemeanor. *Id.* § 12-18-201(b). Commission of this offense may also result in civil liability. *Id.* § 12-18-206.

41. *Id.* § 12-18-102 (LEXIS Supp. 2011).

abuse.⁴² Along with those persons required to report, the statute adds that any other person may report abuse if he or she has witnessed the abuse or has a reasonable suspicion that an adult has been maltreated.⁴³ Much like the mandated reporting of suspected child abuse, the Arkansas General Assembly has declared that part of its purpose in enacting the laws that require reporting of suspected adult maltreatment is to protect maltreated adults in Arkansas.⁴⁴

3. *Knife and Gunshot Wound Reporting*

In addition to the child maltreatment and elder maltreatment reporting statutes, Arkansas law also requires all physicians and other persons that provide first aid treatment to report all cases in which they treat intentionally inflicted knife or gunshot wounds to the county sheriff's office or municipal law enforcement agency.⁴⁵ When originally enacted, the emergency clause accompanying this statute indicated that the legislative intent behind this reporting statute was to "curtail crime and assist peace officers in [the] performance of their duties."⁴⁶ The emergency clause further described the reporting of knife and gunshot injuries as "being necessary for the health, peace, and safety of the public."⁴⁷

4. *Reporting Crimes Committed on School Grounds*

Along with mandating the reporting of abuse and treatment of certain injuries, Arkansas has also enacted a statute that places a duty upon public school principals to report crimes that occur on school property.⁴⁸ Section 6-17-113(b) of the Arkansas Code provides that any public school principal who has knowledge or "a reasonable belief that any person has committed or has threatened to commit an act of violence or any crime involving a deadly weapon on school property or while under school supervision" must report such crime to law enforcement authorities.⁴⁹

42. *Id.* § 12-12-1708(a)(1) (LEXIS Repl. 2009).

43. *Id.* § 12-12-1708(a)(3).

44. *Id.* § 12-12-1702 (LEXIS Repl. 2007). The offense of failure to report suspected elder abuse in the first degree is a Class B misdemeanor. *Id.* § 12-12-1720(a)(2).

45. *Id.* § 12-12-602(a)(1), (b)(1)–(2) (LEXIS Supp. 2011).

46. Act of Mar. 8, 1949, No. 258 § 4, 1949 Ark. Acts 769–70 (codified as amended at ARK. CODE ANN. § 12-12-601 to 603). Failure to report under this statute is a violation punishable by a fine of no more than \$100. *Id.* § 12-12-601 (LEXIS Repl. 2009).

47. Act of Mar. 8, 1949, No. 258 § 4, 1949 Ark. Acts 769–70 (codified as amended at ARK. CODE ANN. § 12-12-601 to -603).

48. ARK. CODE ANN. § 6-17-113(b) (LEXIS Repl. 2007).

49. *Id.* § 6-17-113(b). Failure to comply with this statute is a Class C misdemeanor. *Id.* § 6-17-113(d).

III. ENACTING A GENERAL DUTY-TO-REPORT STATUTE IN ARKANSAS

A. Public Policy

The Supreme Court of the United States has declared that providing information for the assistance of law enforcement is “an act of responsible citizenship.”⁵⁰ Others have noted that “[w]itnessing a crime and ignoring the plight of the victim is antisocial behavior and therefore a public wrong.”⁵¹ Furthermore, although some commentators have criticized laws that attempt to “legislate morality,” many others agree that “our nation should not permit its citizens to act, or fail to act, with callous indifference.”⁵²

One author has maintained that rather than “coercing kindness” in general, the government “should require an individual to confer a benefit on another only when the value of the benefit sufficiently outweighs the cost of providing it.”⁵³ Child and elder abuse reporting statutes, for example, shed some light on this theory. Generally, laws requiring certain persons to report suspected child or adult abuse have been accepted as a legitimate use of government control because society gains a significant benefit (the protection of its children and elderly) at an acceptable cost (deprivation of the freedom to not report suspected abuse).⁵⁴

Applying this theory to general duty-to-report statutes, the results are much the same. The benefits conferred on society by a statutory duty to report certain crimes, namely, the saving of lives and effective crime control, are significant. The value of these benefits likewise outweighs the cost, which is essentially the deprivation of the freedom to refuse to notify police when a crime victim is in danger.⁵⁵ Thus, under this theory, statutes requiring witnesses to report crimes to authorities are also a legitimate use of government control.

While government intrusion on an individual’s freedom to act or not to act requires a legitimate government interest, protecting the public safety has historically constituted such an interest.⁵⁶ “[T]he prevention of crime and minimizing the adverse effects thereof” are necessarily included in this

50. *Miranda v. Arizona*, 384 U.S. 436, 477–78 (1966); *see also* *Roberts v. United States*, 445 U.S. 552, 557–58 (1980) (“[G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.”).

51. Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 *IND. L. REV.* 571, 583 (2000).

52. King, *supra* note 8, at 617.

53. Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 *WM. & MARY L. REV.* 423, 430 (1985).

54. *Id.* at 430–31.

55. *Id.* at 431.

56. *See, e.g.*, *ARK. CODE ANN.* § 12-12-902 (LEXIS Repl. 2009).

legitimate governmental interest in public safety.⁵⁷ Much like the rationale underlying Arkansas's knife and gunshot wound reporting statute, one reason for requiring witnesses to report serious crimes "is that effective crime prevention and law enforcement depend significantly on the cooperation of the public."⁵⁸ It has been noted that "as victims and witnesses, citizens have a virtual monopoly over information about who did what, and this tight control extends over almost all . . . crimes."⁵⁹ As such, the implications for crime control would be considerable if witnesses would become more involved as bystanders.⁶⁰ By requiring witnesses to report crimes to authorities, Arkansas's criminal justice system would be able to more effectively "fulfill its role in aiding the victims of crime and stopping criminal acts."⁶¹

B. Ease of Reporting

In addition to its positive public policy implications, an Arkansas reporting statute is necessary because "[t]here is probably nothing easier than reporting."⁶² Unlike duty-to-rescue statutes, duty-to-report laws do not require a witness to directly intervene during an attack. Instead, reporting statutes require witnesses to simply place a phone call to police.⁶³

In response to an attack during which ten witnesses ignored a victim's pleas for help while the victim was being assaulted, one police spokesperson commented that if people are "not comfortable [because they] don't feel capable of intervening, that's fine. . . . But not calling is not understandable."⁶⁴ After the highly publicized murder of Kitty Genovese, during which thirty-seven people, aware of the ongoing attack, refused to assist or even

57. 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, 415 (1998).

58. OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2010). See also Jack Wenik, Note, *Forcing Bystander to Get Involved: Case for Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1794 (1985) ("Non-legal means, such as publicity campaigns and rewards, have proven insufficient in encouraging crime reporting, perhaps because only those who are already willing to report crimes can be reached by noncoercive measures.").

59. WESLEY G. SKOGAN, *Making Better Use of Victims and Witnesses*, in POLICE LEADERSHIP IN AMERICA 332, 334 (William Geller ed., 1985), available at http://skogan.org/files/Making_Better_Use_of_Victim_Witness.Geller.pdf.

60. See *id.* at 332.

61. Bagby, *supra* note 51, at 581.

62. Kaplan, *supra* note 9, at 79 (citing Yeager, *supra* note 11, at 24).

63. Because of the lack of physical intervention required under a duty-to-report statute, "some argue that the case for reporting laws is stronger than that for duty-to-rescue laws." Thompson, *supra* note 19, at 40. Even opponents of general duty-to-assist laws have agreed that "[c]rime-reporting . . . statutes are more appropriate forms of governmentally persuaded actions." Stewart, *supra* note 57, at 414.

64. Patrick Condon, *Witnesses Ignore Woman's Pleas for Help*, GRAND RAPIDS PRESS, Aug. 24, 2007, at A3.

call for help, one New York detective described how easy it would have been to contact police.⁶⁵ The officer stated that “[a] phone call would have done it.”⁶⁶

C. Preparation for Future Tragedy

Most states that have enacted duty-to-assist laws have done so in response to tragic incidents such as those mentioned in the introduction of this note.⁶⁷ The fact that such a horrific attack has yet to be reported in Arkansas, however, does not mean that one will not occur or that existing laws should remain unexamined or unchanged.⁶⁸ Despite one Maine trial court judge’s claim that “shocking cases where one human being sits idle during another’s peril are difficult to find,”⁶⁹ news stories and case law indicate to the contrary.⁷⁰ Instances of rape or assault of a victim in front of passive witnesses are not only legion, but they also typically involve multiple witnesses, rather than just one individual bystander.⁷¹ Advocating for the passage of a federal reporting statute that would hold witnesses criminally liable for failing to report sexual crimes against children, Representative Nick Lampson explained that “[w]ith crimes against children on the rise, this type of legislation is more important than ever before.”⁷²

Even though Arkansas courts have yet to be faced with the issue of bystander indifference in this state, nothing prohibits the Arkansas Legislature

65. Martin Gansberg, *37 Who Saw Murder Didn’t Call the Police*, N.Y. TIMES, March 17, 1964, at A1, 38.

66. *Id.* at A38.

67. *See supra* Part I.

68. *See generally* PAUL H. ROBINSON, WOULD YOU CONVICT? SEVENTEEN CASES THAT CHALLENGED THE LAW 82, 217 (1999) (describing correction of law’s weakness as proper accommodation of the tension between the demands for legality and justice).

69. *Cilley v. Lane*, No. CV-06-009, 2009 WL 558273 (Me. Super. Ct. Jan. 22, 2009) (Trial Court Order).

70. *See, e.g.*, MICHAEL W. BROOKS, SUBWAY CITY: RIDING THE TRAINS, READING NEW YORK 194 (1997) (eleven witnesses looked on as seventeen-year-old Andrew Mormile was stabbed on a train and bled to death; not a single person attempted to help); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 3.3 n.70 (2d ed. 1986) (quoting NAT’L L.J., Aug. 22, 1983, at 5) (a fourteen-year-old St. Louis girl was raped for over forty minutes while bystanders did nothing until an eleven-year-old boy finally called police); Stewart, *supra* note 57, at 390 (although four different people were aware that Joey Levick lay beaten in a drainage ditch for fifteen hours, none of them attempted to assist him; he eventually died in a two-inch puddle of water).

71. *See supra* note 70; S.B. 840, 2009-2010 Leg., Reg. Sess. (Cal. 2010) (Bill Analysis), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0801-0850/sb_840_cfa_20100803_161326_asm_comm.html.

72. Kaplan, *supra* note 9, at 78 (quoting Press Release, United States House of Representatives, Lampson to Introduce Federal “Good Samaritan” Legislation (Sept. 2, 1998)) (on file with author).

from preemptively enacting legislation. In fact, the Arkansas General Assembly has previously enacted statutes without Arkansas courts having to first adjudicate the particular issues such laws were designed to address.⁷³ Rather than waiting until problems arise in Arkansas, legislators have reacted proactively to issues brought to light by cases in other states by arming prosecutors with criminal statutes to be applied if similar, unfortunate crimes occur in this state. For instance, in 1993, Arkansas followed the national trend when it enacted a criminal stalking statute⁷⁴ in response to the California murder of actress Rebecca Schaeffer by her stalker, Robert Bardo.⁷⁵ Arkansas again joined a majority of the states when it enacted the Sex Offender Registration Act of 1997⁷⁶ after the highly publicized death of seven-year-old Megan Kanka, who was brutally raped and murdered by a convicted sex offender who lived in her New Jersey neighborhood.⁷⁷

As more and more cases of bystander indifference haunt news headlines around the nation, Arkansas's need to address the issue becomes greater. Because the Arkansas Legislature has exhibited its willingness to enact laws in response to crimes that have taken place outside of the state, the fact that incidents such as those that have occurred in California, Pennsylvania, Nevada, and Massachusetts have yet to be reported in Arkansas should not preclude legislators from enacting a statute that would preemptively address the problem of witness indifference in this state.

D. A Proposed Duty-to-Report Statute for Arkansas

Common themes among existing duty-to-assist and duty-to-report statutes include: that a witness must have the ability to assist or report without

73. It is not uncommon for state legislatures to enact statutes in response to incidents that have occurred in other states but not yet in their own. See LAFAYE & SCOTT, *supra* note 70 (sponsor of Minnesota's proposed duty-to-assist legislation stated that he was moved to introduce the bill by reports of the barroom gang rape that took place in New Bedford, Massachusetts earlier that year where spectators stood by, some of them repeatedly shouting "go for it!").

74. ARK. CODE ANN. § 5-71-229 (LEXIS Supp. 2011).

75. See Joseph C. Merschman, Note, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 263, 266 (2001). After this dramatic murder brought national attention to the problem of stalking, stalking statutes swept the country, and by 1995, they had been enacted by every state. *Id.* at 266.

76. ARK. CODE ANN. §§ 12-12-901 to -924 (LEXIS Repl. 2009 and Supp. 2011).

77. Mary-Marsha Porter Loe, Note, *Arkansas Sexual Offender Registration and Notification Laws: An Ex Post Facto Violation?*, 53 ARK. L. REV. 175, 177-78 (2000) (attributing the nationwide "explosion of registration and notification laws" to the shocking 1994 New Jersey murder). By 1997, forty-eight states had enacted sex offender registration statutes; of those statutes, almost half contained community notification provisions. See *id.* at 178 (citing Chrisandrea L. Turner, Note, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?*, 86 KY. L.J. 477, 479-80 (1997)).

harming himself or others;⁷⁸ that a witness is immune from civil liability for assisting or reporting;⁷⁹ and that the witness must know or reasonably should know that a victim is in peril.⁸⁰ In keeping with these themes, a proposed duty-to-report statute for Arkansas follows:

(1) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall notify law enforcement officers or other assistance personnel. A person need not comply with this subsection under the following circumstances:

- (a) Compliance would place him or her in danger;
- (b) Compliance would interfere with any duties the person owes to others;
- (c) Assistance is being summoned or provided by others; or
- (d) The crime or alleged crime has been reported to an appropriate law enforcement agency by others.

(2) Any person who, in good faith, reports or provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.

The offense of failing to report a crime would likely be best classified as a misdemeanor. According to one commentator, “imposing only a limited penalty is essential to the success of a novel statute that proposes to alter traditional modes of behavior.”⁸¹ Moreover, classification as a misdemeanor would be consistent with existing Arkansas reporting statutes.⁸²

IV. POTENTIAL ENFORCEABILITY PROBLEMS

Although duty-to-report laws have been successfully enacted in several states, the statutes’ opponents often highlight many criticisms regarding

78. *See supra* note 17 and accompanying text.

79. *But see* VT. STAT. ANN. tit. 12, § 519 (2002) (no immunity from civil liability where assistance amounts to gross negligence).

80. *See supra* note 17 and accompanying text. *But see* ARK. CODE ANN. § 27-53-101 (LEXIS Repl. 2010) (containing no element requiring driver’s knowledge of victim’s injuries).

81. Wenik, *supra* note 58, at 1800 n.99.

82. *See* ARK. CODE ANN. § 12-18-201(b) (LEXIS Repl. 2009) (first degree failure to report suspected child abuse is a Class A misdemeanor); *id.* § 12-12-1720(a)(2) (first degree failure to report suspected elder abuse is a Class B misdemeanor); *id.* § 6-17-113(d) (LEXIS Repl. 2007) (failure to report crime on school property is a Class C misdemeanor).

enforcement of the duty. Along with contending that duty-to-report laws are, and would be, rarely enforced by prosecutors, some critics argue that identifying witnesses who have failed to assist those in need would be almost impossible. In the event that a witness who failed to report a crime could be identified, an additional problem arguably facing prosecutors is proving that the witness had actual knowledge of the victim's need for help. Finally, some commentators have argued against the enactment of a duty-to-report statute simply because they find it to be ineffective.

A. Lack of Actual Enforcement

According to a trial court judge in Maine, one problem with adopting a duty-to-report statute "is that applying such a duty would be nearly impossible."⁸³ Even in jurisdictions where statutes mandate a duty to assist, according to the judge, "such statutes have not been often applied," as is evidenced by the small number of prosecutions that take place.⁸⁴ Instances such as one that occurred in Minnesota, where ten witnesses went unpunished after ignoring a victim's screams during a ninety-minute attack, support this argument.⁸⁵ According to one commentator, "the lack of prosecutions under existing [duty-to-assist statutes] suggests that, at least in prosecutors' minds, such failures to rescue or report are not loudly crying for retribution."⁸⁶

On the other hand, some prosecutors have indicated that the lack of application may not be a reluctance to prosecute "but instead a combination of 'thankfully few incidents such as the [Massachusetts] case and an inability

83. *Cilley v. Lane*, No. CV-06-009, 2009 WL 558273 (Me. Super. Ct. Jan. 22, 2009) (Trial Court Order).

84. *Id.* See also Kaplan, *supra* note 9, at 92. It has been further noted that most prosecutors especially do not invoke their reporting laws against non-reporters who are not professionals within a class of mandated reporters. Thompson, *supra* note 19, at 16.

85. See *Cilley*, 2009 WL 558273. Even though Minnesota has adopted a duty-to-assist statute, no action was taken against the bystanders who did not summon help. *But see* *State v. LaPlante*, 521 N.W.2d 448 (Wis. Ct. App. 1994). In *LaPlante*, the Wisconsin Court of Appeals affirmed the conviction of Karie LaPlante for violating WIS. STAT. ANN. § 940.34 (West 2005), the failure-to-aid statute, when she failed to either help or call for assistance as she witnessed Monica Hendy being brutally beaten by seven other people outside of a party at LaPlante's home. *Id.* at 449, 452. "[LaPlante] was fined \$300 and ordered to perform community service." Eli Sanders, *Good Samaritan Law a Mother's Mission*, SEATTLE TIMES, Feb. 11, 2001, <http://community.seattletimes.nwsourc.com/archive/?date=20010211&slug=goodsam11m>. See also *Mom Given Probation for Videotaped Beating*, HOUS. CHRON., Feb. 15, 2003, http://www.chron.com/CDA/archives/archive.mpl/2003_3627043/mom-given-probation-for-videotaped-beating.html (woman convicted of failing to report child abuse where security camera captured her sister, Madelyn Toogood, repeatedly hitting and shaking Toogood's daughter).

86. Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 111 (1999).

to identify perpetrators in those reported cases where the statute does apply,⁸⁷ as well as the problematical nature of coercing testimony from crucial witnesses, that accounts for the dearth of precedent on point.”⁸⁷ Noting that Arkansas has not experienced such a heinous crime as that which occurred in Massachusetts, one Arkansas prosecuting attorney stated, “As a prosecutor, part of my job is to abide by the law of the State of Arkansas. If a statute is enacted, I shall use it as often as I am required to.”⁸⁸

Even if violations of a duty-to-report statute were rarely prosecuted in Arkansas, the statute could still serve an important purpose as the basis of civil claims against witnesses for failure to report.⁸⁹ Criminal statutes have often had a role in establishing civil liability.⁹⁰ Some states, including Arkansas, have determined that the statutorily imposed duties to report child and elder abuse, which were enacted as criminal laws, also give rise to civil causes of action.⁹¹ In fact, the primary use of some criminal reporting statutes is to impose civil liability upon non-reporting witnesses by creating a legal duty under criminal law.⁹²

Using the criminal statute for the purpose of allowing claimants to bring civil suits could potentially be more effective than using it to prosecute witnesses who fail to assist.⁹³ One reason for this is that “[m]any people rightly fear the risk of civil liability, which could mean the loss of all the assets that they’ve worked for years to accumulate, even more than [they fear] the risk of prosecution under a rarely enforced misdemeanor statute.”⁹⁴ Furthermore, enforcing the statute civilly would likely result in more successful suits because a civil claim requires a lower burden of proof than a criminal suit.⁹⁵

87. Yeager, *supra* note 11, at 35.

88. Email from Vicky Ewenike, Deputy Prosecuting Attorney, Pulaski Cnty., Ark., to author (Feb. 20, 2011) (on file with author).

89. See Stewart, *supra* note 57, at 426 (noting that while “a vast increase in criminal prosecutions under duty-to-aid statutes” is unlikely, the statutes may generate increased civil litigation).

90. LAFAVE & SCOTT, *supra* note 70, § 1.3.

91. See ARK. CODE ANN. § 12-18-206 (LEXIS Repl. 2009); *id.* § 12-12-1706; see also Thompson, *supra* note 19, at 16.

92. Thompson, *supra* note 19, at 7 (“Non-reporters of child abuse, for example, are rarely prosecuted, but often are sued.”). See also SAMAHA, *supra* note 26, at 88 (noting that the failure to perform *legal* duties is a criminal omission, but failure to perform *moral* duties is not).

93. See EDWARD ELDEFONSO & ALAN R. COFFEY, CRIMINAL LAW: HISTORY, PHILOSOPHY, ENFORCEMENT 38 (John L. Michel ed., 1981) (explaining that civil liability and other non-criminal penalties carry the brunt of controlling conduct, with “a little additional force contributed by infrequently used criminal provisions that may appear in statute books”).

94. Volokh, *supra* note 86, at 112.

95. For civil claims, the burden of proof is a preponderance of the evidence, even though the action may involve criminal conduct. *United States v. Regan*, 232 U.S. 37, 48 (1914).

B. Identifying Witnesses Who Have Failed to Assist

Prosecutorial difficulty in identifying those individuals who witnessed a crime but failed to report it is another possible hurdle facing enactment of a duty-to-report statute in Arkansas.⁹⁶ Some critics argue that witnesses who failed to report crimes would be difficult to identify and trace, especially if their failure to report was not witnessed by anyone else.⁹⁷

For some crimes, however, such as the one that occurred at Richmond High School, identifying these witnesses may not be as difficult as critics perceive. During the Richmond High attack, which took place in the school's courtyard, over a dozen witnesses were present, some of whom were recognized as classmates of the victim.⁹⁸ One witness to the gang rape informed news reporters that he "knew at least one of the attackers."⁹⁹ In addition to the significant number of witnesses present, cell phone cameras were also used to capture parts of the attack, which likely captured photos of some of the witnesses as well.¹⁰⁰ Although not every crime will have such a considerable number of witnesses as the Richmond High School incident, the difficulty of identifying witnesses of those crimes that do will be greatly diminished.

C. Proving Witness Had Knowledge of Victim's Need for Aid

A third potential problem with the enforceability of a duty-to-report statute is that it may be difficult for prosecutors to establish that a witness who failed to report actually knew of the victim's injury or peril.¹⁰¹ The bur-

Criminal claims, on the other hand, must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970).

96. See generally David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 712–14 (2006). Hyman argues that "[t]he willingness of average Americans to rescue one another is typically discounted or dismissed entirely." *Id.* at 663. Hyman uses stories such as that of Lillian Robinson, a woman who was saved from being killed by a train by Marsha Cozier, to illustrate this point. *Id.* at 698. Hyman argues that Cozier's actions are "much more representative of the real world of rescue." *Id.* at 699. Typical duty-to-report statutes, however, as well as the proposed Arkansas statute, are geared toward witnesses of violent crimes, who stand idly by and watch, without reporting anything to authorities, as opposed to being directed at those who do not risk their lives to save people endangered by accidents. See *supra* notes 33–34 and accompanying text; *supra* Part III.D.

97. See Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 270–72 (1983); Silver, *supra* note 53, at 433.

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

99. Friedman, *supra* note 3.

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

101. Silver, *supra* note 53, at 433. See also Condon, *supra* note 64, at A3 (noting the unlikelihood of police pursuing "charges against witnesses because authorities would have to

den rests on the government to prove beyond a reasonable doubt that a defendant knew of the victim's peril and did not act.¹⁰² "[T]he problem of proving what was on a defendant's mind exists in nearly every criminal prosecution," however, and would, thus, be neither a new nor a unique problem facing prosecutors.¹⁰³

In addition, the amount of knowledge a prosecutor would be required to prove a witness possessed at the time of the crime would typically be minimal. Existing duty-to-report statutes generally require that individuals have only reasonable grounds to believe that a crime was committed.¹⁰⁴ Case law has further elaborated that such statutes do not require citizens who are reporting the commission of a crime to possess as high of a degree of certainty as is required by the probable cause standard that police must satisfy when making warrantless arrests.¹⁰⁵ In *State v. LaPlante*,¹⁰⁶ the Wisconsin Court of Appeals explained that "to know" that a crime is occurring and that a victim is exposed to harm "requires only that the actor believe that a specific fact exists."¹⁰⁷ Thus, prosecutors would likely face little difficulty in proving that witnesses possessed the requisite knowledge in cases such as the Richmond High School gang rape, the Penn State child molestations, and the Massachusetts bar rape, where the actions observed by witnesses were so obvious and so heinous that no reasonable person could mistake their criminal nature.

D. Hindrance to Prosecution

Some commentators argue that the enactment of a duty-to-report statute could create difficulties for prosecutors, as "quite often the prosecution of the violent crime itself would depend upon the witness[']s cooperation and testimony to have success."¹⁰⁸ One problem facing prosecutors is that a duty-to-report statute may cause some witnesses to remain silent, out of fear

prove they knew the woman was in extreme danger"); Thompson, *supra* note 19, at 43 (duty-to-assist laws have been challenged based on difficulty of people knowing whether they have a duty to rescue).

102. See Kaplan, *supra* note 9, at 91 (acknowledging problem of proving a witness's knowledge). See also *supra* note 95 discussing burden of proof requirements.

103. Silver, *supra* note 53, at 433.

104. See, e.g., COLO. REV. STAT. § 18-8-115 (2011).

105. See Lunsford v. W. States Life Ins., 919 P.2d 899, 901 (Colo. App. 1996).

106. 521 N.W.2d 448 (Wis. Ct. App. 1994).

107. *LaPlante*, 521 N.W.2d at 451 (rejecting the appellant's claim that the wording of Wisconsin's failure-to-aid statute made it difficult to know whether a witness must actually have believed a crime was being committed before she had to report it). The court held that the statute was not unconstitutionally vague as to its knowledge requirement. *Id.*

108. Email from Will Jones, Deputy Prosecuting Attorney, Pulaski Cnty., Ark., to author (Mar. 7, 2011) (on file with author).

that they themselves will be prosecuted.¹⁰⁹ Once a witness is obtained for use by the prosecution, an additional problem may arise. According to some prosecutors, the effectiveness or credibility of a witness may be diminished if the witness himself has been previously prosecuted in relation to the case for which he is presently testifying.¹¹⁰ It is reasonably foreseeable that a witness who has been prosecuted might not be as forthcoming with truthful information as compared to a witness who had not previously been punished by the same prosecutors seeking to later use his testimony.¹¹¹ Similarly, a witness who has been granted immunity from prosecution in exchange for his testimony may also be afforded less credibility by a jury.¹¹² On cross examination, a defendant's counsel may question the witness about any deals the prosecution agreed to make with the witness in exchange for his testimony, thereby allowing a jury to know that the witness initially failed to report the crime.¹¹³

While some argue that a duty-to-report statute would be problematic for prosecutors, others note that "there is a market for these laws, either as a compromise charge or, for some, as leverage to be applied against recalcitrant witnesses to serious crimes."¹¹⁴ Some prosecutors see "the threat of . . . prosecution [a]s a bargaining chip in negotiations with potential witnesses who hesitate to testify in the principal prosecution."¹¹⁵ Additionally, as one Arkansas prosecutor explained, in cases involving multiple defendants where prosecutors are unable to charge a particular defendant with the crime itself or as an accomplice, a duty-to-report statute may allow the state to at least charge the defendant with the lesser offense of failure to report.¹¹⁶ According to Pulaski County Deputy Prosecuting Attorney Jennifer Waymack, in many cases, three individuals may have committed a crime, but the state has only enough evidence to charge two of them, rather than all three, because the third person claimed that he only witnessed the crime take place but did nothing more than watch.¹¹⁷ In those situations, she explained, "this statute might allow [the state] to at least charge [the defendant] with some-

109. See Volokh, *supra* note 86, at 110.

110. See Email from Will Jones to author, *supra* note 108.

111. "If the sentence is severe, it would likely impact the willingness of the witness to cooperate at trial." Email from Will Jones to author, *supra* note 108.

112. See Volokh, *supra* note 86, at 110; Yeager, *supra* note 11, at 37–38.

113. For example, a defense attorney might ask: Mr. Smith, isn't it true that the State "has agreed to drop criminal charges against you in exchange for your testimony against the defendant?" Volokh, *supra* note 86, at 110.

114. Yeager, *supra* note 11, at 38.

115. Yeager, *supra* note 11, at 37.

116. Email from Jennifer Waymack, Deputy Prosecuting Attorney, Pulaski Cnty., Ark., to author (Mar. 18, 2011) (on file with author).

117. Email from Jennifer Waymack to author, *supra* note 116.

thing. If we can't prove the [crime], maybe we can prove [he] didn't report."¹¹⁸

E. Ineffectiveness

An additional criticism of the duty-to-report statute is that it is ineffective.¹¹⁹ One critic has declared that duty-to-assist legislation “allows for emotional venting, but is nevertheless an exercise in futility in trying to change human behavior.”¹²⁰ In a similar tone, another commentator noted that “[t]he imposition of [a] duty to report does not . . . seem to prevent the same two persons in the same situation from repeating their identical conduct.”¹²¹ On the other hand, however, a spokesperson for the Wisconsin Attorney General's office has explained that even though it may provide little use as a deterrent, Wisconsin's duty-to-assist statute nevertheless “has value as [both] a moral guide . . . and as a legal tool that can be used if needed.”¹²²

While a reporting statute may not deter certain individuals from not reporting the crimes they witness, “deterrence is not the only motivation for [a reporting] statute's implementation.”¹²³ In many instances, people are often more likely to assist or report crimes when they are aware that the law requires them to do so, as opposed to when it does not. As one commentator explained, “[t]he very existence of a criminal statute, even an unpopular one, may compel obedience by virtue of the respect most people have for the institution of law.”¹²⁴ Furthermore, results of social experiments have shown that where people have been encouraged, even in subtle ways, to report the crimes they witness, those individuals are much more likely to actually report them.¹²⁵

V. CONCLUSION

As Representative Nick Lampson noted, “In a perfect world, reporting crimes . . . would be common sense. This . . . is not a perfect world, and Congress needs to pass legislation to make sure witnesses do report inci-

118. Email from Jennifer Waymack to author, *supra* note 116.

119. See ELDEFONSO & COFFEY, *supra* note 93, at 38 (explaining that internal moral compunctions and societal pressures are some sanctions “that are often more effective than criminal laws”).

120. Stewart, *supra* note 57, at 391.

121. Kaplan, *supra* note 9, at 93.

122. Sanders, *supra* note 85.

123. King, *supra* note 8, at 638.

124. See Wenik, *supra* note 58, at 1798.

125. SKOGAN, *supra* note 59, at 338; Wenik, *supra* note 58, at 1789.

dents of violence against [victims].”¹²⁶ Although the law has traditionally maintained that individuals have no duty to aid others, many states have reacted to serious instances of indifference exhibited by witnesses of violent crimes by enacting duty-to-assist and duty-to-report statutes. Because of the policy implications, the benefits derived from witnesses reporting crimes, and the ease with which individuals can report, it would be worthwhile for Arkansas to follow this trend. While some steadfast followers of the common law no-duty-to-aid rule will undoubtedly remain opposed to the idea of enforcing a legal duty to report, the benefits of enacting such legislation outweigh the costs and potential enforceability issues. Furthermore, the fact “that some cases may present problems is insufficient reason to deny recognition of a rule compelling easy [assistance].”¹²⁷ Ultimately, “if[,] because of this statute[,] just one [witness], who normally would have kept on walking, calls the police just in time to save a victim’s life, none of the proof or prosecution issues matter. It’s worth enacting.”¹²⁸

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126. Nick Lampson, *New Congressional Caucus Helps to Protect Children*, KLAAS ACT. REV. (Marc Klaas Found. for Children, Sausalito, Cal.), Winter 1998, at 4, 4.

127. Lipkin, *supra* note 97, at 271.

128. Email from Jennifer Waymack, Deputy Prosecuting Attorney, Pulaski Cnty., Ark., to author (Mar. 17, 2011) (on file with author).

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