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My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes

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COMMENTS

MY BROTHER'S KEEPER? THE CRIMINALIZATION OF NONFEASANCE: A CONSTITUTIONAL ANALYSIS OF DUTY TO REPORT STATUTES

A seven-year-old girl was sexually assaulted and murdered in the women's restroom of a Las Vegas casino. The casino security cameras show two young men entering the restroom behind her. One of the men watched the other take the girl into a bathroom stall and begin to muffle her screams with his hand. After two minutes, the observer exited the restroom. The other young man remained in the restroom with the girl, walking out twenty minutes later. The little girl never walked out. She had been strangled and her dead body lay slumped over a toilet in one of the stalls.¹

The sexual assault and murder of a little girl is always shocking and outrageous. However, this particular case was shocking not only because of the nature of the attack itself, but because it could have easily been prevented.

The controversy over the inaction of the observer has created a furor of legislation.² In California, where the victim, assailant, and witness all reside, a state bill was introduced in December 1998.³ AB 37 would make it a misdemeanor to fail to report any violent felony or a sexual assault on a child, or any assault on a child likely to result in serious bodily harm.⁴ In the U.S. Senate, California Senator Barbara Boxer has co-sponsored legislation which would force all states to pass laws that require witnesses of child sexual abuse to report the crime to police.⁵ The "Sherrice Iverson Act" would require states to enact this legislation within five years or lose their federal funding for child abuse prevention.⁶

1. This scenario is based on the facts of the Sherrice Iverson murder, *infra*.

2. There is pending legislation in the U.S. Congress, California and Nevada in direct response to this murder. See *State Laws with Regard to "Duty to Assist" in Crime Situation*, National Conference of State Legislatures, Dec. 1998 [hereinafter *State Laws*]; S. 2452, 105th Congress (1998). In addition to the furor of legislation, there has also been a furor at the University of California, Berkeley, where the young man who observed the assault is a student. The public has called for his expulsion, but the University insists it cannot penalize the young man, as no violation of campus rules has occurred. See Anne-Marie O'Conner, *California and the West Protest Follows Accused Accomplice College: Out of Town Demonstrators Make Angry Calls for UC Berkeley Officials to Expel David Cash, the Friend of Child-Murder Suspect Jeremy Strohmeier*, L.A. TIMES, Aug. 27, 1998, at A3.

3. See *Bill Requires Reporting of Violent Crimes*, S.D. UNION TRIBUNE, Dec. 10, 1998, at A6.

4. See *id.*

5. See S. 2452, 105th Congress (1998).

6. See *id.*

This comment examines the proposed Federal and California legislation, and determines that it is unconstitutional to criminalize nonfeasance. Part I will briefly survey contemporary legal arguments both for and against "Good Samaritan" legislation. Part II will examine the constitutional issues raised by the Federal legislation. Part III will address specifically the constitutional questions raised by the proposed California legislation. Part IV will show the ineffectiveness of the California legislation as applied to the Sherrice Iverson murder.

Casino security cameras and statements made by both the killer and his friend documented the details of the murder. Jeremy Strohmeyer and David Cash, Jr. had driven with David's father to Las Vegas from their homes near Los Angeles, California.⁷ As the night turned to the early hours of the morning, the young men played video games at the Primadonna Casino.⁸

A seven-year-old girl, Sherrice Iverson, was also playing in the game room, while her father gambled in the casino.⁹ Sherrice, while playing with another young boy, was throwing wet, wadded paper towels, when an errant shot hit Jeremy Strohmeyer.¹⁰ Jeremy turned toward the little girl and began playfully chasing her.¹¹ Video security cameras display the two playing around the game room.¹² Sherrice then ran into the women's restroom and began to get more wet paper towels to throw at Jeremy.¹³

David Cash, Jr., Jeremy's best friend, followed Jeremy into the restroom, and watched as they threw paper towels at each other. David then saw Jeremy pick up the little girl and take her into a toilet stall.¹⁴ David walked over to the next stall and looked over the door to see what his friend was doing.¹⁵ Jeremy had Sherrice pressed up against the wall with his hand over her mouth, muffling her screams.¹⁶ Jeremy told Sherrice to shut up or he would kill her.¹⁷ David maintains that he never saw Strohmeyer actually sexually molest the girl,¹⁸ but that he tapped Jeremy in the head and gave him a look as if he should not be doing that.¹⁹ Jeremy just looked back at him with a

7. See *Sixty Minutes: The Bad Samaritan?; David Cash Faces Hostility From Public for Not Taking Action to Prevent the Rape and Murder of Sherrice Iverson by His Friend Jeremy Strohmeyer* (CBS television broadcast, Sept. 27, 1998) [hereinafter *Sixty Minutes*].

8. See *id.*

9. See *id.*

10. See Nora Zamichow, *The Fractured Life of Jeremy Strohmeyer*, L.A. TIMES, July 19, 1998, at A1.

11. See *id.*

12. See *id.*

13. See *Sixty Minutes*, *supra* note 7.

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See Nora Zamichow, *Strohmeyer Friend Saw Him Molest Girl, Classmates Say Crime: David Cash Described Assault in Casino, Teens Tell Authorities*, L.A. TIMES, Sept. 16, 1998, at A1.

19. See *Sixty Minutes*, *supra* note 7.

blank stare and David felt it was time to for him to get out of there.²⁰

Tapes from the video surveillance cameras showed David Cash leaving the restroom about two minutes after he walked in.²¹ He waited outside for over twenty minutes for his best friend, Jeremy.²² His best friend walked out, looked at David Cash and said, "I – I killed her."²³ The two boys immediately left. They spent the rest of the night at other casinos, playing slot machines and riding roller coasters, before returning to California.²⁴

Jeremy Strohmeyer was arrested and charged with first-degree murder.²⁵ He pled guilty to the crime and received life in prison without the possibility of parole.²⁶ In his statement to the court he expressed remorse and blamed his friend, David, for not stopping the attack.²⁷

David Cash, Jr., has not been charged with any crime.²⁸ According to Nevada prosecutors, he has committed none.²⁹ Merely witnessing a crime is not a crime in itself.³⁰ There is no law against the failure to report a crime in Nevada.³¹ So-called "Good Samaritan" laws have only been enacted in a few states.³²

Undoubtedly, David Cash was in a position to stop the assault and murder of Sherrice Iverson. He could have pulled his friend off of her or summoned the nearby casino security guards. He could have stopped the attack with little or no risk to himself. But he chose not to do so. There is no question that his decision to remain uninvolved while his friend sexually assaulted and eventually murdered a little girl was morally reprehensible, but prosecutors concede it is not a crime.³³ Therefore, the question is whether it is possible to create a law that would make Cash's behavior criminal without violating the U.S. Constitution.

20. *See id.*

21. *See id.*

22. *See id.*

23. *Id.*

24. *See Sixty Minutes*, *supra* note 7.

25. *See* John M. Glionna, *Strohmeyer Partly Blames Others Courts: Girl's Killer Admits 'monstrous' Deed, But Says Casinos, Internet, Cash Share Responsibility*, L.A. TIMES, Oct. 15, 1998, at A1.

26. *See id.*

27. *See id.*

28. *See* Maura Dolan, *'Good Samaritan' Laws Are Hard to Enact, Experts Say Aid: Outrage Over Inaction of Strohmeyer Friend Sparks Calls for Bills. But Existing Legislation Has Limited Success*, L.A. TIMES, Sept. 9, 1998, at A1.

29. *See id.*

30. *See id.*; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 6.7 (1986). "In the absence of unique circumstances giving rise to a duty to do so, one does not become an accomplice by refusing to intervene in the commission of a crime." *Id.*

31. *See* LAFAVE & SCOTT, JR., *supra* note 30, § 6.7; Dolan, *supra* note 28.

32. Currently just seven states require bystanders to report certain crimes; Florida, Massachusetts, Minnesota, Ohio, Rhode Island, Washington, and Wisconsin. *See State Laws*, *supra* note 2.

33. *See* Dolan, *supra* note 28.

Cash has done little to bolster his case. On a Los Angeles radio program, he expressed no remorse for his actions,

“How much am I supposed to—to sit down and cry about this? I mean. . . lets be reasonable here. Is my life supposed to halt for— like, for days, weeks and months on end. . . .The simple fact remains, I do not know this little girl. I do not know starving children in Panama.”³⁴

When asked if the murder was on his conscience during a national television broadcast, Cash responded, “No, not to the extent that most people would want it to be.”³⁵

Cash’s lack of remorse has fueled the controversy surrounding his actions. Surely, any decent human being would stop the molestation and murder of a little girl if it were easily within their power.

Critics of the Nevada prosecution have claimed that there is evidence that David Cash may have aided the commission of the crime or been an accessory after the fact.³⁶ They claim that prosecutors made a deal with Cash to secure his testimony against Strohmeyer.³⁷ Prosecutors, however, maintain that what Cash did was not a crime, and that even if he had witnessed the entire assault and murder, he could not be charged.³⁸ In order to have convicted Cash, the state would need some type of “Good Samaritan” statute; criminal sanctions for failing to rescue a victim that could easily be saved or failure to report a crime to police.

I. COMMON THEMES IN ‘GOOD SAMARITAN’ LEGISLATION

Historically, there has never been a legal penalty for failing to come to the aid of others in the United States. Although several exceptions have been created for those who have a special relationship with the victim or put the victim in the perilous situation, we still adhere to the common law doctrine of nonfeasance; there is no duty to come to the aid of a stranger.³⁹

34. *Sixty Minutes*, *supra* note 7.

35. *Id.*

36. *See* Zamichow, *supra* note 18. Friends of Cash claim Cash admitted to watching Strohmeyer molest the girl with his fingers and then asked Strohmeyer if she was aroused. The comment may indicate that Cash encouraged the assault and could be prosecuted as an accomplice.

37. *See id.*; Charles Ashby, *The Right to be Apathetic: Iverson Case Raises Questions About Good Samaritan Laws*, L.A. DAILY JOURNAL, Sept. 2, 1998, at A1 (critics argue that Cash was not prosecuted because he could not be compelled to testify against Strohmeyer if he were suspected of the crime).

38. *See* Zamichow, *supra* note 18. Accomplice liability is dependent on acts which aid, encourage, assist, or induce the criminal behavior of another. Although physical aid is not necessary, there must be some encouragement from the observer, “one does not become an accomplice by refusing to intervene in the commission of a crime.” LAFAYE & SCOTT, *supra* note 30, at § 6.7.

39. *See* Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 424 (1985).

Courts have followed this rule despite the often horrific consequences of victims left maimed or killed, while bystanders who easily could have intervened, refrained from doing so.⁴⁰ Even though morality might well obligate a person to come to the rescue of another, no corresponding legal obligation exists.⁴¹

Common law proponents assert that this lack of legal liability for nonfeasance is justified because the actor did not cause the actual harm.⁴² It is also argued that forced altruism infringes on individual liberty and autonomy.⁴³ Questions arise about the feasibility of identifying the individuals who fail to aid.⁴⁴ A duty to aid others may also lead to an uncertainty about when to act and create problems of strangers intervening in the affairs of others.⁴⁵ Finally, it is argued that a legal duty dilutes, if it does not destroy entirely, the moral incentive to aid others.⁴⁶

Modern critics of the general rule argue that there should be a legal duty to act in cases of "easy rescue."⁴⁷ The fact that injuries would be reduced and lives saved is one justification for this proposed rule.⁴⁸ Further, the law would reinforce morality and virtue, rather than dilute it.⁴⁹ Some critics have argued individualism is actually furthered by a legal duty to rescue.⁵⁰

The controversy over imposing a general duty to come to the aid of others is bolstered whenever a shocking case of failure to aid is brought to the

40. See generally *Yania v. Bigan*, 397 Pa. 316 (1959) (man who dared another man to jump in a deep water filled coal ditch, then watched him drown); *Depue v. Flateau*, 100 Minn. 299 (1907) (man refused to permit a business guest to spend the night, although it was dark and the man had taken ill); *Union P.R. Co. v. Cappier*, 66 Kan. 649 (1903) (railroad employees refused to render aid to little boy hit by train).

41. See generally *Yania*, 397 Pa. at 316; *Depue*, 100 Minn. at 299; *Union P.R. Co.*, 66 Kan. at 649.

42. See Robert Justin Lipkin, Note, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of The General Duty to Rescue*, 31 UCLA L. Rev. 252, 267 (1983); John T. Pardun, Note, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L.J. 591, 603 (1998). These authors merely present the argument, but do not necessarily endorse it.

43. See Lipkin, *supra* note 42, at 276-77.

44. See *id.* at 270; Silver, *supra* note 39, at 433.

45. See Silver, *supra* note 39, at 431-32.

46. See Saul Levmore, *Waiting For Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 889 (1985); A.D. Woolzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1292 (1983).

47. Lipkin, *supra* note 42, at 289-90; Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993). "Easy rescue" would require intervention by a bystander when there is no risk of harm to himself. *Id.* at 24-25.

48. See Lipkin, *supra* note 42, at 289-90.

49. See Anthony D'Amato, *The "Bad Samaritan" Paradigm*, 79 NW. U. L. REV. 798 (1976).

50. See Lipkin, *supra* note 42, at 293 (arguing that personal autonomy and individualism are advanced because individuals have a significant self-interest in 'easy rescue' since a legal duty increases the likelihood that they, themselves, will be rescued if needed.)

attention of the nation. The Sherrice Iverson murder is a modern example of a case that has created public debate over the duty to aid strangers. Similarly in 1997, a wave of controversy surrounded Princess Diana's death when it was reported that photographers who witnessed the fatal crash stood by and took pictures, offering no assistance to the injured victims.⁵¹ In 1983 legislation was enacted in Minnesota, Massachusetts and Rhode Island, when a young woman was raped in a Massachusetts bar while other patrons looked on.⁵² In 1964, a young woman was stabbed to death outside her New York apartment. Though she cried and screamed for thirty-five minutes, thirty-eight neighbors who witnessed the crime failed to even summon the police.⁵³ It was in reaction to this tragedy that Vermont passed its "Good Samaritan Statute."⁵⁴

In the legislative wake of the Sherrice Iverson murder, the U.S. Congress will consider forcing every state in the union to enact a "Good Samaritan" law or lose federal funding.⁵⁵ Now is the time to examine carefully not only the theoretical controversy surrounding such legislation, but also the constitutional questions it raises.

II. THE PROPOSED FEDERAL LEGISLATION

U.S. Senator Barbara Boxer has introduced legislation that would require states to enact laws creating a duty to report child sexual assaults:

To amend the Child Abuse Prevention Act to require States receiving funds under section 106 of such Act to have in effect a State law providing for a criminal penalty on an individual who fails to report witnessing another individual engaging in sexual abuse of a child.⁵⁶

Also known as the "Sherrice Iverson Act", this bill would force states to enact a duty to report statute or lose funding for child abuse prevention.⁵⁷ Each state in the union will be pressured to create legislation that is directly opposed to the traditional common law rule and may be directly violative of the U.S. Constitution.

The Federal Government has the authority to require states to enact certain legislation under its spending power, so long as there is a rational relationship between the conditions imposed and the corresponding federal

51. See Pardun, *supra* note 42, at 591.

52. See Silver, *supra* note 39, at 423.

53. See *id.*

54. VT. STAT. ANN. Tit. 12, § 519 (1968). *But see* Yeager, *supra* note 47, at 35-38 (while the statute has been in existence the longest, there is no record of any prosecutions and a survey of district attorneys indicates the statute is never enforced); Dolan, *supra* note 28 (Vermont prosecutor of 20 years has no memory of the statute ever being enforced).

55. See S. 2452, 105th Cong. (1998).

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

57. See S. 2452, 105th Cong. (1998).

funds.⁵⁸ If the legislation meets this test,⁵⁹ it places each state in the difficult position of trying to draft a duty to report statute that does not violate the U.S. Constitution.

Central to the Bill of Rights is the right to free speech, including the right not to be compelled to speak.⁶⁰ Duty to report statutes require compelled speech, thus raising serious constitutional questions. The Federal Government has never had the authority to coerce states into drafting unconstitutional laws.⁶¹

Ironically, those states that refuse to enact an unconstitutional statute will lose the very funding that is used to protect children from child abuse. The Sherrice Iverson Act will have the effect of either, forcing states to infringe on their citizens' constitutional rights or depriving children of funds to help protect them.

III. CONSTITUTIONAL QUESTIONS RAISED BY THE PROPOSED CALIFORNIA LEGISLATION.

In California, a bill has already been introduced which would require citizens to report certain crimes.⁶² On December 7, 1998, Assembly Member Tom Torlakson introduced a bill, which would criminalize failure to report the commission of a violent felony or an assault on a child;

SECTION 1. Section 152 is added to the Penal Code, to read:

152. (a) Any person who reasonably believes that he or she has observed the commission of any of the following offenses shall notify a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, as soon as reasonably possible:

A violent felony, as defined in subdivision (c) of Section 667.5,⁶³ or an at-

58. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditions of federal grants are legitimate if related to a federal interest in a particular national program; there was a rational relationship between state highway funds and the minimum legal drinking age).

59. There appears to be a rational relationship between federal funding for child abuse prevention and a law that is created to protect children from sexual assaults.

60. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding violation of First Amendment where state compelled citizen to display state motto on license plate); *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding government mandated speech, where speaker would not otherwise speak, violates First Amendment); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding one important aspect of free speech is the right of the speaker to decide what not to say); *Glickman v. Wileman Bros. & Elliot Inc.*, 521 U.S. 457 (1997) (finding generic advertising paid for by agricultural growers under the California Agricultural Marketing Agreement Act is not compelled speech).

61. See *Dole*, 483 U.S. at 209; *United States v. Butler*, 297 U.S. 1 (1936) (holding that Congress can not use its spending power as a means to an unconstitutional end).

62. See AB 37, Assembly (Cal. 1998).

63. This section lists violent felonies as: murder, voluntary manslaughter, mayhem, rape, sodomy by force, oral copulation by force, lewd acts on a child, any felony punishable by life

tempt to commit a violent felony. A violation of section 288, or an attempt to violate Section 288.⁶⁴

Any assault of a child that appears reasonably likely to cause substantial bodily harm to the child. This section shall not be construed to affect privileged relationships as provided by law.

(c) The duty to notify a peace officer imposed pursuant to subdivision (a) is satisfied if the notification or an attempt to provide notice by telephone or any other means is made as soon as reasonably possible. Failure to notify as required pursuant to subdivision (a) is a misdemeanor.

This section shall not apply when the person has a reasonable belief that giving notice, as required by subdivision (a), would place that person or another family or household member in danger of immediate physical harm.⁶⁵

The statute would make it a misdemeanor for an eye-witness of a violent felony, a sexual assault on a child, or any assault on a child likely to lead to serious harm, to refrain from contacting the authorities as soon as reasonably possible.⁶⁶ This legislation was proposed in direct response to the murder of Sherrice Iverson.⁶⁷ Although the Federal bill specifically states that its goal is to protect children,⁶⁸ the proposed California statute does not state its purpose. Tom Torlakson has stated that the law will serve to remind citizens of their duty to be good Samaritans.⁶⁹ However, the law acts as more than a mere reminder; it criminally penalizes all who fail to act.

There may, in fact, be legitimate interests in enacting a duty to report violations of the law. The law may require people to report to authorities as soon as possible, so that police may intervene before the attack goes any further. The law may seek to alert authorities to crimes, so that the police can capture the perpetrator while the leads are still "hot." In either case, the law may run afoul of several constitutional principles, including procedural due process, the First Amendment, the Privileges and Immunities Clause, substantive due process, and the Equal Protection Clause.

imprisonment or death, any felony in which the defendant inflicts great bodily harm on any person other than an accomplice, any robbery in an inhabited home or vessel, arson, attempted murder, kidnapping, car-jacking, and any robbery in the first degree. CAL PENAL CODE § 667.5 (West 1998).

64. This section makes it a crime to commit a lewd act on a child under 14. The penalties are stiffer than for sex crimes against adults. CAL PENAL CODE § 288.

65. AB 37, Assembly (Cal. 1998).

66. See AB 37, Assembly (Cal. 1998).

67. See Chuck Squatriglia, *Bill Would Require Crime Report*, CONTRA COSTA TIMES, Dec. 9, 1998, at A1.

68. See S. 2452, 105th Cong. (1998).

69. See Squatriglia, *supra* note 67, at A1.

A. Procedural Due Process

Inherent in our Constitution is the right to due process of law.⁷⁰ Due process protects citizens from arbitrary enforcement of criminal laws.⁷¹ A statute is invalid if it does not give fair notice as to what behavior constitutes a crime or if it has the potential for arbitrary and discriminatory enforcement.⁷² As a matter of due process, a law is void if it is so vague that “persons of common intelligence must necessarily guess at its meaning and differ as to its application.”⁷³

It is possible that this California legislation will not provide fair notice to its citizens. This is because those citizens may be unaware that they are violating the law. Under the first prong of the analysis it is both ambiguous and vague. Section 1(a) requires individuals to report to police, as soon as reasonably possible, a felony or attempt to commit a felony that they reasonably believe they have witnessed.⁷⁴ While the violent felonies are enumerated in Section 677.5 of the penal code,⁷⁵ it may not always be possible to determine whether or not a crime is actually being committed. If a witness sees two people struggling in the back seat of a car, she may be witnessing a rape, or an attempted rape. On the other hand, the witness may be observing a consensual act. It is unclear whether the witness must continue observing to determine whether a crime has occurred.

Even though the “reasonably believes” language is meant to clear up the ambiguity, the word “reasonable” indicates that it is an objective test. Whether one subjectively believes he is witnessing a crime is not at issue. A jury may infer that a reasonable person in a similar situation would have believed a crime was in progress, and find the person who failed to report guilty, even if the person subjectively believed that no crime was taking place.

A witness may be required to take into consideration the prospect of affirmative defenses. Suppose a witness observes a man shooting another man, but reasonably believes that the act was in self-defense.⁷⁶ Logic would dictate that no report is necessary because the witness does not believe a crime has occurred. However, it remains unclear what the statute intends with regard to such situations.

The prospect of reporting ‘attempts’ raises further questions. First year

70. See *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (Fourteenth Amendment creates a due process right applicable to the states.)

71. See *Kolender*, 461 U.S. at 354.

72. See *id.* at 357-58; *Parker v. Levy*, 417 U.S. 733, 752 (1974).

73. *United States v. Lanier*, 520 U.S. 259, 264 (1997).

74. See AB 37, Assembly (Cal. 1998).

75. See CAL. PENAL CODE § 667.5 (West 1998).

76. See LAFAYE & SCOTT JR., *supra* note 30, § 5.7. Acting in self-defense is a complete defense to crimes against the person, so that the person acting in self-defense is not guilty of any crime. See *id.*; *People v. Toledo*, 193 P.2d 953 (Cal. Ct. App. 1948) (self-defense need not be proven beyond a reasonable doubt).

law students have struggled heavily with issues of attempt. There is a fine line between mere preparation to commit a crime and an actual attempt.⁷⁷ A witness to an act that borders on that line would have a difficult time determining whether a report to police is in fact required.

Section 1(a)(3) raises some of the more serious questions. It requires a witness to report "any assault on a child that appears reasonably likely to cause serious bodily injury to the child."⁷⁸ A witness may determine that a red mark, a welt, or a bruise constitutes serious bodily injury. Certainly broken bones, internal injuries and death would qualify, but a witness may not know where to draw the line. A witness would not be on notice when a report is required in those situations.

Further, the statute does not define a child. A child may be any person under the age of eighteen, perhaps under the age of fourteen or even twelve. The statute is silent as to age. The statute is simply too ambiguous for a witness to know when they are committing a crime.

Section (b) specifies that the statute does not affect privileged relationships.⁷⁹ It does not state whether those privileges are evidentiary or common-law privileges. For instance, a married individual who witnesses her husband assault a child would not have a duty to report the crime under the evidentiary privilege.⁸⁰ However, at common law, the wife, as mother to the child, would be required to intervene on behalf of her child.⁸¹ Further, at common law, a father is privileged to discipline his child.⁸² A witness who observes an assault by a parent may not have a duty to report if the assault falls within the common law privilege. It is entirely unclear what type of privileged relationships the statute means to exclude.

Section (e) relieves a witness of the obligation to give notice when the person has a reasonable belief that she or a family member would be in danger of immediate physical harm.⁸³ This section seems to make the statute reasonable by addressing the concerns of bystanders who fear for their own safety. The problem is the "immediate" language. It is unclear when the fear of harm is no longer immediate. Certainly an individual who is very close to a violent attack may be in fear of immediate harm. However, witnesses are often farther away. Suppose a witness sees a drive-by shooting from her

77. See Linda P. Bell, R.N., Comment, *Criminally Attempting the Medically Improbable*, T. MARSHALL L. REV. 243, 251-52 (Spring, 1995). "Precisely what type of act is required (for an attempt) is not made very clear by . . . courts and legislatures . . . more than an act of mere preparation must occur." LAFAVE & SCOTT JR., *supra* note 30, § 6.2.

78. AB 37, Assembly (Cal. 1998).

79. See AB 37, Assembly (Cal. 1998).

80. See CAL EVID. CODE § 972 (a spouse is privileged from testifying against his/her spouse in criminal proceedings).

81. See RESTATEMENT (SECOND) OF TORTS § 315 (1993) (there is a special relationship between parent and child, thus a parent already has an affirmative duty to assist/rescue their child).

82. See *id.* § 147 (a parent is privileged to discipline his/her child).

83. See AB 37, Assembly (Cal. 1998).

kitchen window. Suppose that person also knows that the perpetrator has threatened to kill anyone who gives any information about his illegal activity to the police. In fact, the drive-by shooting was in retaliation for the victim's alleged 'squealing.' The witness is justified in fearing harm to herself or her family. It is entirely unclear whether the threat of violence is the type of harm that exempts one from the reporting requirements of the statute. It is not immediate, because the perpetrator is not close in proximity. The witness would not know whether he is committing a crime by failing to report. The ambiguity creates a fair notice problem.

The statute also fails under the second prong of the vagueness doctrine as there is a great potential for arbitrary and discriminatory enforcement.⁸⁴ Witnesses who fail to come forward initially may be reluctant to come forward later for fear of prosecution. While those who do come forward may be threatened with prosecution unless they agree to testify against the perpetrator of the crime. In states that already have a duty to report statute, there is evidence that the statute is enforced primarily in cases where the witness has some possible involvement in the crime.⁸⁵ The individual is prosecuted under the misdemeanor duty to report statute because there is a lack of sufficient evidence for a felony conviction, or the prosecutors feel a felony conviction would be too harsh.⁸⁶ This type of discriminatory enforcement is not merely a violation of due process, but raises Fifth Amendment concerns as well.⁸⁷

The proposed California legislation leaves open many questions whose answers witnesses must guess at in determining whether they must make a report to police. This lack of fair notice is in direct violation of procedural due process. The vagueness creates windows for arbitrary enforcement by allowing peace officers and courts to interpret each case according to their own beliefs and attitudes. The potential is for arbitrary enforcement of the statute to compel witnesses to testify at trials or punish witnesses the court finds morally repugnant.

B. The First Amendment

Vagueness becomes even more important in a First Amendment context.⁸⁸ The right to free speech is one that is very closely guarded by our

84. See *Kolender*, 461 U.S. at 357-58; *Parker*, 417 U.S. at 752.

85. See *Yeager*, *supra* note 47, at 32-33. The potential for this type of discriminatory enforcement is particularly great in light of the fact that the proposed legislation was created in response to the inaction of David Cash, an individual who may have been involved in the murder of Sherrice Iverson. See *Zamichow*, *supra* note 18 and text accompanying note 36.

86. See *Zamichow*, *supra* note 18 and text accompanying note 36.

87. The Fifth Amendment protects individuals from self-incrimination. See U.S. CONST. amend. V. Prosecuting an individual under a duty to report statute for failure to report a crime in which that person is involved is in clear violation of the right against self-incrimination. See *Yeager*, *supra* note 47, at 34.

88. See *Parker*, 417 U.S. at 752 ("where a state's literal scope. . . is capable of reaching expression sheltered by the First Amendment, the (vagueness) doctrine demands a greater de-

courts.⁸⁹ The potential for arbitrary enforcement is frightening when the law regulates protected speech. The prospect of speaking (or not speaking) at your peril is repugnant to the First Amendment.⁹⁰

The proposed legislation would compel those witnessing violent crimes to report it to police. The reporting requirement, essentially, compels speech.⁹¹ The law would make it a crime to remain silent. This ostensibly stands in direct contradiction to the witness' constitutional right to free speech. In order to justify such infringement, the state must demonstrate that a sufficient state interest justifies the infringement on constitutionally protected speech.⁹²

The state will likely assert its interest in protecting its citizens from violent crime, and its children from sexual assaults. The Supreme Court has already held the state has a compelling interest in protecting its citizens, particularly children.⁹³

The state must next demonstrate that the law is narrowly tailored to achieve this interest.⁹⁴ A narrowly tailored law must be necessary to achieve the compelling state interest.⁹⁵ To be necessary, there must not be other available methods of achieving the same governmental interest, which are less intrusive on the constitution.⁹⁶

California already has several laws that are designed to protect children from violent and sexual assaults. Specifically, California has a statute making it a crime to sexually assault a child,⁹⁷ and it imposes stiffer penalties on the perpetrators of crimes against children.⁹⁸ The state has the ability to go after witnesses who aid in an assault or conceal it later by prosecuting them as accessories.⁹⁹ None of these laws involve compelled speech or constitutional violations.

gree of specificity than in other contexts"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991), (prohibition against vague regulations on free speech is based on the risk of discriminatory enforcement).

89. *See id.*

90. *See Kolender v. Lawson*, 461 U.S. 352, 353 (1983).

91. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 573 (1995) (the right to free speech includes the right to refrain from speaking, thus, the government cannot compel speech without violating the First Amendment).

92. Free speech violations are subject to strict scrutiny by the court. *See Wooley*, 430 U.S. at 716-17.

93. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

94. *See Wooley*, 430 U.S. at 716-17.

95. *See Wooley*, 430 U.S. at 716 ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved").

96. *See Wooley*, 430 U.S. at 716-17 ("the breadth of legislative abridgment must be viewed in light of less drastic means of achieving the same basic purpose").

97. *See CAL PENAL CODE* § 288 (West 1999).

98. *See id.*

99. *See id.* § 32.

While the state does have in place some laws requiring affirmative duties to report, they are readily distinguishable. California's Hit and Run statute requires individuals involved in auto accidents to remain on the scene and report the accident.¹⁰⁰ The purpose of the statute is to prevent drivers involved in auto accidents from leaving the scene without identifying themselves or rendering aid to injured persons.¹⁰¹ This statute is distinguishable because the individuals who are compelled to report are directly involved in the accident. A mere observer to an accident is not required to make a report, just as an observer to a crime has never been required to report it.

In addition, the state can encourage voluntary reporting of crimes, without making it a crime if you don't report one. Local police departments already work closely with many communities to form neighborhood watch programs and encourage voluntary reporting.¹⁰² Further, positive incentives such as monetary rewards and public recognition could be implemented to encourage voluntary reporting. Public awareness campaigns have already been instituted to educate the public on the importance of community involvement in law enforcement¹⁰³ and the appropriate numbers to call during an emergency.¹⁰⁴ These positive methods that encourage reporting may be far more effective than criminal penalties for failing to report.

In fact, the failure to report statute is likely to be ineffective in meeting its stated goals. Nevada prosecutors oppose duty to report statutes. They feel that individuals who fail to report will be unwilling to come forward as witnesses at a later date for fear of prosecution under the statute.¹⁰⁵

Further, in order for the citizens to be protected from these types of assaults by the reporting requirement, police would have to respond to the emergency in time to stop the assault from proceeding any further. Police response time in emergency situations varies widely from area to area. Major metropolitan areas may require upwards of nine minutes for police to arrive on the scene.¹⁰⁶ While nine minutes may seem relatively fast, absent some

100. See CAL VEH. CODE § 20001 (West 1999).

101. See *People v. Kuhn*, 292 P.2d 964 (Cal. Ct. App. 1956).

102. See *Neighborhood Watch Program*, (visited Mar. 21, 1998) <<http://www.maxnet.com/community/dpd/ladner/neighbor.html>> (describing one local neighborhood watch program in which neighbors are encouraged to call police if they notice anything out of the ordinary).

103. As a result of the McGruff® public service campaign, almost half of those seeing the campaign reported feeling more personally responsible for preventing crime. See *McGruff® Background Information* (visited Mar. 12, 1999) <<http://www.mcgruff-safe-kids.com/cspopup.html>>.

104. The Chicago Police Department instituted a "Make the Right Call" ad campaign to encourage community policing. See *Report Crime...But Make the Right Call* (visited Feb. 23, 1999) <<http://www.ci.chi.il.us/CommunityPolicing/FoghtCrime/Report Crime.html>>.

105. See Zamichow, *supra* note 18.

106. See Paul H.B. Shin, *Cop Response Time Lags / Longer Than City Average*, N.Y. DAILY NEWS, Apr. 12, 1998, at 1 (police response times average 9.5 minutes city-wide); Jon Yates, *Study Finds Faster Police Responses*, THE TENNESSEAN, Mar. 18, 1998, at 1B (Nashville police average 9.03 to 8.67 minutes for life threatening calls).

degree of torture, most violent felonies are completed long before the elapse of nine minutes. In some cases, the police may take far longer to respond to a call.¹⁰⁷

The response time may be exacerbated in the case of domestic violence.¹⁰⁸ Many children who are victims of assault are victimized in their own homes. Historically, police have been resistant to involvement in domestic issues and “frequently ignored domestic violence calls or delayed responding for several hours.”¹⁰⁹

Furthermore, police intervention does not always diffuse a violent situation. In some cases, police intervention may actually escalate the violence.¹¹⁰ With little evidence that a reporting statute would actually help victims, the state cannot justify infringing on the free speech rights of witnesses.

Another governmental interest is in capturing and punishing the criminals who engage in violent felonies. By compelling witnesses to report crimes as soon as reasonably possible, authorities will be able to investigate leads while they are still “hot.” This would conceivably lead to more arrests and convictions of violent felons. While the state does have an interest in punishing the perpetrators of violence, it remains questionable whether that interest is sufficiently strong enough to compel speech. Investigation of criminal activity has always been balanced against the constitutional rights of the public. For example, a police officer may not violate an individual’s Fourth Amendment rights by searching without probable cause in order to arrest that individual.¹¹¹

Here, the state seeks to violate an individual’s First Amendment rights, although the person is completely innocent of any crime. If one were guilty or even merely suspected of a committing a crime, that person could not be compelled to speak. Compelled speech would violate a suspect’s Fifth Amendment rights.¹¹² A criminal suspect has the right to remain silent, to avoid self-incrimination. However, an innocent bystander must speak or face criminal penalties. The fact that a person witnesses a violent act by chance, should not be the basis for violating protected rights. Further, if an individual does report, but fails to do so “as soon as reasonably possible” the reporting

107. See Fran Spielman, *Alderman wants hearing on 911 response times*, CHICAGO SUN TIMES, Apr. 29, 1998, at 20 (police in Chicago took 45 minutes to respond to a call about a young man beaten outside a woman’s front door); Marybeth McFarland, *Police Response Time Appalls Woman: W. Rockhill Supervisor Defends Pennridge Force’s Overall Job Performance*, ALLENTOWN MORNING CALL, Jan. 28, 1998, at B4 (police took 20 minutes to respond to a man’s call that someone had broken into his home).

108. See generally Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (Spring, 1992).

109. *Id.* at 48.

110. See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (Spring, 1992) (while arrest was helpful in some domestic violent cases, others were less successful, with the violence escalating in retaliation for the arrest).

111. See U.S. CONST. amend. IV.

112. See U.S. CONST. amend. V.

itself would subject the individual to prosecution, and may violate that person's right against self-incrimination.

When one is an innocent bystander to a violent assault, he may choose to call the police and report it. Compelling a report is a direct contradiction to the freedom of speech guaranteed by the First Amendment. While the state does have an interest in protecting victims of crimes and capturing the perpetrators of violent crimes, there are alternative means available for achieving those goals that are far less intrusive on free speech rights. The proposed California legislation would fail this constitutional test because it is not narrowly tailored to effectuate its purpose.

C. Privileges or Immunities

The failure to report a crime is an omission. The act itself does not specifically harm anyone. The doctrine of nonfeasance has traditionally granted immunity from liability to bystanders.¹¹³ Throughout our history citizens have been immune from prosecution for omissions.¹¹⁴ In the absence of some legal duty to act, inaction has never been considered a punishable crime. The privileges and immunities clause of the Fourteenth Amendment forbids States from passing laws, which infringe on the privileges or immunities of its citizens.¹¹⁵

However, this clause was essentially nullified in the Slaughter House Cases and has yet to be resurrected by the Supreme Court.¹¹⁶ Instead, the Court has classified fundamental rights and protections under the Due Process Clause as "liberty interests."¹¹⁷ Thus, nonfeasance should be classified as a liberty interest under a substantive due process analysis.

D. Substantive Due Process

The due process clause protects those fundamental rights that are deeply rooted in the Nation's history and traditions.¹¹⁸ The state is forbidden from infringing on a fundamental right unless the infringement is narrowly tai-

113. See RESTATEMENT (SECOND) OF TORTS § 315 (1993).

114. See Silver, *supra* note 39, at 425. "Preoccupation with affirmative acts and the desire to limit judicial intervention evolved into the principle of not imposing liability for omissions." *Id.*

115. See U.S. CONST. amend. XIV, § 1.

116. See The Slaughter House Cases, 83 U.S. 36 (1873) (holding privileges or immunities clause does not grant U.S. citizens broad protection against the actions of state governments) (no modern court has resurrected its powers).

117. The Court has recognized liberty interests in several fundamental rights under the Due Process Clause of the Fourteenth Amendment. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to personal choice in matters of marriage and child bearing); *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967) (fundamental right to marry); *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose an abortion in first trimester); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (right to refuse medical treatment).

118. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

lored to serve a compelling state interest.¹¹⁹ The right to free speech is a fundamental right, rooted not only in our history and traditions, but also enumerated in the First Amendment of the Constitution.¹²⁰

The due process clause also protects fundamental rights that are not specifically enumerated in the constitution but are so rooted in our history and traditions that they are protected.¹²¹ Duty to report statutes may also infringe on our historically based fundamental right to privacy and personal autonomy.

The Court has recognized fundamental rights with respect to procreation, marital privacy, abortion and the right to die by natural causes.¹²² The general principle inherent in all of these decisions is an individual's right to privacy and personal autonomy. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."¹²³

In *Cruzan v. Director, Missouri Dept. of Health*, the Court recognized a liberty interest in an omission, the refusal of life sustaining medical treatment.¹²⁴ The Court noted that this right was rooted in traditional common law, which made it a battery to perform medical treatment without consent.¹²⁵

Similarly, the right to refuse to act, when witnessing a crime, derives from the common law doctrine of nonfeasance. One has never been obligated to come to the aid of a stranger whom they did not put in danger.¹²⁶ There is a liberty interest in the freedom to make choices that do not cause harm to others.

Personal autonomy and privacy include the right of an individual to go about his business, so long as his actions do not create harm to others. Failure to report a crime is merely an omission. It is the private choice of an individual to go about his own business, without interfering in the lives of others.

The liberty interest is strengthened by the fact that the compelled action involves free speech. Where a state statute invades the personal sphere of thoughts and beliefs of individuals in order to advance an ideological point of view, it goes too far.¹²⁷ Here, the state is seeking to advance the ideological view that all citizens should be morally obligated to intervene on the be-

119. See *Glucksberg*, 521 U.S. at 721.

120. See U.S. CONST. amend. I.

121. See *Glucksberg*, 521 U.S. at 721.

122. See *Griswold*, 381 U.S. at 479 (right to personal choice in matters of marriage and child bearing); see also *Loving*, 388 U.S. at 1 (fundamental right to marry); *Roe*, 410 U.S. at 113 (right to choose an abortion in first trimester); *Cruzan*, 497 U.S. at 261 (right to refuse medical treatment).

123. *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 847 (1992).

124. 497 U.S. at 278.

125. See *id.* at 276-78.

126. See RESTATEMENT (SECOND) OF TORTS § 315 (1993).

127. See *Wooley v. Maynard* 430 U.S. 705, 715 (1977); *Board of Education v. Barnette*, 319 U.S. 624 (1943).

half of others when they witness a violent crime or an assault on a child. The legislation would compel individuals who choose not to involve themselves in the affairs of others to ignore their personal beliefs and contact authorities. Compelled speech goes to the heart of personal liberty and autonomy. Thus, there is a liberty interest in an individual's thoughts, words and actions.

This right is particularly strong in cases where, as in the Sherrice Iverson case, the victim is a complete stranger. While the law has always made exceptions to the doctrine of nonfeasance with respect to special relationships, the general rule is that one has no duty to come to the aid of anyone with whom there is no special relationship. This doctrine distinguishes a general duty to report from existing duties imposed on mental health professionals, doctors and education professionals, whose jobs entail specific responsibility for the health and well-being of children, and whose duty is limited to observations made in a professional capacity.¹²⁸

Once the Court determines that a fundamental right is being regulated, the state must demonstrate both a compelling state interest, and that the statute is narrowly tailored to achieve that goal.¹²⁹ Here, the state's interests are in protecting victims and capturing perpetrators of violent crimes. As noted above, these are valid interests. However, there are many laws and public programs already in place to help achieve these interests that do not infringe on fundamental rights.¹³⁰ In addition, the slow response time of police and the possibility of increased violence when police intervene may significantly reduce the validity of this interest.¹³¹ The statute also excludes those in privileged relationships from having to report an assault on a child. Given most assaults on children occur within the family, many of the likely witnesses will be involved in a privileged relationship.

Thus, the California legislation fails on due process grounds. There is a fundamental liberty interest in the right to go about one's business, so long as an individual does not imperil others. The California statute infringes on both the liberty interest of privacy and the fundamental right to freedom of speech. It is not narrowly tailored to achieve the state's interest, and is likely to be ineffective in achieving those goals. Thus, the proposed legislation fails on substantive due process grounds.

E. Equal Protection Clause

The Equal Protection Clause affords protection so everyone will be

128. See CAL. PENAL CODE § 11166.5 (West 1998).

129. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

130. There are already criminal sanctions for behavior that rises to the level of an accessory and stiffer penalties for perpetrators of crimes against children. See *supra* notes 97-99. In addition there are many programs designed to encourage voluntary reporting including public service campaigns and neighborhood watch programs. See *supra* notes 102-04.

131. See *supra* notes 106-110.

treated equally under the law.¹³² The Supreme Court has stated that “all similarly situated individuals . . . be treated alike.”¹³³ A state must justify any law that is not uniformly applied. Where a fundamental right is at issue, a statute violating the Equal Protection Clause must demonstrate that it is narrowly tailored to achieve a compelling state interest.¹³⁴

The proposed California legislation violates the Equal Protection Clause because it treats individuals in privileged relationships differently from those not in privileged relationships. The legislation specifically excludes those in privileged relationships from having to report an assault.¹³⁵ Those who are not in privileged relationships would have to fulfill the requirements of the statute. Thus, a woman who is married may watch her husband assault a child and fail to report it without fear of criminal prosecution. Conversely, a similarly situated woman who lives with her boyfriend, without a formal marriage, must report the assault of a child by her boyfriend. This is violative of Equal Protection, because as noted above, the state is infringing upon a fundamental right.¹³⁶ Married people will not be prosecuted under the law if they fail to report the crimes of their spouse. Meanwhile, unmarried individuals will face criminal penalties for the exact same behavior.

As noted above, the duty to report legislation regulates a fundamental right. One has the right to decide whether or not to intervene in the affairs of others, as well as the right to freedom of speech, which includes the right not to be compelled to speak. As such, the state must demonstrate that the legislation is narrowly tailored to achieve a compelling state interest. The legislation is not narrowly tailored. There are other laws and programs already in place, which help achieve the state’s interests.¹³⁷ Further, the legislation would likely do little to effectively meet its goals.¹³⁸ The legislation may even prevent witnesses from coming forward at a later date.¹³⁹

The proposed duty to report law violates Equal Protection, as it does not treat similarly situated individuals equally. The state has valid interests in protecting its citizens, particularly children, from violent and sexual assaults, and in capturing the perpetrators of violent crimes. The proposed statute is not narrowly tailored to meet these objectives. Other, less intrusive means of

132. See U.S. CONST. amend. 14, § 1.

133. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

134. See *id.* at 440.

135. See AB 37, Assembly (1998).

136. Where a fundamental right is at issue, the equal protection violation is subject to strict scrutiny. See *Cleburne*, 473 U.S. at 440. However, if no fundamental right is at issue, the law is subject to the rational basis test. See *id.* The equal protection problem would probably be constitutional in the absence of a fundamental right, as the distinction between privileged and unprivileged relationships has been upheld in evidentiary issues. See generally *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976).

137. See *supra* text accompanying note 130.

138. See *supra* notes 106-110.

139. See *Zamichow*, *supra* note 18, at A1 (Nevada prosecutors fear that a duty to report statute may prevent witnesses from coming forward later, for fear of prosecution).

accomplishing the goals are already available and the legislation itself is likely to be ineffective. The California statute violates the Equal Protection Clause of the Constitution as it discriminates between privileged and unprivileged relationships and is not narrowly tailored to achieve its stated goals.

IV. APPLICATION OF CALIFORNIA'S PROPOSED STATUTE TO CASH

California's proposed statute was drafted specifically to address the Sherrice Iverson Murder and subsequent public outrage that David Cash was not charged with any crime.¹⁴⁰ Assuming that California's statute was in effect at the time of the murder, and that California had jurisdiction to prosecute Cash, it is unlikely that the public would have been satisfied with the result.

In order for the duty to be applied, the proposed legislation requires that an individual reasonably believes he has witnessed a violent felony, sexual assault on a child, or any assault on a child likely to result in serious bodily injury.¹⁴¹ Cash maintains he did not witness the child being sexually assaulted and he did not feel she was in danger.¹⁴² He left because he did not want to know what was going to happen, but he did not believe his friend would hurt the child.¹⁴³

The state must establish that Cash believed that he was witnessing one of the listed crimes. Although friends of Cash have come forward to say that Cash admitted to watching Strohmeyer assault the girl,¹⁴⁴ Cash continues to maintain that he did not know a crime was going to occur.¹⁴⁵ He left the restroom within two minutes of entering it,¹⁴⁶ evidence which may bolster his case.

There is still a question of what Cash actually saw during that two-minute time span. If he did not actually witness any crime, surely he suspected his friend was acting inappropriately for the twenty minutes he remained in the restroom. The proposed statute does not seem to address suspected criminal activity that is not actually witnessed. Cash may have avoided the proposed legislation altogether by leaving the restroom before the assault actually took place, even if he suspected that an attack would occur.

Even if convicted, the penalty hardly seems to be what an outraged citizenry had in mind when it sought to create a law to address Cash's behavior.

140. See William Brand, *Assemblyman Introduces Good Samaritan Bill: Inspired by Murder of Girl in Stateline Casino*, OAKLAND TRIBUNE, Dec. 9, 1998, at NEWS-1.

141. See AB 37, Assembly (1998).

142. See Dolan, *supra* note 28, at A1.

143. See *id.*

144. See Zamichow, *supra* note 18, at A1.

145. See *Sixty Minutes*, *supra* note 7.

146. See *id.*

The crime is a misdemeanor. The maximum penalty is a thousand-dollar fine and/or six months in jail.¹⁴⁷ Sherrice Iverson's mother has been very vocal and supportive of a duty to report statute.¹⁴⁸ Primarily, her intent was to see people like Cash punished.¹⁴⁹ She considers Cash to be equally responsible for the death of her daughter.¹⁵⁰ It is doubtful that a thousand-dollar fine is what she had in mind when she said that Cash should be punished.

Finally, if a duty to report statute were in place, it is unlikely that it would have had any effect on Cash's actions. A person who lacks the moral fortitude to come to the aid of a helpless little girl when it would be easy for him to do so, is hardly the type of person who would be concerned about the legal consequences of his failure to do anything. The actual consequences of Cash's inaction were the sexual assault and murder of a little girl. He does not appear to be remorseful about the girl's murder.¹⁵¹ If the death of a little girl was not enough to spur Cash into action, a small fine would be little incentive for him to act.

CONCLUSION

There is no question that David Cash's failure to intervene on behalf of a little girl was reprehensible. In fact, there is evidence that he may have been an accessory,¹⁵² but that prosecutors did not charge him with a crime to secure his testimony against Strohmeyer.¹⁵³ Perhaps society's anger should be channeled toward the prosecution for failing to build a case against Cash under existing laws. In any case, the rush to legislate a moral "duty to report" seems to create more problems than it solves.

As a society, we have always been willing to permit some infringements on our rights in exchange for the personal security given to us by law enforcement. But it is foolish to let our outrage over the acts of one young man chip away at our cherished constitutional rights. Until the State is able to

147. AB 37 does not prescribe a specific punishment, but merely states the crime is a misdemeanor. Where no specific punishment is prescribed, every misdemeanor is punishable by a maximum of six months in jail and/or a \$1,000.00 fine. See CAL PENAL CODE § 19 (West 1998).

148. See generally Metro Desk, *News in Brief: A Summary of Developments Across Los Angeles County Official Business / Courts and Government Council Backs Stronger Good Samaritan Law*, L.A. TIMES, Sept. 16, 1998, at B4 (Iverson's mother thanks lawmakers for their efforts).

149. See *Sixty Minutes*, *supra* note 7 (Iverson's mother states that "Cash needs to be locked up").

150. See *id.* (Iverson's mother states that Cash is a "murderer within" and "should be charged with accessory to the murder").

151. Cash's lack of remorse has helped to fuel the public outrage. See *Sixty Minutes*, *supra* note 7.

152. See Zamichow, *supra* note 18, at A1 (there is evidence that Cash may have encouraged the assault and told other students to keep quiet about the surveillance video); Ashby, *supra* note 35, at 1.

153. See Ashby, *supra* note 37, at 1.

draft legislation that is fair, narrowly tailored and likely to actually address the problem, we should not be willing to accept the prosecution of affirmative duties for which we have traditionally been immune.

Prosecutions under the statute will do little to motivate those who are inclined to walk away from their moral responsibilities. Further, those who may be willing to report crimes can be effectively encouraged to do so through positive community policing programs. The moral outrage over the acts of one reprehensible human being should not be used as the catalyst for chipping away at the rights of everyone else. Most people in Cash's situation would have come to the aid of Sherrice Iverson. No law would have been necessary to force them to do so.

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