

## Notes & Comments

### THE CYBER-SAMARITANS: EXPLORING CRIMINAL LIABILITY FOR THE “INNOCENT” BYSTANDERS OF CYBERBULLYING

*Heather Benzmilller*

**ABSTRACT**—In recent years, the media have consistently documented the stories of teens who committed suicide or otherwise suffered severe physical and psychological harm following periods of vitriolic cyberbullying. While legislators and scholars have proposed several solutions to combat cyberbullying, none have drawn on the work of social psychologists to address the role that witnesses play in escalating bullying. This Note proposes that the witnesses of cyberbullying be held liable under a “Bad Samaritan” law for failing to report the most severe forms of bullying where the witness reasonably believes the victim will suffer physical harm. Drawing on the justifications for classic Samaritan laws in both civil and common law jurisdictions, the Note suggests that a well-publicized duty to report cyberbullying would undermine teens’ general reluctance to report such abuse and provide the means for adults to intervene to assist victims. Cyberbullying harms countless children, both physically and emotionally; a complete response to the problem must hold responsible not only the bully, but also the bystanders who, through their silence, contribute to the bully’s power and the victim’s isolation.

**AUTHOR**—J.D., Northwestern University School of Law, 2013; B.A., Vanderbilt University, 2009. I wish to express my sincere gratitude to Professors Janice Nadler and Susan Provenzano of Northwestern University School of Law, who provided thoughtful comments and insights during the many iterations of this Note. Thanks also to the editorial staff of the *Northwestern University Law Review* for their effort and patience during production. Finally, I am grateful to my family for their unwavering support.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION ..... 928

I. BULLYING IN THE TWENTY-FIRST CENTURY ..... 930

    A. *Classic Bullying and Its Consequences* ..... 930

    B. *Cyberbullying: Classic Bullying Intensified* ..... 933

    C. *The Code of Silence* ..... 937

    D. *The Legal Status of Bullying* ..... 939

II. BAD SAMARITAN LAWS AND BYSTANDER LIABILITY ..... 943

    A. *The History of Samaritan Laws* ..... 944

    B. *Modern American Trends in Bystander Liability* ..... 946

III. THE CYBER-SAMARITAN’S DUTY ..... 952

    A. *The Duty to Report* ..... 952

    B. *Penalties and Enforcement* ..... 956

IV. THE NEW AGE OF CYBER-SAMARITANS ..... 960

    A. *Breaking the Code of Silence* ..... 960

    B. *Reporting in Practice* ..... 961

CONCLUSION ..... 962

INTRODUCTION

Danny Alexander,<sup>1</sup> a fifteen-year-old student at a private school in Los Angeles, created and maintained a website to promote his budding acting and singing career.<sup>2</sup> A fellow student used the site’s comment function to post the following message:

I want to rip out your fucking heart and feed it to you. . . . I’ve . . . wanted to kill you. If I ever see you I’m . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell.<sup>3</sup>

At least five other students posted similar threatening and derogatory messages on his website, including “Faggot, I’m going to kill you” and “[You need] a quick and painless death.”<sup>4</sup> The death threats and abuse only

---

<sup>1</sup> “Danny Alexander” is the pseudonym used by D.C. in his entertainment career. D.C. claimed defamation and intentional infliction of emotional distress in a civil suit against his cyberbullies. *See* D.C. v. R.R., 106 Cal. Rptr. 3d 399, 405, 407 (Ct. App. 2010).

<sup>2</sup> *Id.* at 405.

<sup>3</sup> *Id.* (alterations in original).

<sup>4</sup> *Id.* at 406 (alterations in original).

came to the attention of authorities when Alexander's father read the comments and contacted the school and law enforcement.<sup>5</sup>

In Benson, North Carolina, Justin Ray Jackson and Joshua Aaron Temple created a Facebook page specifically to threaten a fifteen-year-old classmate.<sup>6</sup> Jackson threatened to run over the student with his pickup truck, while Temple wrote "that he was bringing a gun to school to hunt [the student]."<sup>7</sup> Investigators only found the Facebook page after the victim's father reported the bullying.<sup>8</sup>

For these two teens and countless others across the nation, the Internet is a threatening place where tormenters attack with impunity and friends stand by in silence. Both of these students were fortunate to have parents discover the threats and report them to the proper authorities, but how much sooner might the bullying have ended if witnesses—often the classmates and friends of these victims—had reported the threats and abuse?

The bully has been a figure in adolescent life for centuries, but recent research has drawn attention to a previously ignored participant in the bullying relationship: the witness-bystander. Scholars now recognize that bullying is not a dyadic, or two-person, relationship between the bully and the victim, but rather a communal problem in which the witnesses and bystanders to bullying behavior play a role in escalating the abuse. Even while researchers redevelop how they understand bullying relationships, the nature of bullying has changed as it moves from the playground to cyberspace.

Although cyberbullying is a relatively new phenomenon, the legal community has rushed to address the problem.<sup>9</sup> After tragic stories of teen suicide following online taunts, threats, and abuse, communities demanded a response. Legislators and policymakers heeded the call by passing civil and criminal sanctions aimed at a variety of bullying behaviors and

---

<sup>5</sup> See *id.* Alexander brought a lawsuit against the students who posted the comments to his Facebook page, alleging claims under California's hate crime statute and common law claims for intentional infliction of emotional distress and defamation. See *id.* at 405. The court denied the students' "strategic lawsuit against public participation" (SLAPP) defense that the comments were in connection with a matter of public interest because the students did not demonstrate that the messages they posted were public speech. See *id.*

<sup>6</sup> See Colin Campbell, *Benson Teens Charged with Cyberbullying*, NEWSOBSERVER.COM (Feb. 3, 2011), <http://www.newsobserver.com/2011/02/03/964768/benson-teens-charged-with-cyberbullying.html>.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* The case was settled out of court and all charges against Temple and Jackson were dropped. Kelly Poe, *North Carolina to Outlaw Student Cyberbullying of Teachers*, NEWSOBSERVER.COM (Oct. 23, 2012), <http://www.newsobserver.com/2012/10/23/2430928/north-carolina-to-outlaw-student.html>.

<sup>9</sup> For a survey of legislative and judicial methods of combating cyberbullying, see Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 852–65 (2010).

imposing liability on bullies and educators alike. Although critiquing the various solutions that have been proposed is beyond the scope of this Note, each has failed to specifically consider the role witnesses and bystanders play in the bullying relationship. Indeed, leveraging the role of the bystander as part of the solution to cyberbullying has been almost entirely ignored by legal theorists.<sup>10</sup>

This Note addresses this gap in the literature and proposes that bystanders be held liable under “Bad Samaritan” laws when they fail to report serious cyberbullying that threatens another person’s life or well-being. Part I introduces research regarding the structure of bullying relationships, explores the online reincarnation of traditional bullying as cyberbullying, and examines the reluctance of young people to report bullying to adults. In addition, Part I describes the current legal status of cyberbullying and addresses the challenges brought against legislation that criminalizes it. Part II discusses the development of Samaritan laws in both European civil law jurisdictions and Anglo-American common law jurisdictions, and explores the reasons underpinning their adoption or rejection. Part III proposes a model criminal statute creating a duty to report cyberbullying that constitutes a threat of violence or is likely to result in physical harm. Finally, Part IV analyzes how the proposed Cyber-Samaritan’s Duty would operate in practice and suggests that a duty to report will attack the social and psychological underpinnings of teens’ reluctance to seek the help of adults when they encounter cyberbullying.

## I. BULLYING IN THE TWENTY-FIRST CENTURY

### A. *Classic Bullying and Its Consequences*

Bullying is a complex relational behavior that takes many forms. Leading bullying scholar Dan Olweus<sup>11</sup> defines bullying using three components: (1) aggressive behavior with negative actions, (2) a pattern of behavior over time, and (3) an imbalance of power or strength.<sup>12</sup> Bullying is a product of culture, learned from observing interactions between both adults and peers.<sup>13</sup> The media contributes to the culture of bullying by immersing youth in violence and vulgar language and desensitizing them to

---

<sup>10</sup> For a brief discussion of the role of bystanders in the search for a solution to bullying, see Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 62–63 (2005).

<sup>11</sup> Dan Olweus is generally regarded as a leading authority on bullying research, pioneering the field with scientific studies of bullying problems among school children and developing the Olweus Bullying Prevention Program aimed at restructuring the school environment to alter the costs and rewards of bullying behavior. See *Olweus Bullying Prevention Program: Brief Information About Dan Olweus*, CLEMSON UNIV. (Sept. 2003), <http://www.clemson.edu/olweus/history.htm>.

<sup>12</sup> *Recognizing Bullying*, VIOLENCE PREVENTION WORKS!, [http://www.violencepreventionworks.org/public/recognizing\\_bullying.page](http://www.violencepreventionworks.org/public/recognizing_bullying.page) (last visited Feb. 21, 2013).

<sup>13</sup> See Janis Entenman et al., *Victims, Bullies, and Bystanders in K-3 Literature*, 59 READING TCHR. 352, 354 (2006).

these words and images.<sup>14</sup> Bullying can involve either direct, open attacks on a victim—such as kicking, taunting, and threatening—or indirect manipulation of the victim’s social status.<sup>15</sup> In this indirect form of bullying, the bully changes the way that the victim’s peers perceive him using social attacks, which ostracize the victim by spreading negative or unflattering information and persuade others to alienate the victim.<sup>16</sup>

A complex group dynamic underlies all forms of bullying; bullies, victims, and bystanders all play a role. The growing recognition of the effect of group dynamics on bullying undermines the traditional dyadic conception of bullying<sup>17</sup> in which victims are characterized as weak for failing to defend themselves.<sup>18</sup> Instead, researchers have developed an understanding of bullying as a complex social interaction shaped by adult and peer awareness and behavior.<sup>19</sup> Indeed, a number of studies indicate that most bullying incidents are witnessed by bystanders.<sup>20</sup> Whether the bystanders are merely passive observers, who encourage bullying by providing attention, or active participants, who join in the harassment,<sup>21</sup> they become part of the bullying dynamic.<sup>22</sup> The presence—or more accurately, the absence—of adults also heightens the risk of bullying behavior, as bullying is more likely to flourish in unsupervised areas.<sup>23</sup>

Peer bystanders are important to the bullying dynamic because bullying is essentially a public display from which bullies derive power.<sup>24</sup> This relationship suggests that bullying is not a conflict between peers involving mutual disagreement, as it is commonly understood.<sup>25</sup> Rather,

---

<sup>14</sup> See SAMUEL C. MCQUADE, III ET AL., *CYBER BULLYING: PROTECTING KIDS AND ADULTS FROM ONLINE BULLIES* 45–46 (2009).

<sup>15</sup> See, e.g., Rona S. Atlas & Debra J. Pepler, *Observations of Bullying in the Classroom*, 92 J. EDUC. RES. 86, 87 (1998).

<sup>16</sup> See *id.*

<sup>17</sup> See, e.g., René Veenstra et al., *The Dyadic Nature of Bullying and Victimization: Testing a Dual-Perspective Theory*, 78 CHILD DEV. 1843 (2007) (analyzing the bully–victim relationship from a dyadic perspective).

<sup>18</sup> See Entenman et al., *supra* note 13.

<sup>19</sup> See Karin S. Frey et al., *Reducing Playground Bullying and Supporting Beliefs: An Experimental Trial of the Steps to Respect Program*, 41 DEVELOPMENTAL PSYCHOL. 479, 479 (2005); see also Gianluca Gini et al., *Determinants of Adolescents’ Active Defending and Passive Bystanding Behavior in Bullying*, 31 J. ADOLESCENCE 93, 94 (2008) (noting the recent scholarly focus on bullying as a group process where the majority of students are witnesses to bullying rather than uninvolved).

<sup>20</sup> See, e.g., Atlas & Pepler, *supra* note 15 (peers present in 85% of bullying episodes and actively involved in two-thirds of the interactions); Frey et al., *supra* note 19 (bystanders present for over 80% of bullying episodes); see also Jodie Lodge & Erica Frydenberg, *The Role of Peer Bystanders in School Bullying: Positive Steps Toward Promoting Peaceful Schools*, 44 THEORY INTO PRACT. 329, 330 (2005) (canvassing research finding peer bystanders involved in as many as 85% of bullying instances).

<sup>21</sup> Lodge & Frydenberg, *supra* note 20.

<sup>22</sup> Entenman et al., *supra* note 13, at 355.

<sup>23</sup> See Atlas & Pepler, *supra* note 15, at 88; Frey et al., *supra* note 19.

<sup>24</sup> Entenman et al., *supra* note 13, at 355.

<sup>25</sup> See MCQUADE ET AL., *supra* note 14, at 35.

bullying involves one-way aggression in which the bully dominates the victim.<sup>26</sup> Indeed, bullies often carefully select the targets and the setting of a bullying episode to maximize the demonstration of power to peers.<sup>27</sup> The bully's need for power and dominance in the peer social structure motivates the bully to select a weaker peer to victimize.<sup>28</sup> Bystanders, by their mere presence and attention, provide at least tacit support so that the bully does not act entirely alone.<sup>29</sup> And bullies are more sensitive to this subtle reinforcement from complicit bystanders than to any support provided to the victim because defenders can provide comfort privately without directly confronting the bully.<sup>30</sup>

The ubiquity of destructive bullying behavior carries physical, emotional, and educational consequences for bullies, victims, and witnesses alike. Adolescent victims of bullying are at greater risk for depression and anxiety, loneliness and suicidal ideations, and physical changes in sleep and eating habits.<sup>31</sup> Targets of bullying also experience poor peer relations<sup>32</sup> and withdraw from educational pursuits, missing more school, participating less, and suffering decreased academic achievement.<sup>33</sup> Bullies experience negative social and health outcomes as well. They are at a higher risk of abusing alcohol and drugs,<sup>34</sup> becoming involved in criminal activity, and forming abusive relationships.<sup>35</sup> Similar patterns emerge with witnesses to bullying, who are more likely to use alcohol and drugs, experience mental health problems, such as depression and anxiety, and have lower educational achievement.<sup>36</sup> These potentially serious consequences for all children and adolescents involved in bullying indicate that a more robust effort must be made to address the problem.

---

<sup>26</sup> See *id.*

<sup>27</sup> Christina Salmivalli et al., *Bystanders Matter: Associations Between Reinforcing, Defending, and the Frequency of Bullying Behavior in Classrooms*, 40 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 668, 669 (2011).

<sup>28</sup> See *Recognizing Bullying*, *supra* note 12.

<sup>29</sup> See Barbara Coloroso, *A Bully's Bystanders Are Never Innocent*, EDUC. DIG., Apr. 2005, at 49, 50.

<sup>30</sup> See Salmivalli et al., *supra* note 27, at 674.

<sup>31</sup> See ROBIN M. KOWALSKI ET AL., CYBER BULLYING: BULLYING IN THE DIGITAL AGE 26 (2008); *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/topics/effects/index.html> (last visited Feb. 21, 2013).

<sup>32</sup> See Michele L. Ybarra & Kimberly J. Mitchell, *Youth Engaging in Online Harassment: Associations with Caregiver-Child Relationships, Internet Use, and Personal Characteristics*, 27 J. ADOLESCENCE 319, 321 (2004).

<sup>33</sup> See *Effects of Bullying*, *supra* note 31.

<sup>34</sup> See Ybarra & Mitchell, *supra* note 32.

<sup>35</sup> See *Effects of Bullying*, *supra* note 31.

<sup>36</sup> See *id.*

### B. Cyberbullying: Classic Bullying Intensified

While cyberbullying carries many of the same consequences for young people as traditional face-to-face bullying, the Internet medium magnifies the harm. Most adolescents equate the term “cyberbullying” with “bullying via the Internet.”<sup>37</sup> Researchers echo this idea, defining cyberbullying as “willful and repeated harm inflicted through the medium of electronic text,” in which hurtful content is disseminated to the victim, a third party, or a public forum.<sup>38</sup> Relational bullying and ostracism are particularly problematic in cyberspace.<sup>39</sup> The defining characteristics of cyberbullying overlap with the criteria of traditional bullying: the perpetrator intends to hurt the victim, the victim perceives the interaction as hurtful, the harmful interactions are repetitive, and there is a power imbalance.<sup>40</sup> Both are rooted in aggression, but in cyberbullying, the aggression may or may not be directed toward a target known to the bully in the offline world.<sup>41</sup> Research suggests, however, that there is considerable overlap between the young people who are likely to be bullied in school and online.<sup>42</sup> As with traditional bullying, students involved in cyberbullying are likely to miss school and have lower academic achievement, and to experience emotional and physical health problems, including alcohol and drug use.<sup>43</sup>

Cyberspace is conducive to rampant bullying because it is a space often beyond adult supervision. Traditional bullying occurs most frequently in relatively unsupervised areas like the playground;<sup>44</sup> cyberspace is akin to a new Internet playground where adult vigilance does not intrude.<sup>45</sup> Indeed,

---

<sup>37</sup> Heidi Vandebosch & Katrien Van Cleemput, *Defining Cyberbullying: A Qualitative Research into the Perceptions of Youngsters*, 11 *CYBERPSYCHOL. & BEHAV.* 499, 500 (2008).

<sup>38</sup> Sameer Hinduja & Justin W. Patchin, *Cyberbullying: An Exploratory Analysis of Factors Related to Offending and Victimization*, 29 *DEVIAN'T BEHAV.* 129, 131 (2008) (quoting Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 *YOUTH VIOLENCE & JUV. JUST.* 148, 152 (2006)).

<sup>39</sup> See KOWALSKI ET AL., *supra* note 31, at 49.

<sup>40</sup> See Vandebosch & Van Cleemput, *supra* note 37, at 501.

<sup>41</sup> Ybarra & Mitchell, *supra* note 32.

<sup>42</sup> See KAVERI SUBRAHMANYAM & DAVID ŠMAHEL, *DIGITAL YOUTH: THE ROLE OF MEDIA IN DEVELOPMENT* 193 (2011).

<sup>43</sup> *What Is Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/what-is-it/index.html> (last visited Feb. 21, 2013).

<sup>44</sup> Atlas & Pepler, *supra* note 15, at 88.

<sup>45</sup> See NAT'L CRIME PREVENTION COUNCIL, *TEENS AND CYBERBULLYING: EXECUTIVE SUMMARY OF A REPORT ON RESEARCH* (2007), available at <http://www.ncpc.org/resources/files/pdf/bullying/Teens%20and%20Cyberbullying%20Research%20Study.pdf> (revealing teens' perception that their Internet use is mostly unsupervised by parents). To be sure, many Internet control services that allow parents to block their children's access to the inappropriate Internet sites exist. See, e.g., NET NANNY, <http://www.netnanny.com> (last visited Mar. 22, 2013); PARENTAL CONTROL BAR, <http://parentalcontrolbar.com> (last visited Feb. 21, 2013). However, web filters alone without direct parental supervision are not sufficient to prevent children from accessing objectionable content, meaning that cyberspace is still largely an unsupervised area. See Alorie Gilbert & Stefanie Olsen, *Do Web Filters Protect Your Child?*,

as teens are confined to their homes much more than in past generations, they turn to the Internet as a means of socializing with peers.<sup>46</sup> Social networking sites provide autonomy and escape from adult supervision.<sup>47</sup> The freedom from supervision in turn decreases the role of social norms in regulating antisocial behavior.<sup>48</sup> This dearth of supervision and established norms “allows bullying to escalate to dangerous, even life-threatening, levels.”<sup>49</sup> The Internet provides a hospitable environment for both traditional bullying and new forms of harassment enabled by developing technology.

The Internet and other forms of electronic communication also foster harmful social behavior because such technology alters the nature of social interactions. There are several unique characteristics associated with cyberbullying that change the nature and consequences of bullying: anonymity and resultant disinhibition, infinite bystanders, and perpetual accessibility.<sup>50</sup> When individuals act anonymously on the Internet, they speak more harshly than they would in “real-life” interactions because they are not held as accountable socially for deviations from normative behavior.<sup>51</sup> Anonymity can significantly increase aggression, dishonesty, and other antisocial behaviors.<sup>52</sup> In the absence of authority to set and enforce clear boundaries and structure, teens lose their inhibitions and engage in negative behavior.<sup>53</sup> If people can hide behind anonymity and

---

CNET (Jan. 24, 2006, 9:29 AM), [http://news.cnet.com/Do-Web-filters-protect-your-child—page-2/2100-1032\\_3-6030200-2.html?tag=mncol](http://news.cnet.com/Do-Web-filters-protect-your-child—page-2/2100-1032_3-6030200-2.html?tag=mncol).

<sup>46</sup> See HELENE GULDBERG, RECLAIMING CHILDHOOD: FREEDOM AND PLAY IN AN AGE OF FEAR 123 (2009).

<sup>47</sup> See *id.*

<sup>48</sup> See Tom Postmes et al., *Breaching or Building Social Boundaries?: SIDE-Effects of Computer-Mediated Communication*, 25 COMM. RES. 689, 693 (1998). This idea is known in mainstream social science literature as deindividuation, “a psychological state of decreased self-evaluation, causing antinormative and disinhibited behavior.” *Id.* at 695.

<sup>49</sup> Shaheen Shariff & Dianne L. Hoff, *Cyber Bullying: Legal Obligations and Educational Policy Vacuum*, in CYBER CRIMINOLOGY: EXPLORING INTERNET CRIMES AND CRIMINAL BEHAVIOR 359, 360 (K. Jaishankar ed., 2011).

<sup>50</sup> See *What Is Cyber Bullying?*, VIOLENCE PREVENTION WORKS!, [http://www.violencepreventionworks.org/public/cyber\\_bullying.page?menuheader=1](http://www.violencepreventionworks.org/public/cyber_bullying.page?menuheader=1) (last visited Feb. 21, 2013).

<sup>51</sup> Cf. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 140 (2007) (explaining that a person’s reputation suffers when he betrays secrets and spreads false or malicious rumors); Linda Zener Solomon et al., *The Effects of Bystander’s Anonymity, Situational Ambiguity, and Victim’s Status on Helping*, 117 J. SOC. PSYCHOL. 285, 285 (1982) (“[A]nonymous people are freed from social pressure to behave normatively . . .”).

<sup>52</sup> See M.E. Kabay, *Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy* 9–10 (Mar. 16–18, 1998), <http://www.mekabay.com/overviews/anonpseudo.pdf>. Even the officers of social networking sites have commented on the costs of anonymity. Randi Zuckerberg, Facebook’s former marketing director, stated that “internet users would ‘behave a lot better’ if people were forced to use their real names when communicating on the internet.” Richard Hall, *Zuckerberg’s Sister Takes Aim at Internet Bullies*, INDEP., July 29, 2011, at 2.

<sup>53</sup> See Shariff & Hoff, *supra* note 49, at 365.

escape the reputational consequences of their words, there is no disincentive for escalating teasing, harassment, or threats. The kinds of norms and social rules that encourage people to interact positively with one another have not yet developed on the Internet, which creates a space without the safety of enforced civility.<sup>54</sup> Anonymity also works as an “equalizer” by empowering individuals who would never bully in “real life” to assert themselves with aggressive acts.<sup>55</sup>

Moreover, online bullying tends to escalate the scale and severity of teasing and threats because bullies cannot see the impact of their words on the victim. The social presence theory posits that the reduction of contextual and visual cues in online communication reduces the participants’ sensitivity to the real-world effects of their behavior.<sup>56</sup> Users are disembodied, removing the nonverbal communication of facial expression and body posture that is present in face-to-face communication.<sup>57</sup> The use of electronic communication decreases the sender’s awareness of how the receivers will perceive and react to the communications.<sup>58</sup> Bullies therefore seem not to understand that their behavior has real-life costs; they see their hurtful messages as a fun way to retaliate against their peers and feel better about themselves.<sup>59</sup> The feeling that online activities do not have offline consequences<sup>60</sup> supports antinormative and uninhibited aggression online.<sup>61</sup>

In addition, the Internet’s features magnify the effects of bullying by opening access to the bullying relationship to a broader audience and creating a permanent record of the aggression. Cyberbullying proves insidious because it allows participation by an “infinite audience.”<sup>62</sup> The expansive potential audience reinforces the bully’s actions and facilitates the display of power on which the bully thrives.<sup>63</sup> This open access is particularly troublesome because social network users often perceive public exchanges as similar to private conversations where more personal details

---

<sup>54</sup> See *id.* at 361.

<sup>55</sup> See Vandebosch & Van Cleemput, *supra* note 37, at 502; see also Hinduja & Patchin, *supra* note 38, at 148 (explaining that historically disadvantaged groups face a level playing field in cyberspace where their marginal status is not exposed).

<sup>56</sup> See Shariff & Hoff, *supra* note 49, at 366.

<sup>57</sup> See SUBRAHMANYAM & ŠMAHEL, *supra* note 42, at 13; Sara Kiesler et al., *Social Psychological Aspects of Computer-Mediated Communication*, 39 AM. PSYCHOLOGIST 1123, 1125 (1984).

<sup>58</sup> See Postmes et al., *supra* note 48, at 692; Ybarra & Mitchell, *supra* note 32, at 320 (“[T]he user cannot be seen nor the impact of his or her words on the other person be experienced.”).

<sup>59</sup> SUBRAHMANYAM & ŠMAHEL, *supra* note 42, at 194.

<sup>60</sup> See MCQUADE ET AL., *supra* note 14, at 41.

<sup>61</sup> See Francine Dehue et al., *Cyberbullying: Youngsters’ Experiences and Parental Perception*, 11 CYBERPSYCHOL. & BEHAV. 217, 217 (2008).

<sup>62</sup> Shariff & Hoff, *supra* note 49, at 365.

<sup>63</sup> See KOWALSKI ET AL., *supra* note 31, at 60.

might be readily shared.<sup>64</sup> Users are typically unaware of how visible their profiles are to the public,<sup>65</sup> and they open themselves and their private information to attack.

Young users also fail to understand that the information that appears on the Internet becomes a permanent record, following them into the future.<sup>66</sup> On the Internet, there are no second chances; once information about an individual's misconduct leaks online, it cannot be concealed.<sup>67</sup> Youthful indiscretions and past mistakes haunt people throughout their lives even as they grow and change,<sup>68</sup> which makes them "prisoner[s] of [their] recorded past[s]."<sup>69</sup> Open access and permanence, combined with the tendency for Internet gossip to go "viral" and spread in a contagious fashion, means that a particularly "sticky"<sup>70</sup> piece of information can spread to thousands of people quickly<sup>71</sup> and with devastating effects for the victim.<sup>72</sup>

Finally, cyberbullying intrudes on the victim more than traditional bullying. The broad dissemination of personal information on the Internet provides ample fodder for cyberbullies, who attack victims in both home and school environments.<sup>73</sup> The messages and images sent by a cyberbully have the potential to harass the victim "any time of the day or night."<sup>74</sup> A victim might be tormented by a traditional bully at school, but he can escape to the safety of his home at the end of the school day and avoid the abuse.<sup>75</sup> No such escape exists for the victims of cyberbullying; the ubiquity of online social interaction prevents a victim from ever completely

---

<sup>64</sup> See Tammy Swenson Lepper, *Facebook: Student Perceptions of Ethical Issues About Their Online Presence*, in *THE ETHICS OF EMERGING MEDIA: INFORMATION, SOCIAL NORMS, AND NEW MEDIA TECHNOLOGY* 175, 175 (Bruce E. Drushel & Kathleen German eds., 2011).

<sup>65</sup> See *id.* at 180.

<sup>66</sup> See *id.*

<sup>67</sup> See SOLOVE, *supra* note 51, at 72.

<sup>68</sup> See *id.* at 73.

<sup>69</sup> SEC'Y'S ADVISORY COMM. ON AUTOMATED PERS. DATA SYS., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS (1973), available at <http://www.hsd.org/?view&did=479784> (explaining how a universal identification system would allow more accurate record keeping over the course of an individual's entire lifetime).

<sup>70</sup> A piece of information is "sticky" if it is interesting in a way that prompts people to keep talking about it. See MALCOLM GLADWELL, *THE TIPPING POINT* 25, 30–33 (2002). The conversation potentially leads to a "tipping point" where the communication or gossip becomes an "epidemic." *Id.*

<sup>71</sup> See SOLOVE, *supra* note 51, at 61.

<sup>72</sup> See, e.g., Alex Pasternack, *After Lawsuits and Therapy, Star Wars Kid Is Back*, MOTHERBOARD (June 1, 2010), <http://www.motherboard.tv/2010/6/1/after-lawsuits-and-therapy-star-wars-kid-is-back>. Ghyslain Raza, the "Star Wars Kid," faced severe bullying after a video of him imitating Star Wars light saber fights surfaced on the Internet and went viral. In response to the abuse and harassment, he suffered depression and entered a psychiatric ward for children. *Id.*

<sup>73</sup> See CARL TIMM & RICHARD PEREZ, *SEVEN DEADLIEST SOCIAL NETWORK ATTACKS* 111 (2010).

<sup>74</sup> *What Is Cyberbullying*, *supra* note 43.

<sup>75</sup> Hinduja & Patchin, *supra* note 38, at 136.

cluding the reach of his bully, unless he also chooses to cut himself off from his entire social network.<sup>76</sup>

### C. *The Code of Silence*

Neither bullying victims nor bystanders report bullying to teachers, parents, or law enforcement with any regularity. Instead, children maintain a “code of secrecy,”<sup>77</sup> an implicitly shared creed not to “snitch.”<sup>78</sup> Indeed, teens are twice as likely to talk about cyberbullying with friends as to confide in parents or other adults.<sup>79</sup> One reason that children choose not to report bullying is the widely held perception that notifying adults rarely leads to effective intervention.<sup>80</sup> Students who approach school administrators for support routinely experience a “wall of defense,” creating an environment that tacitly condones bullying.<sup>81</sup> Children also lack confidence in their ability to intervene effectively in a bullying situation; they fear that they will make the situation worse and lack knowledge of what to do or confidence in their ability to act effectively.<sup>82</sup> Bystanders are especially prone to inaction without the support of other observers to bolster their confidence to intervene on behalf of the victim.<sup>83</sup> They might also fear that reporting bullying to adults will make them the next target of the bully’s ire.<sup>84</sup>

When bullying occurs through electronic communication, there is an additional obstacle to reporting. Perhaps the greatest fear that restrains students from reporting abusive online behavior is that adults will restrict the reporting child’s digital access.<sup>85</sup> Removing technology is a common adult response to reports of cyberbullying, which many adolescents see as

---

<sup>76</sup> See KOWALSKI ET AL., *supra* note 31, at 85–86. Even if a victim were to block a bully’s activity on his own website or social network, cyberbullying could continue either on peers’ websites or through the use of fictional user names.

<sup>77</sup> Atlas & Pepler, *supra* note 15, at 88.

<sup>78</sup> See MCQUADE ET AL., *supra* note 14, at 19.

<sup>79</sup> NAT’L CRIME PREVENTION COUNCIL, *supra* note 45.

<sup>80</sup> See KOWALSKI ET AL., *supra* note 31, at 28; MCQUADE ET AL., *supra* note 14, at 31 (noting that children perceive adults as lacking in empathy and understanding); Frey et al., *supra* note 19.

<sup>81</sup> Shariff & Hoff, *supra* note 49, at 369. Surveyed plaintiffs in bullying litigation indicate that school administrators blame the victims for inviting abuse, fault the parents for exaggerating the problem, or absolve themselves of responsibility for protecting victims beyond a written policy. *Id.*

<sup>82</sup> Coloroso, *supra* note 29; see also Gini et al., *supra* note 19, at 96 (explaining bystanders’ passive reactions to bullying as a perceived lack of self-efficacy).

<sup>83</sup> See KOWALSKI ET AL., *supra* note 31, at 33; Lodge & Frydenberg, *supra* note 20, at 333 (identifying “emotional support from friends as a factor related to the likelihood that peers would support the victim”).

<sup>84</sup> See Atlas & Pepler, *supra* note 15; Coloroso, *supra* note 29.

<sup>85</sup> See Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 28, 2010, at A1.

punitive toward the victim or reporter rather than the bully.<sup>86</sup> Children who have grown up saturated in new media, dubbed “digital natives,”<sup>87</sup> may communicate more through electronic devices than through face-time interaction with family and peers.<sup>88</sup> For the current generation of youth, “media technologies are an important social variable and [the] physical and virtual worlds are psychologically connected.”<sup>89</sup> Online social networks have become integrated into offline adolescent social life, which changes peer relationships and even reshapes the meaning of a “friend.”<sup>90</sup> Adolescents co-construct their online environments by using digital worlds as a forum to explore offline developmental issues.<sup>91</sup> Removing access to electronic media constitutes a dramatic threat to teens’ identity exploration and formation, both because cyberspace provides the perfect venue for experimentation<sup>92</sup> and because identity formation occurs in the context of peer relationships,<sup>93</sup> which now regularly unfold online. Therefore, the apprehension that adults might respond to reports of cyberbullying with a restriction on electronic media access is a powerful disincentive to reporting bullying behavior.<sup>94</sup>

To address the cyberbullying problem and deter vitriolic behavior between young people online, legislators and policymakers must break the code of silence that deters young people from reporting cyberbullying. Any bullying prevention initiative should include mechanisms to encourage reporting by victims and bystanders.<sup>95</sup> Cyberbullies are more likely to

---

<sup>86</sup> *What is Cyber Bullying?*, *supra* note 50; *see also* KOWALSKI ET AL., *supra* note 31, at 3 (“Want to punish a teenager? Simply threaten to take their computer away. To a teenager, that may seem to be a punishment worse than death . . .”).

<sup>87</sup> Marc Prensky, *Digital Natives, Digital Immigrants Part I*, ON THE HORIZON, Sept./Oct. 2001, at 1, 1.

<sup>88</sup> *See* Diana D. Coyl, *Kids Really Are Different These Days*, 90 PHI DELTA KAPPAN 404, 405 (2009).

<sup>89</sup> Kaveri Subrahmanyam & Patricia Greenfield, *Online Communication and Adolescent Relationships*, FUTURE CHILD., Spring 2008, at 119, 124; *see also* Shariff & Hoff, *supra* note 49, at 362 (explaining that young people who grow up immersed in technology blur the distinction between their virtual and “real” lives).

<sup>90</sup> Subrahmanyam & Greenfield, *supra* note 89, at 126–27; *see* SUBRAHMANYAM & ŠMAHEL, *supra* note 42, at 61–63.

<sup>91</sup> *See* SUBRAHMANYAM & ŠMAHEL, *supra* note 42, at 34–35 (“[A]dolescents’ physical, social, and digital worlds are intertwined and interconnected . . . and within their subjective experiences, the ‘real’ and ‘virtual’ may even blend with each other.”).

<sup>92</sup> *See* Subrahmanyam & Greenfield, *supra* note 89, at 139 (“[T]hese media afford them opportunities to explore as well as to practice self-disclosure and self-presentation, which are both important steps toward constructing a coherent identity.”).

<sup>93</sup> *See* Shariff & Hoff, *supra* note 49, at 368 (“[Teens’] virtual relationships have become an integral aspect of their social relationships.”).

<sup>94</sup> Despite this reluctance to confide in adults, nearly half of teens say that cyberbullying should be reported to adults. *See* NAT’L CRIME PREVENTION COUNCIL, *supra* note 45.

<sup>95</sup> *See* KOWALSKI ET AL., *supra* note 31, at 35, 37.

continue their abusive behavior if adult and peer bystanders are unlikely to intervene.<sup>96</sup>

#### *D. The Legal Status of Bullying*

Communities, haunted by the tragic consequences of cyberbullying, have demanded action from legislators and policymakers. Many state legislatures have responded with cyberbullying and cyberharassment statutes that take one of two forms.<sup>97</sup> First, most states among those that have enacted legislation delegate policymaking and enforcement of cyberbullying rules to schools.<sup>98</sup> These statutes charge schools with developing a comprehensive bullying policy by consulting with parents, teachers, administrators, and students.<sup>99</sup> School policies are typically required to include appropriate training and education mechanisms, as well as disciplinary procedures and remedial responses to bullying.<sup>100</sup> Some states specifically mandate reporting to the school board or appropriate school official when a student, parent, or school employee witnesses bullying.<sup>101</sup>

The Supreme Court has responded to school attempts to restrict student speech with a quartet of cases<sup>102</sup> allowing schools to restrict student speech that materially disrupts the educational environment so long as the restrictions are motivated by pedagogical concerns.<sup>103</sup> These cases are inapposite to criminal cyberbullying statutes, however, because they specifically address the authority of the *school* to restrict student speech on

---

<sup>96</sup> *Id.* at 183.

<sup>97</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-309 (Supp. 2012) (electronic communication by minors of sexual material depicting minors); 720 ILL. COMP. STAT. ANN. 135/1-2 (West 2010 & Supp. 2012) (electronic harassment); MO. ANN. STAT. § 160.775 (West 2010 & Supp. 2013) (mandatory school anti-bullying policies).

<sup>98</sup> *See, e.g.*, KAN. STAT. ANN. § 72-8256 (Supp. 2011); MASS. ANN. LAWS ch. 71, § 370(c) (LexisNexis Supp. 2012); MO. ANN. STAT. § 160.775; N.J. STAT. ANN. § 18A:37-15.1 (West Supp. 2012). For a discussion of how schools are best positioned to respond to cyberbullying and why legislation should be crafted to emphasize education over criminalization, see, e.g., Darcy K. Lane, Note, *Taking the Lead on Cyberbullying: Why Schools Can and Should Protect Students Online*, 96 IOWA L. REV. 1791 (2011); Bethan Noonan, Note, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. CONTEMP. HEALTH L. & POL'Y 330 (2011).

<sup>99</sup> *See, e.g.*, OR. REV. STAT. § 339.356(1) (2011); WYO. STAT. ANN. § 21-4-314(a) (2011).

<sup>100</sup> *See, e.g.*, OR. REV. STAT. § 339.356(2); WYO. STAT. ANN. § 21-4-314(b).

<sup>101</sup> *See, e.g.*, MD. CODE ANN., EDUC. § 7-424(b) (LexisNexis 2008); MISS. CODE ANN. § 37-11-67(4) (Supp. 2012); S.C. CODE ANN. § 59-63-130(B) (Supp. 2012).

<sup>102</sup> *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>103</sup> For an extensive discussion of the standards developed by these cases, see Jessica Moy, Note, *Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After Morse v. Frederick*, 37 HASTINGS CONST. L.Q. 565, 570-74 (2010).

and off campus. A school's authority to control the actions of students implicates different interests than the government's ability to restrict harmful speech.

The second legislative response has been to criminalize the act of cyberbullying itself. At the federal level, Representative Linda Sanchez introduced the Megan Meier Cyberbullying Prevention Act in 2009, proposing to fine or imprison anyone using electronic communication to harass another person or cause him or her emotional distress.<sup>104</sup> Representative Sanchez introduced the bill to provide a tool to prosecutors in cases like the suicide of thirteen-year-old Megan Meier following cyberbullying via a fake MySpace profile.<sup>105</sup> The House Committee on Crime, Terrorism, and Homeland Security failed to take further action on the Act, however, because the bill as proposed threatened to unconstitutionally restrict free speech.<sup>106</sup>

State legislatures have also developed statutes that hold the bullies themselves criminally liable for their behavior.<sup>107</sup> Within the last decade, at least ten states have adopted or amended statutes to impose criminal liability for cyberbullying or electronically threatening communications: Arkansas,<sup>108</sup> Idaho,<sup>109</sup> Louisiana,<sup>110</sup> Massachusetts,<sup>111</sup> Missouri,<sup>112</sup> Nevada,<sup>113</sup>

---

<sup>104</sup> Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009). For the argument that a federal cyberbullying criminal statute is the most effective and least restrictive means of restricting cyberbullying behavior, see Christopher S. Burrichter, Comment, *Cyberbullying 2.0: A "Schoolhouse Problem" Grows Up*, 60 DEPAUL L. REV. 141, 167-74 (2010).

<sup>105</sup> David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED THREAT LEVEL (Sept. 30, 2009, 6:37 PM), <http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/>.

<sup>106</sup> See *id.*

<sup>107</sup> See, e.g., N.C. GEN. STAT. § 14-458.1 (2011). For the contrary position that criminal cyberbullying laws chill student free speech rights, see John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85 (2011).

<sup>108</sup> ARK. CODE ANN. § 5-71-217(b) (Supp. 2011) ("A person commits the offense of cyberbullying if: (1) [h]e or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, harass, or alarm another person; and (2) [t]he transmission was in furtherance of severe, repeated, or hostile behavior toward the other person.").

<sup>109</sup> IDAHO CODE ANN. § 18-917A(2) (Supp. 2012) ("[Bullying] means any intentional gesture, or any intentional written, verbal or physical act or threat by a student that: (a) [a] reasonable person under the circumstances should know will have the effect of: (i) [h]arming a student; or (ii) [d]amaging a student's property; or (iii) [p]lacing a student in reasonable fear of harm to his or her person; or (iv) [p]lacing a student in reasonable fear of damage to his or her property . . .").

<sup>110</sup> LA. REV. STAT. ANN. § 14:40.7(A) (Supp. 2013) ("Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.").

<sup>111</sup> MASS. ANN. LAWS ch. 265, § 43A(a) (LexisNexis 2010) ("Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment . . .").

<sup>112</sup> MO. ANN. STAT. § 565.090(1)(3) (West 2012) ("A person commits the crime of harassment if he or she . . . [k]nowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication . . .").

New York,<sup>114</sup> North Carolina,<sup>115</sup> Rhode Island,<sup>116</sup> and Utah.<sup>117</sup> These statutes make cyberbullying a misdemeanor<sup>118</sup> and impose a small fine or short sentence of imprisonment on violators.<sup>119</sup>

Because these statutes are of such recent vintage, there has been only limited judicial response. Very few courts have addressed claims brought pursuant to cyberbullying statutes.<sup>120</sup> Even fewer have addressed challenges to the constitutionality of such statutes. For example, in 2000, an earlier form of the Utah electronic communications harassment statute that forbade telephone harassment was challenged as unconstitutionally overbroad.<sup>121</sup> The Utah statute is not limited to cyberbullying, but rather prohibits certain electronic communications made “with [the] intent to annoy, alarm, intimidate, offend, abuse, threaten, harass, frighten, or disrupt the electronic communications of another.”<sup>122</sup>

In *Provo City v. Whatcott*, a man convicted under the Utah law challenged the constitutionality of statutory language that prohibited “mak[ing] a telephone call, whether or not a conversation ensues[,]” and “mak[ing] a telephone call and us[ing] any lewd or profane language or suggest[ing] any lewd or lascivious act.”<sup>123</sup> The court held that certain sections of the statute were unconstitutionally overbroad because they prohibited otherwise legitimate telephone calls that created a “reckless

---

<sup>113</sup> NEV. REV. STAT. ANN. § 392.915(1) (LexisNexis Supp. 2011) (“A person shall not, through the use of any means of oral, written or electronic communication, including, without limitation, through the use of cyber-bullying, knowingly threaten to cause bodily harm or death to a pupil or employee of a school district or charter school with the intent to: (a) [i]ntimidate, harass, frighten, alarm or distress a pupil or employee of a school district or charter school . . .”).

<sup>114</sup> N.Y. PENAL LAW § 240.30(1)(b) (McKinney 2008) (“A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . causes a communication to be initiated by mechanical or electronic means or otherwise with a person . . . in a manner likely to cause annoyance or alarm . . .”).

<sup>115</sup> N.C. GEN. STAT. § 14-458.1(a)(2) (2011) (criminalizing certain online activities done “[w]ith the intent to intimidate or torment a minor or the minor’s parent or guardian”).

<sup>116</sup> R.I. GEN. LAWS § 11-52-4.2(a) (Supp. 2012) (“Whoever transmits any communication by computer or other electronic device to any person or causes any person to be contacted for the sole purpose of harassing that person or his or her family is guilty of a misdemeanor . . .”).

<sup>117</sup> UTAH CODE ANN. § 76-9-201(2) (LexisNexis 2012) (defining “electronic communication harassment” as repeated electronic contact made with the “intent to annoy, alarm, intimidate, offend, abuse, threaten, harass, frighten, or disrupt the electronic communications of another”).

<sup>118</sup> See, e.g., N.C. GEN. STAT. § 14-458.1(b); UTAH CODE ANN. § 76-9-201(3)(a)(i).

<sup>119</sup> See, e.g., LA. REV. STAT. ANN. § 14:40.7(D)(1) (Supp. 2013).

<sup>120</sup> Cf., e.g., *Doe ex rel. Subia v. Kan. City, Mo. Sch. Dist.*, 372 S.W.3d 43, 52 n.2 (Mo. Ct. App. 2012).

<sup>121</sup> In 2005, the legislature amended the Act to include other forms of electronic communications. See 2005 Utah Laws 864.

<sup>122</sup> UTAH CODE ANN. § 76-9-201(2).

<sup>123</sup> *Provo City v. Whatcott*, 1 P.3d 1113, 1115 (Utah Ct. App. 2000) (quoting UTAH CODE ANN. § 76-9-201(1)(a) & (d) (1999)).

risk” that the receiver would be offended.<sup>124</sup> The court cautioned, however, that the First Amendment does not provide the absolute right to annoy another; rather, a statute must be drawn narrowly so as to avoid sweeping into its ambit harmless communications that are constitutionally protected.<sup>125</sup> In *Provo City Corp. v. Thompson*, the court upheld the constitutionality of another section of the statute prohibiting a person from “mak[ing] repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back.”<sup>126</sup>

Scholars have been more vocal than the courts in discussing the constitutional challenges to cyberbullying laws. The most prominent criticism of proposed and enacted cyberbullying statutes is that they unconstitutionally restrict protected speech. Any legislation criminalizing cyberbullying must balance the competing governmental interests in free speech and protecting children.<sup>127</sup> The free speech interest is significant, but the governmental interest in protecting children is itself “compelling.”<sup>128</sup> Although the Court has been most concerned in the past with protecting children from sexual exploitation, it has “sustained legislation aimed at protecting the physical and *emotional* well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”<sup>129</sup> Cyberbullying, though perhaps not as severely threatening to the physical and emotional health of children as sexual abuse, represents a significant threat to the emotional health of many children. Legislation that prevents such harm may be constitutional even when it infringes to some extent on protected speech.<sup>130</sup>

In addition, legislation criminalizing cyberbullying can be narrowly crafted so as to fit restraints on speech into narrow categories of unprotected speech, such as true threats.<sup>131</sup> A prohibition on true threats—statements which express an intent to commit violence—protects not

---

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 1116.

<sup>126</sup> *Provo City Corp. v. Thompson*, 86 P.3d 735, 737 (Utah 2004) (quoting UTAH CODE ANN. § 76-9-201(1)(b) (1999)).

<sup>127</sup> *See* Laura Pontzer, Note, *If Words Could Kill: Can the Government Regulate Any Online Speech?*, 5 PITTSBURGH J. ENVTL. & PUB. HEALTH L. 153, 162 (2011).

<sup>128</sup> *See* *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (upholding state legislation prohibiting the distribution of child pornography); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (ruling that the protection of minor victims of sex crimes from public embarrassment during their testimony is a compelling interest even if it does not justify a mandatory court closure rule).

<sup>129</sup> *Ferber*, 458 U.S. at 757 (emphasis added).

<sup>130</sup> *See* Pontzer, *supra* note 127, at 163.

<sup>131</sup> *See* Matthew C. Ruedy, Comment, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 340–44 (2008). For a discussion of how the “fighting words” doctrine, another exception to speech protected by the First Amendment, might be extended to apply to cyberbullying, see Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART TECH. & INTELL. PROP. L. 1 (2010).

necessarily against actual violence, but against the fear of violence.<sup>132</sup> The Supreme Court distinguished true threats from hyperbolic speech in excluding true threats from First Amendment protection.<sup>133</sup> Although the Court did not articulate a test for whether speech constitutes a true threat, lower courts have developed a variety of tests,<sup>134</sup> which might be applied to cyberbullying legislation in the appropriate jurisdiction. Thus, with appropriately narrow drafting, statutes that criminalize cyberbullying may withstand constitutional attack.

This Note proposes that criminal liability should likewise attach to the witnesses of cyberbullying who fail to report the behavior. A Bad Samaritan law carrying criminal penalties will attack the code of silence and encourage the (not so) innocent bystanders of clearly harmful cyberbullying to report the abuse to law enforcement. An incentive to report will both reduce the level of cyberbullying because the tacit support of silent bystanders will be removed and bring threatening situations to the attention of law enforcement before the harm occurs. Of course, a duty to report cyberbullying could only logically attach in jurisdictions where cyberbullying is itself a crime. Therefore, the proposed legislation could only be enacted in a limited number of states currently. However, as states continue to formulate legislative solutions to the rampant cyberbullying problem, it is likely that the proposed law will have broader applicability.

## II. BAD SAMARITAN LAWS<sup>135</sup> AND BYSTANDER LIABILITY

The biblical parable of the Good Samaritan tells the story of a traveler who took pity on the victim of a robbery and offered him medical care.<sup>136</sup> The term Bad Samaritan now labels the stranger who knows that another person is in immediate danger but fails to offer aid.<sup>137</sup> Throughout history, legal theorists and philosophers have debated whether the duty to offer aid

---

<sup>132</sup> See *Virginia v. Black*, 538 U.S. 343, 360 (2003) (finding that intimidation in the form of cross burning creates fear in a particular group that they will be the target of violence).

<sup>133</sup> See, e.g., *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (distinguishing “political hyperbole” from true threats).

<sup>134</sup> See e.g., *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 244 F.3d 1007, 1015 n.9 (9th Cir. 2001), *aff’d in part, vacated in part, and remanded*, 290 F.3d 1058 (9th Cir. 2002) (“Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.” (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990))).

<sup>135</sup> Although the terms Good Samaritan laws and Bad Samaritan laws are often used interchangeably in the legal literature, I distinguish between the terms here. Good Samaritan laws refer to the statutes and common law that provide protection from liability to those individuals that choose to help another in distress. Bad Samaritan laws, which I focus on here, impose affirmative duties on individuals to assist another person in peril or danger.

<sup>136</sup> *Luke* 10:27–37.

<sup>137</sup> Michael Davis, *How Much Punishment Does a Bad Samaritan Deserve?*, 15 L. & PHIL. 93, 93 (1996).

to another in peril is a purely moral duty or whether it is a legal obligation as well. The debate continues in modern American jurisprudence as the traditional focus on autonomy and individualism bows to moral and civic imperatives.

#### A. *The History of Samaritan Laws*

Civilizations throughout history have recognized various forms of Samaritan duties to rescue and report.<sup>138</sup> Ancient Egyptians imposed a general duty to rescue, punishing by death those who found a person in danger and did not act to protect them.<sup>139</sup> In addition, Plato's *Laws* included broad duties to rescue with harsh penalties.<sup>140</sup> Likewise, ancient German laws severely punished Bad Samaritans who failed to aid neighbors in distress.<sup>141</sup> Such affirmative duties survived as moral imperatives in medieval Europe, but it was not until the eighteenth century that European jurisdictions began to embrace affirmative duties to rescue in limited contexts, such as during times of external aggression or common disasters.<sup>142</sup>

During the nineteenth century, many European nations began to enact criminal causes of action based upon violations of the duty to rescue.<sup>143</sup> By the turn of the twentieth century, roughly half of the continental legal systems recognized a general duty to rescue in criminal law.<sup>144</sup> And in the twentieth century, European civil law jurisdictions began to embrace broader formulations of the duty to rescue. During and after World War II,

---

<sup>138</sup> For a detailed global history of Samaritan laws, see Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 81–88 (2005).

<sup>139</sup> Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 93, 97 (Michael A. Menlowe & Alexander McCall Smith eds., 1993).

<sup>140</sup> See, e.g., PLATO, THE LAWS 272–73 (A.E. Taylor trans., 1960) (“Every bystander of native birth, child or woman or man, shall join in the rescue . . . and any that takes no part shall be held by the law under the curse of the god of kindred and family.”).

<sup>141</sup> See Cadoppi, *supra* note 139.

<sup>142</sup> See Schiff, *supra* note 138, at 82–83.

<sup>143</sup> See Cadoppi, *supra* note 139, at 99–100. The Spanish Criminal Code of 1822 imposed criminal liability for breach of the duty to rescue. *Id.* Likewise, the “Police” Code of Württemberg in Germany and the Criminal Code of the Kantons Thurgau of 1841 both contained general duties to rescue. *Id.* at 99. Bolivia and Russia soon followed, and in the latter half of the nineteenth century, similar statutes appeared in Tuscany, Denmark, Norway, the Netherlands, and Italy. *Id.* at 100.

<sup>144</sup> See *id.* Although these statutes do not include any explanatory language justifying the imposition of affirmative duties, European civil law jurisdictions have traditionally placed greater importance on civic duty and less on citizens’ rights than Anglo-American common law jurisdictions. See Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157, 158 (1994). Similarly, scholars have explained the lack of Good Samaritanism in China as a product of a traditional cultural focus on personal networks, which leaves the plight of strangers outside of an individual’s scope of concern. See Stanley Lubman, Op-Ed., *After the Foshan Tragedy: China’s Good Samaritan Debate*, BERKELEY L. (Dec. 9, 2011), <http://www.law.berkeley.edu/12597.htm>.

Germany, France, Belgium, Spain, and Portugal all adopted or broadened preexisting statutes creating a duty to rescue.<sup>145</sup> Almost every European nation and every Latin American nation has now enacted a duty to rescue provision in their criminal codes.<sup>146</sup>

Absent a special relationship between the would-be rescuer and the one in peril, however, no common law legal obligation to rescue arose.<sup>147</sup> English law does not recognize a general legal obligation to save a stranger in peril; rather, “[t]here must be some additional reason why it is fair and reasonable that one person should be regarded as his brother’s keeper and have legal obligations in that regard.”<sup>148</sup> Likewise, American courts have traditionally been resistant to the imposition of affirmative duties unless those duties arose from a special relationship of dependence, by contract,<sup>149</sup> or by statute.<sup>150</sup> The *Restatement (Second) of Torts* encapsulates the traditional position that affirmative duties exist only as a product of special relationships.<sup>151</sup>

---

<sup>145</sup> See Schiff, *supra* note 138, at 86–87. Although several of the duty-to-rescue statutes were enacted under the control of Nazi Germany and its totalitarian philosophy, the statutes were some of the very few to survive the repeal of legislation passed during the occupation after the collapse of German power. See *id.*

<sup>146</sup> See *id.*; see also Cadoppi, *supra* note 139, at 104. Currently, the only two civil law countries in the European Union that do not embrace a general duty to rescue are Finland and Sweden. See Jan M. Smits, The Good Samaritan in European Private Law; On the Perils of Principles Without a Programme and a Programme for the Future, Inaugural Lecture, Maastricht University 5 (May 19, 2000), available at <http://arno.unimaas.nl/show.cgi?fid=3773>. When Sweden considered enacting a duty-to-rescue law in 2011, the official who led the inquiry into the effects of such a law advised against it because he thought it would increase the difficulty of getting people to act as witnesses. See Sweden Mulls ‘Good Samaritan’ Law, LOCAL (Swed.) (Mar. 11, 2011, 10:18 PM), <http://www.thelocal.se/32530/20110311/>.

<sup>147</sup> See Schiff, *supra* note 138, at 85.

<sup>148</sup> *Stovin v. Wise*, [1996] A.C. 923 (H.L.) 931 (Lord Nicholls of Birkenhead) (Eng.).

<sup>149</sup> See Smits, *supra* note 146, at 10–11. For an early case exemplifying the common law rejection of affirmative duties, see *Buch v. Amory Mfg. Co.*, 44 A. 809, 810 (N.H. 1898) (“With purely moral obligations the law does not deal. . . . Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury . . .”).

<sup>150</sup> See Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571, 573 (2000).

<sup>151</sup> RESTATEMENT (SECOND) OF TORTS §§ 314, 314A (1965). Professor D’Amato argues that the “‘Bad Samaritan’ paradigm is part of a larger paradigm linking the law of torts with the criminal law.” Anthony D’Amato, *The “Bad Samaritan” Paradigm*, 70 NW. U. L. REV. 798, 798 (1975). He argues, however, that Bad Samaritan laws are not based on personal duties between the victim and the potential rescuer, but on the principle that both are members of the community and should be expected to act responsibly. See *id.* at 806. Regardless, the law of torts and criminal law often inform one another, as with the imposition of affirmative duties.

*B. Modern American Trends in Bystander Liability*

1. *Traditional Resistance.*—American legislators and legal scholars have traditionally been resistant to affirmative legal duties as compared to European and Latin American civil jurisdictions. This resistance is surprising in light of the broad acceptance of utilitarianism as a normative theory of law, as utilitarianism explains justice in terms of the positive obligation to maximize the benefit to society.<sup>152</sup> However, the common law reluctance to impose a duty to rescue or assist victims of crime is understandable as a product of a philosophical and political climate that praises individualism and autonomy and respects privacy.

Perhaps the most prolific argument against affirmative legal duties is the threat they pose to the common law's traditional respect for individual liberty.<sup>153</sup> American society values the principle of individualism—the right to be left alone—and rejects the imposition of affirmative legal duties.<sup>154</sup> According to this view, the victim of a crime cannot impose duties that restrict the freedoms and rights of the people around him.<sup>155</sup> The American focus on individualism, however, obscures the social causes of “individual” victimization<sup>156</sup> and the social responsibility that members of a community have for one another.<sup>157</sup> Likewise, the social value placed on autonomy, and the accompanying characteristics of self-sufficiency and resiliency, diminish a witness's perception of a victim's suffering and make it less apparent that assistance is really needed.<sup>158</sup> Even half a century ago, a commentator noted that “there is much to be said for the old Anglo-American attitude of minding your own business—except that as the world changes, other peoples' business in more and more ways becomes yours.”<sup>159</sup> This philosophy is even more evident today, especially in cyberspace as the boundary between public and private information erodes and the old emphasis on individualism becomes more out of step.

---

<sup>152</sup> See Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 605 (2001).

<sup>153</sup> See, e.g., *id.* at 632. For a detailed discussion of the philosophical underpinnings of the libertarian position, see *id.*

<sup>154</sup> See LAWRENCE S. WRIGHTSMAN, *PSYCHOLOGY AND THE LEGAL SYSTEM* 47 (1987).

<sup>155</sup> See John Kaplan, *A Legal Look at Prosocial Behavior: What Can Happen for Failing to Help or Trying to Help Someone*, J. SOC. ISSUES, Summer 1972, at 219, 220.

<sup>156</sup> Individuals become victims of crime because of both individual characteristics and community characteristics, including socioeconomic factors, age distribution, and social integration. See Motoko Akiba et al., *Student Victimization: National and School System Effects on School Violence in 37 Nations*, 39 AM. EDUC. RES. J. 829, 833–34 (2002). Therefore, an overemphasis on individualism fails to account for the way that an individual operates within the community.

<sup>157</sup> See MAUREEN H. O'CONNELL, *COMPASSION: LOVING OUR NEIGHBOR IN AN AGE OF GLOBALIZATION* 21 (2009).

<sup>158</sup> See *id.* at 22.

<sup>159</sup> Charles O. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law, in THE GOOD SAMARITAN AND THE LAW* 23, 38 (James M. Ratcliffe ed., 1966).

Respect for the victim's privacy also contributes to the resistance to affirmative duties to rescue or report. A duty to report a crime may unacceptably violate the victim's privacy, especially for victims of sexual offenses.<sup>160</sup> For example, victims of rape may choose not to prosecute to avoid the psychological trauma of reliving the abuse,<sup>161</sup> and the common law resists violating individual privacy.<sup>162</sup> And although victims of crime have been traditionally treated as third parties without individual standing in the common law criminal justice system,<sup>163</sup> they have gradually begun to gain power in the process.<sup>164</sup> In addition, reporting may do more harm than good in certain contexts where the victim fears retaliation from the bully.<sup>165</sup> In that case, Bad Samaritan laws might prompt too much action and encourage people to intervene in others' private affairs.<sup>166</sup> These concerns, while particularly applicable to sexual offenses and other personally invasive crimes, have little weight for required reporting of cyberbullying. By their very nature, the communications that will be reported are already public,<sup>167</sup> and a report to law enforcement will not further intrude on the privacy of the victim.

2. *Justifications for Bad Samaritan Laws.*—The growing trend in American law toward acceptance of affirmative duties to aid<sup>168</sup> developed from increasing recognition of the important moral and political reasons for these duties. One primary justification for Bad Samaritan legislation is the desire for the criminal law to reflect the moral imperative to render aid to

---

<sup>160</sup> SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 201 (8th ed. 2007).

<sup>161</sup> See WRIGHTSMAN, *supra* note 154, at 177 (describing the secondary victimization that occurs during a rape prosecution, where the victim is called as a witness and forced to relive her experience while undergoing cross-examination that questions her truthfulness and morality).

<sup>162</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.").

<sup>163</sup> See *Victim Privacy and the Open Court Principle*, CAN. DEP'T OF JUSTICE, [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/tr03\\_vic1/p8.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/tr03_vic1/p8.html) (last visited Feb. 24, 2013).

<sup>164</sup> See WRIGHTSMAN, *supra* note 154, at 148–50 (describing recent social movements to grant more rights to victims, including greater participation in the prosecution or compensation to victims).

<sup>165</sup> See KADISH ET AL., *supra* note 160.

<sup>166</sup> Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 658 (2010).

<sup>167</sup> Although such communications may be initially shared with only a limited group of people, such as a network of friends on a social site, an individual loses proprietary control over communications upon posting them on the Internet. Any communication may be shared more broadly than the original poster intended, without that person's knowledge or consent. Therefore, even seemingly private conversation between known individuals becomes "public" by virtue of entering cyberspace.

<sup>168</sup> See *infra* text accompanying notes 190–202 for a survey of state statutes imposing affirmative duties.

others in need.<sup>169</sup> In a series of lectures, Lord Patrick Devlin,<sup>170</sup> a fellow of the British Academy, expounded on morality and the law. In his explanation of morals in the criminal law, he stated:

[T]he morals which underly [sic] the law must be derived from the sense of right and wrong which resides in the community as a whole; it does not matter whence the community of thought comes, whether from one body of doctrine or another or from the knowledge of good and evil which no man is without.<sup>171</sup>

When the criminal law mirrors moral obligations, it fulfills the expectations held by the majority of citizens.<sup>172</sup> Indeed, when “[l]egal and moral rules are in symbiotic relation,” individuals learn morality by observing the behaviors that are enforced by authorities.<sup>173</sup>

The moral imperative to aid strangers in distress is nearly universal across world religions<sup>174</sup> and has also become established in the public morality—the “community of ideas” in a society about how its members should conduct themselves.<sup>175</sup> However, the question of whether the law should be consistent with morality has been debated for centuries, and there are many areas in which the law does not align with conventional morality.<sup>176</sup> Regardless, American criminal law is to a large extent based on moral principles, and a number of crimes function solely to enforce a moral

---

<sup>169</sup> See Bagby, *supra* note 150, at 579.

<sup>170</sup> Lord Devlin, a leading British judge, argued against the philosophical basis of the Wolfenden Report, which recommended that private acts of homosexuality should not be a criminal offense. William Miller, *Conservatism and the Devlin-Hart Debate*, 1 INT’L J. POL. & GOOD GOVERNANCE, Quarter III 2010, at 1–2. His debate with H.L.A. Hart sparked a global discussion over the place of morality in the criminal law. *Id.* at 1.

<sup>171</sup> PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 22 (1965).

<sup>172</sup> See Antony M. Honoré, *Law, Morals and Rescue*, in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 159, at 225, 239.

<sup>173</sup> D’Amato, *supra* note 151, at 809.

<sup>174</sup> See Bagby, *supra* note 150, at 580; accord 2 TALMUD BAVLI: TRACTATE SANHEDRIN 73a (Rabbi Yisroel Simcha Schorr ed., Rabbi Michoel Weiner & Rabbi Asher Dicker trans., Mesorah Publ’ns, Ltd. 1994) (commanding under Talmudic law: “Do not stand by the blood of your friend but rather save him.”); *Inqadh*, THE OXFORD DICTIONARY OF ISLAM 138 (John L. Esposito ed., 2003) (“In Islamic law, there is a duty to rescue a person in distress as long as the rescuer does not unduly endanger her-or himself.”); Kinh Phạm-Võng, *Sutra Translation Comm. of the U.S. & Can., Brahma Net Sutra: Moral Code of the Bodhisattvas* (Jan. 2000), <http://www.ymba.org/bns/bnsframe.htm> (explaining that the moral code of the Bodhisattvas requires as a secondary precept that any disciple of Buddha who sees a sick person should provide for that person’s needs).

<sup>175</sup> See DEVLIN, *supra* note 171, at 9. Devlin conceives of morality as a sphere in which there are conflicting public and private interests. See *id.* at 16. The two are in proper balance when there is “toleration of the maximum individual freedom that is consistent with the integrity of society.” *Id.*

<sup>176</sup> See WRIGHTSMAN, *supra* note 154, at 46. For example, adultery is widely considered immoral, but in most jurisdictions it is no longer a criminal offense. *Id.*

principle, not to maintain public order or any other function of criminal law.<sup>177</sup>

In addition to the need to align the criminal law with shared moral principles, Bad Samaritan laws are justified by the common interest in public safety. There already exists a civic duty to come forward with information concerning a crime.<sup>178</sup> Statutory duties to report merely codify and enforce this existing civic duty. The common interest of the public in avoiding harm also justifies a criminal Bad Samaritan statute. Harm prevention is a legitimate objective of criminalization, including both forbidding people from actively causing harm and requiring them to prevent harm.<sup>179</sup> Bad Samaritan statutes operate as a social insurance mechanism, similar to taxes for police protection,<sup>180</sup> and minimize the deaths and injuries associated with criminal activity.<sup>181</sup> They prevent harm by prohibiting the exercise of personal liberties to the detriment of others.<sup>182</sup> While affirmative duties impinge slightly on personal liberty, as with other criminal statutes, the social interests served by the criminal law justify the limitation on personal liberty.<sup>183</sup> Finally, Bad Samaritan legislation is justified by its ability to protect the public interest through deterring the antisocial behavior of “[w]itnessing a crime and ignoring the plight of the victim.”<sup>184</sup>

The normative influence of criminal law also justifies Bad Samaritan statutes as a means of influencing psychological motivations to intervene. Criminal statutes that impose a duty to assist crime victims create a societal expectation of intervention that encourages individuals to internalize helping behavior and normalizes the responsibility of witnesses.<sup>185</sup> Bad Samaritan laws send the message that failing to aid a fellow human in distress is morally wrong and that the community has acted together to express its outrage; they serve to counter the alienation and indifference of modern society.<sup>186</sup>

The utilitarian movement toward statutory affirmative obligations arose in reaction to contemporary social norms, which lack the power, in light of weaker ties to religious institutions and community, to motivate

---

<sup>177</sup> See DEVLIN, *supra* note 171, at 7. Devlin cites several examples of such laws, including prohibitions on assisted suicide and incest. *See id.*

<sup>178</sup> See Bagby, *supra* note 150, at 580.

<sup>179</sup> See JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 128 (1984).

<sup>180</sup> Davis, *supra* note 137, at 94.

<sup>181</sup> See Levy, *supra* note 166, at 626–27.

<sup>182</sup> See FEINBERG, *supra* note 179, at 129.

<sup>183</sup> See Bagby, *supra* note 150, at 581.

<sup>184</sup> *Id.* at 583; see D’Amato, *supra* note 151, at 808.

<sup>185</sup> See Bagby, *supra* note 150, at 583–86.

<sup>186</sup> See Levy, *supra* note 166, at 628–29.

moral action absent the coercive or normative effect of the law.<sup>187</sup> Recent empirical research indicates that a slight majority of Americans support a law requiring people to assist anyone in distress.<sup>188</sup> In light of this utilitarian movement and the sociological and psychological justifications for affirmative duties, a growing number of states have enacted or are developing Bad Samaritan laws that create an affirmative duty to act in aid of another person.<sup>189</sup>

3. *The Modern Samaritan's Duties.*—Statutes that impose an affirmative duty on bystanders to assist victims of crime generally take one of two forms: the duty to rescue or the duty to report. Several states, including Minnesota,<sup>190</sup> Rhode Island,<sup>191</sup> and Vermont,<sup>192</sup> have enacted statutes requiring a bystander to rescue a victim when there is no danger to the rescuer. Other states, including California,<sup>193</sup> Colorado,<sup>194</sup> Florida,<sup>195</sup> Hawaii,<sup>196</sup> Massachusetts,<sup>197</sup> Nevada,<sup>198</sup> Ohio,<sup>199</sup> Rhode Island,<sup>200</sup> and Washington,<sup>201</sup> have adopted criminal statutes that impose on witnesses of certain crimes the duty to report to law enforcement. Still others, such as Wisconsin, impose more generally a duty to aid, whether by direct assistance or reporting to authorities.<sup>202</sup> Currently, most American statutes impose very lenient misdemeanor penalties on “Bad Samaritans,” such as

---

<sup>187</sup> See Amelia H. Ashton, Note, *Rescuing the Hero: The Ramifications of Expanding the Duty to Rescue on Society and the Law*, 59 DUKE L.J. 69, 81 (2009).

<sup>188</sup> Victoria Time et al., *Don't Help Victims of Crime If You Don't Have the Time: Assessing Support for Good Samaritan Laws*, 38 J. CRIM. JUST. 790, 792 (2010).

<sup>189</sup> At the time of writing, three states—Rhode Island, Massachusetts, and Nevada—had enacted both anti-bullying legislation and affirmative duty legislation.

<sup>190</sup> MINN. STAT. ANN. § 604A.01(1) (West 2010).

<sup>191</sup> R.I. GEN. LAWS § 11-56-1 (2002).

<sup>192</sup> VT. STAT. ANN. tit. 12, § 519(a) (2002).

<sup>193</sup> CAL. PENAL CODE § 152.3 (West Supp. 2013) (certain crimes against children).

<sup>194</sup> COLO. REV. STAT. § 18-8-115 (2012) (general duty to report crimes).

<sup>195</sup> FLA. STAT. ANN. § 794.027 (West 2007) (duty to report sexual battery).

<sup>196</sup> HAW. REV. STAT. ANN. § 663-1.6(a) (LexisNexis 2012) (crimes involving “serious physical harm”).

<sup>197</sup> MASS. ANN. LAWS ch. 268, § 40 (LexisNexis 2010) (certain violent crimes).

<sup>198</sup> NEV. REV. STAT. ANN. § 202.882 (LexisNexis 2012) (crimes against children).

<sup>199</sup> OHIO REV. CODE ANN. § 2921.22 (West 2006 & Supp. 2012) (general duty to report felonies and additional duties for physicians).

<sup>200</sup> R.I. GEN. LAWS §§ 11-1-5.1, 11-37-3.1 (2002) (certain violent crimes).

<sup>201</sup> WASH. REV. CODE ANN. § 9.69.100 (West 2010) (violent crimes and sexual crimes against children).

<sup>202</sup> See WIS. STAT. ANN. § 940.34(2)(a) (West 2005) (“Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.”).

small fines and jail time of up to six months.<sup>203</sup> Even then, prosecutions are rare.<sup>204</sup>

While these statutes vary in scope and application, they impose duties that reflect the four main elements of Bad Samaritan statutes.<sup>205</sup> First, affirmative duties to assist only arise when a person's life, health, or safety is in peril, although some jurisdictions impose a duty to rescue only when there is danger to life.<sup>206</sup> Often, state statutes impose a duty only when there is peril created by some specific crime, such as child abuse<sup>207</sup> or specified violent crimes.<sup>208</sup> Other states create a general duty to assist victims of any physically harmful crime.<sup>209</sup> Second, the scope of the duty to assist ranges from a duty to merely report what was witnessed to the appropriate authority to the duty to act personally in a rescue.<sup>210</sup> Third, there is variation between statutes as to whether action is required when there is a high degree of risk to the would-be rescuer.<sup>211</sup> Finally, statutes differ on whether mere knowledge of the peril is sufficient to trigger the duty or whether physical presence at the scene of danger is necessary.<sup>212</sup>

---

<sup>203</sup> See Bagby, *supra* note 150, at 591. By contrast, many European jurisdictions attach harsher penalties to their duties to assist and enforce them more consistently. KADISH ET AL., *supra* note 160, at 201. For example, France's duty to rescue carries a penalty including up to five years of imprisonment. Levy, *supra* note 166, at 617; *accord* CODE PÉNAL [C. PÉN.] art. 223-6 (Fr.).

<sup>204</sup> KADISH ET AL., *supra* note 160, at 200. Prosecutors rarely pursue violators of affirmative duties to report in part because of the difficulty in determining whether a witness was actually present at the scene of a crime. See Bagby, *supra* note 150, at 591. This difficulty is reduced in cyberspace where users leave a digital footprint recording their presence online.

<sup>205</sup> The following comparison of textual elements borrows from Damien Schiff's comparative study of Samaritan Laws across civil and common law jurisdictions. See Schiff, *supra* note 138, at 94–103.

<sup>206</sup> *Id.* at 94; *accord* Cadoppi, *supra* note 139, at 105 (noting that some states impose a duty to rescue only in cases of mortal danger while “[m]ost criminal codes do not require anything more than a vague danger”).

<sup>207</sup> See, e.g., CAL. PENAL CODE § 152.3 (West Supp. 2013); NEV. REV. STAT. ANN. § 202.882 (LexisNexis 2012).

<sup>208</sup> See, e.g., MASS. ANN. LAWS ch. 268, § 40 (LexisNexis 2010) (“Whoever knows that another person is a victim of aggravated rape, . . . murder, manslaughter or armed robbery . . . [shall] report said crime . . .”).

<sup>209</sup> See, e.g., MINN. STAT. ANN. § 604A.01(1) (West 2010) (“A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall . . . give reasonable assistance to the exposed person.”).

<sup>210</sup> See Schiff, *supra* note 138, at 96–98.

<sup>211</sup> *Id.* at 99; see also Cadoppi, *supra* note 139, at 106–07 (explaining that most Bad Samaritan statutes contain exceptions that exempt the rescuer if he runs a risk of danger, whether any risk at all or only risk of serious danger).

<sup>212</sup> See Schiff, *supra* note 138, at 101.

## III. THE CYBER-SAMARITAN'S DUTY

A. *The Duty to Report*

This Note proposes a Cyber-Samaritan's Duty to report cyberbullying<sup>213</sup> that encompasses either one of two situations: (1) the cyberbullying includes threats of violent criminal behavior or (2) the witness knows or reasonably believes the cyberbullying will cause physical harm or the fear of physical harm.<sup>214</sup> The intervention of law enforcement in these situations is likely to be most beneficial to the victim by introducing the assistance of authorities before the victim suffers harm.

A Bad Samaritan law is particularly appropriate for bullying because the traditional distinction between an act and an omission is inapposite in the group dynamic of bullying.<sup>215</sup> Some argue that Bad Samaritan laws violate a fundamental precept of criminal law and morality that "people may be blamed and punished only for what they *do*, not for what they do *not* do."<sup>216</sup> However, bystanders by their very presence "act" in the sense of providing support and encouragement to the bully.<sup>217</sup> In cyberspace, the bully sees the implicit support of the bystanders through the "hits" a website receives or the "likes"<sup>218</sup> for a particular piece of text or image. When bystanders play a fundamental role in the harm perpetrated by a third party, the distinction between an act and an omission collapses.

An example of proposed language for such a statute is the following:

**Duty of witness of cyberbullying**

## (1) Definitions:

- (a) Cyberbullying means threatening or harassing electronic communication.
- (b) Electronic media means social networking sites, webpages, or other Internet platforms through which electronic text, pictures, or video are communicated.

---

<sup>213</sup> The Cyber-Samaritan's Duty would only apply in jurisdictions where cyberbullying itself has been criminalized, as affirmative duties to report only apply to witnesses of criminal activity.

<sup>214</sup> Although the worst consequences of cyberbullying may be emotional and psychological, traditionally only crimes resulting in physical harm trigger affirmative duties to report. *See supra* text accompanying notes 206–09. The emotional and psychological harm caused by cyberbullying may be partially redressed by the duty to act arising from a victim's fear of physical harm. Stalking statutes similarly establish criminal liability when a stalker intends to cause his victim actual fear or when the stalking behavior would cause a reasonable person to feel fear. *See* NAT'L CTR. FOR VICTIMS OF CRIME, ANALYZING STALKING LAWS 1, available at <http://www.victimsofcrime.org/docs/src/analyzing-stalking-statute.pdf?sfvrsn=2>.

<sup>215</sup> *See supra* text accompanying notes 17–24.

<sup>216</sup> Levy, *supra* note 166, at 630.

<sup>217</sup> *See supra* text accompanying notes 29–30.

<sup>218</sup> The "like" feature on Facebook is a way to provide positive feedback regarding a particular piece of content or page on the website. *See Facebook Help Center: Like*, FACEBOOK, <http://www.facebook.com/help/like> (last visited Feb. 24, 2013).

- (2) A person who witnesses the actual commission of:
- (a) The threat of a violent offense against a minor conveyed through electronic media; or
  - (b) Electronic communication that the person knows or reasonably believes poses an actual threat of substantial bodily harm against a minor or would cause a reasonable person to fear substantial bodily harm,
- shall as soon as reasonably possible notify law enforcement or other public officials, unless the person reasonably believes such notification creates danger or peril to any person.
- (3) The duty contained in subsection (2) arises only when the electronic media publicly records the witness's presence.
- (4) Failure to report as required by subsection (2) is punishable by fine, enrollment in educational or rehabilitative programs, and/or removal from electronic media that facilitate cyberbullying.
- (5) No person will be criminally charged for failure to report as required by subsection (2) if such person subsequently volunteers information to law enforcement or other public officials.

The proposed Cyber-Samaritan's Duty mirrors the language of already enacted state statutes and follows the four elements of Bad Samaritan laws identified by comparative law theorists.

First, the proposed law imposes a duty only when there is a threat to life, health, or safety. When electronic communication includes a threat of violence, it clearly creates a risk of physical harm. In addition, the affirmative legal duty may be triggered even where the victim herself creates the danger to life or safety. Numerous examples exist of young people who have committed suicide in response to extended periods of cyberbullying and harassment.<sup>219</sup> A person who knows that the victim of bullying will attempt suicide has a duty to report to law enforcement because the law "puts human life beyond and above the disposal of the individual," and the duty to rescue arises out of the public interest in protecting human life.<sup>220</sup> The argument that suicide does not trigger the duty to assist rests on the assumption that an individual attempting suicide does not desire help or rescue.<sup>221</sup> However, many researchers now view

---

<sup>219</sup> The term "bullycide" has been coined to describe the spike in teen suicides caused by bullying. See, e.g., NEIL MARR & TIM FIELD, *BULLYCIDES: DEATH AT PLAYTIME* (2d rev. ed. 2011). Well-publicized examples of American bullycides include Megan Meier, Ryan Halligan, Tyler Clementi, and Phoebe Prince, among others. Associated Press, *Teens Who Have Committed Suicide After Being Bullied Online*, NPR (Sept. 30, 2010, 5:36 PM), <http://www.npr.org/templates/story/story.php?storyId=130248877>.

<sup>220</sup> Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 159, at 91, 97–98; see also Levy, *supra* note 166, at 613 (arguing that human life has intrinsic value and that "bad Samaritanism fails to respect and promote the premium that we place on human life").

<sup>221</sup> See Rudzinski, *supra* note 220, at 97.

suicide as a “cry for help”; this research indicates that many young people driven to suicide really do desire the help of their peers and adults.<sup>222</sup>

If a witness to cyberbullying knows or reasonably believes that the victim of cyberbullying might harm herself, he is obligated to report. The reasonable belief might arise from a statement made by the victim or from personal knowledge about the victim’s mental or emotional state and the likely effect of the cyberbullying. This duty does not impose liability on every person who sees malicious or hurtful comments directed at an individual who subsequently commits suicide. The statute imposes liability only on those individuals who observe situations where a reasonable person would believe the victim might harm himself and fail to report to law enforcement. If the witness is a child, this reasonableness standard requires that the child act like a “reasonable person of like age, intelligence, and experience under like circumstances.”<sup>223</sup> Therefore, the duty to report arises when a reasonable person witnessing the cyberbullying would believe that the bully or the victim herself is likely to cause the victim physical harm.

Second, the Cyber-Samaritan’s Duty imposes only a duty to report for witnesses to abusive electronic communication. The duty to rescue is more intrusive than the duty to report and is impractical in cyberspace where there is little a bystander can do to “rescue” the victim of a harassing communication. A witness to cyberbullying might “rescue” a victim by flagging a communication to convey to the cybercommunity that it is abusive or derogatory.<sup>224</sup> Many websites, however, do not offer this flagging feature, and even this step would not be effective rescue because of the permanence and accessibility of Internet communications. By contrast, states could implement simple reporting systems, such as hotlines or reporting websites, to reduce the effort required by young people to make a report.

Third, the proposed language of the Cyber-Samaritan’s Duty requires action only when there is no risk of harm to the witness-reporter. A witness might reasonably fear that if he reports cyberbullying, the bully will next attack him. Indeed, this fear of retribution is one of the reasons that children are traditionally reluctant to intervene in bullying.<sup>225</sup> Such

---

<sup>222</sup> See Linda J. Vorvick & David B. Merrill, *Suicide and Suicidal Behavior*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/001554.htm> (last updated Feb. 11, 2012).

<sup>223</sup> RESTATEMENT (SECOND) OF TORTS § 283A (1965).

<sup>224</sup> Craigslist employs a community moderation system that allows users to flag postings that violate the website’s guidelines. See *About>Help>Flags and Community Moderation*, CRAIGSLIST, [http://www.craigslist.org/about/help/flags\\_and\\_community\\_moderation](http://www.craigslist.org/about/help/flags_and_community_moderation) (last updated Apr. 17, 2012, 2:44 PM). If a particular posting attracts sufficient flags, the content is subject to removal. See *id.* Using a similar system, YouTube employs a staff to review flagged content and remove it if it violates the Terms of Use. See *YouTube Community Guidelines*, YOUTUBE, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Feb. 24, 2013). A similar system could be employed by social networking sites to allow users to flag cyberbullying content as abusive or threatening.

<sup>225</sup> See *supra* Part I.C.

retribution is unlikely in the context of cyberbullying, however, because the identity of the reporter will remain unknown to the cyberbully so long as authorities maintain the reporter's anonymity.<sup>226</sup> Nonetheless, the proposed statute acknowledges that there may be circumstances in which a witness to cyberbullying reasonably believes that by reporting to authorities he places himself, the victim, or another person in danger. In those circumstances, the obligation to report does not arise.

Finally, the proposed statutory language only imposes a duty to report on individuals who themselves witness an act of cyberbullying and whose digital presence is publicly recorded. Digital presence might be publicly reported in either a personal sense, where an individual manifests her presence through activity on a site,<sup>227</sup> or in an impersonal sense, where an individual's presence is recorded in the aggregate on a site.<sup>228</sup> Public digital presence is necessary for the duty to arise because it is the presence of bystanders that lends support to the bully.<sup>229</sup> While any person who knows of a victim may alert law enforcement to the danger, the mere knowledge of cyberbullying does not impose an affirmative duty because the person is not a bystander. Bystanders lend implicit support to the bullying through a supportive presence only when the bully knows that the bystander witnessed the bullying.

The requirement of public digital presence also limits liability to individuals who witness actual bullying, not entire pages where one piece of content is objectionable. For example, an Internet user might visit a website with many innocuous pieces of content and only one instance of cyberbullying. The user would need to manifest public digital presence, by "liking" the content, commenting on it, or digitally recording a "view" or "hit," for that piece of bullying content to trigger the Cyber-Samaritan's Duty. The presence of a witness must be publicly recorded as to specific pieces of content rather than entire web pages with varied content. While this specificity likely excludes many nonreporting witnesses from the scope of the statute, the narrow framing helps to prevent liability from attaching to innocent users who view a website without ever actually witnessing the bullying.

The immunity provision contained in subsection (5) diminishes the anticooperative effects that might emerge from criminalizing the failure to immediately report cyberbullying. Witnesses often fail to initially act because of panic, fear, or uncertainty but decide after a period of reflection

---

<sup>226</sup> See *infra* text accompanying notes 268–70.

<sup>227</sup> For example, Facebook allows users to "like" content or pages and thereafter displays the individual's name beneath the "liked" content and links to that individual's profile. See *Facebook Help Center*, *supra* note 218.

<sup>228</sup> For example, YouTube publicly displays the number of views a particular piece of content receives. See YOUTUBE, <http://www.youtube.com/> (last visited Feb. 24, 2013).

<sup>229</sup> See *supra* text accompanying notes 29–30.

to provide information to law enforcement.<sup>230</sup> A duty to report as soon as reasonably practicable criminalizes the hesitation of these potential reporters and lessens the likelihood that they will come forward at all.<sup>231</sup> As Professor Eugene Volokh notes, “Delayed reports, though less valuable than rescues and prompt reports, are important crime-solving tools . . . .”<sup>232</sup> The immunity provision protects and encourages the cooperation of those who decide to report information after a delay.<sup>233</sup> The proposed Cyber-Samaritan’s Duty contains carefully circumscribed language designed to impose obligations on the individuals who, by their presence, contribute to cyberbullying and are in a position to prevent potential physical harm by notifying authorities.

The proposed statute withstands the constitutional attack that it restricts protected speech under the First Amendment. Digital presence may not be “speech” in a meaningful sense at all, particularly when digital presence is merely recorded as a “hit” signaling that a person has viewed a piece of content. Even if a bystander does create electronic speech, for example by “liking” a piece of content,<sup>234</sup> the government’s interest in protecting speech without real value is not outweighed by its compelling interest in protecting children from the real harm caused by that speech.<sup>235</sup>

### *B. Penalties and Enforcement*

The appropriate penalty for violation of the Cyber-Samaritan’s Duty must balance the traditional goals of criminal punishment with the unique nature of a crime that is most often committed by juveniles. The goals of any punishment include incapacitation, retribution, deterrence, and rehabilitation.<sup>236</sup> The traditional punishment for Bad Samaritan violations, imprisonment, is not entirely appropriate for the failure to report cyberbullying. If the goal is incapacitation, jail time excessively punishes young people.

---

<sup>230</sup> Professor Eugene Volokh terms these individuals “Delayed Samaritans.” See Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 106 (1999).

<sup>231</sup> *Id.* at 107–08.

<sup>232</sup> *Id.* at 111.

<sup>233</sup> See *id.* at 110. This immunity provision might operate to protect some individuals who come forward after the harm has already occurred, thus failing to prevent the harm the reporting law is designed to protect. However, the immunity provision also protects people who report cyberbullying not immediately, but soon enough to allow law enforcement to intervene to protect the victim. Thus, it operates to both prevent harm in some cases and to facilitate police investigation into cyberbullying that has already harmed a victim.

<sup>234</sup> See *supra* note 218.

<sup>235</sup> See *supra* text accompanying notes 127–30.

<sup>236</sup> VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

An equally effective option to incapacitate such behavior is to prohibit offenders from using the specific forms of Internet communication that most easily facilitate bullying, such as social networking sites and picture- or video-sharing websites. A court might bar the witness who failed to report from using specified websites as a condition of probation. Probation officers routinely ensure compliance with the prohibition on use of controlled substances by using random drug testing.<sup>237</sup> A similar model of random compliance checks could be used for a ban on social networking, for example by screening the banned websites for matching profiles or accessing the cyberbully's computer to screen the browsing history. Models for enforcing this type of condition can be drawn from other legal contexts: for example, a law banning the use of social media by jurors, punishable by criminal contempt, recently passed in California.<sup>238</sup> This punishment may be especially effective for young people because their real-life social identities are so intertwined with their virtual activity.<sup>239</sup>

The possibility that access to social technology could be removed or restricted also deters passivity by making the failure to report far less attractive than reporting.<sup>240</sup> The value of a deterrent, however, relies to a greater extent on the certainty of punishment than the severity of punishment.<sup>241</sup> Bad Samaritan statutes therefore might have little deterrent value because in the past they have been only selectively enforced, with rare prosecutions and even rarer convictions.<sup>242</sup> Prosecutors are better able to identify witnesses to cyberbullying through their digital footprints,<sup>243</sup> however, which creates a greater likelihood that any individual offender will be prosecuted. As with Bad Samaritan laws that operate in physical, as opposed to digital, space, prosecutors might lack the resources to prosecute every witness that fails to report. But the statute provides a tool for prosecutors when they determine that pursuing a particular witness is an effective use of resources, such as when the victim of cyberbullying is seriously harmed or killed. When such prosecutions are highly publicized, even if rare, they may operate to make the consequences of failing to report cyberbullying more salient.

The other traditional punitive measure for violation of Bad Samaritan laws, a modest fine, is more appropriate to the cyberbullying context. Since the Bad Samaritan can report to the authorities with no or very insignificant

---

<sup>237</sup> See 18 U.S.C. § 3563(a)(5) (2006).

<sup>238</sup> Dyanna Quizon, *Jury Duty in California? No Social Media Tools for You!*, L.A. CRIM. L. BLOG (Aug. 10, 2011, 12:02 PM), <http://losangelescriminallegalblog.com/2011/08/doing-jury-duty-in-california-no-social-media-tools-for-you.html>.

<sup>239</sup> See *supra* Part I.C.

<sup>240</sup> See Davis, *supra* note 137, at 96.

<sup>241</sup> See WRIGHT, *supra* note 236, at 4–5.

<sup>242</sup> See Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971, 985 (2000).

<sup>243</sup> See *infra* text accompanying note 260.

cost, there need not be a large fine to punish inaction.<sup>244</sup> Even a modest fine is likely to be significant to a teenager or young adult without a source of significant income. In addition, the fines may be used to fund rehabilitative programs that educate young people in appropriate pro-social interactions intended to protect the rights and welfare of other people. Many individuals who fail to report cyberbullying might benefit from educational programming that teaches them to become active defenders rather than joining in or passively observing bullying.<sup>245</sup> Assertiveness training might help these young people to resist peer pressure and increase their belief in their own self-efficacy,<sup>246</sup> and such programs would be an effective form of rehabilitative punishment for witnesses who fail to report. Alternatively, fines might be used to fund peer helpers who act as a resource for victims.<sup>247</sup> A combination of modest fines, educational programs, and removal from cyberspaces where bullying occurs<sup>248</sup> are appropriate punishments to deter, incapacitate, and reform the passive bystanders of cyberbullying.

Enforcement of Bad Samaritan statutes has been traditionally problematic, both because of the large number of potential offenders and because of the difficulty in interpreting a potentially threatening situation. For traditional Bad Samaritan behavior, it would be impossible to determine culpability among a group of witnesses and unfair to punish the entire group when there might be good reasons not to act.<sup>249</sup> One reason that individuals in crowds fail to act is the bystander effect, where the presence of other bystanders reduces each witness's sense of responsibility and motivation to help.<sup>250</sup> Each of the multiple bystanders interprets the inaction of the others as an indication that there is nothing to be done, resulting in "pluralistic ignorance."<sup>251</sup> The purpose of the Bad Samaritan statute is to deter pluralistic ignorance and encourage action from all bystanders.<sup>252</sup> Bad Samaritan statutes that excuse liability when there is a

---

<sup>244</sup> See Davis, *supra* note 137, at 97.

<sup>245</sup> Gini et al., *supra* note 19, at 102.

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> These punishments may be used in different combinations, depending upon the witness's activity and the severity of the cyberbullying. For example, a witness who affirmatively "likes" bullying content might be more harshly punished than one who observes cyberbullying without expressing any support for the bully. Likewise, a witness who fails to report very vicious bullying, such as death threats, might be more severely punished than a witness of less hurtful bullying.

<sup>249</sup> Levy, *supra* note 166, at 615.

<sup>250</sup> Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 16 (1993).

<sup>251</sup> *Id.*

<sup>252</sup> Deterrence rests on the twin pillars of certainty and severity; increasing either heightens the deterrent effect, but certainty of punishment appears to be more effective in deterring behavior. See KADISH ET AL., *supra* note 160, at 95. Although enforcement of Bad Samaritan laws has been

possibility of aid by another person only exacerbate the bystander effect, encouraging individuals to shift responsibility to others.<sup>253</sup>

Another enforcement problem arises in traditional Bad Samaritan law contexts because of the inability to identify witnesses. After a crime has been committed, there is often no record of who was present to witness the crime. Law enforcement is better able to identify witnesses to cyberbullying than witnesses of traditional crime, however, because Internet users leave a digital footprint of their activity. While devoting sufficient resources to the prosecution of Bad Cyber-Samaritans would be challenging, prosecutors are able to identify witnesses to cyberbullying and hold them accountable.

The ambiguity of many dangerous situations creates another potential barrier to enforcement of affirmative duties. It will often not be apparent to a bystander whether the electronic communication is truly abusive or threatening, or whether it presents a risk of bodily harm to the victim. If the witness is reasonably mistaken about how serious the cyberbullying is, officials cannot enforce the Bad Samaritan law against that witness.<sup>254</sup> By specifically enumerating the situations that require reporting, however, the proposed Cyber-Samaritan's Duty removes much potential ambiguity. Any electronic communication that threatens violence creates an obligation to report, whether or not such communication was made in jest or with a serious intent to harm another.<sup>255</sup>

The number of individuals who violate the proposed statute by witnessing cyberbullying and failing to report is potentially vast, which makes consistent prosecution of the offense difficult.<sup>256</sup> The problems in enforcing the statute, however, are not sufficient justification for refusing to adopt the law in the first place. Although the deterrent value of a criminal law decreases when it is inconsistently enforced, the normative value remains. A criminal law is a normative statement of a community's

---

traditionally inconsistent, this Note argues that Bad Samaritans will be less able to escape detection in cyberspace than in the real world, leading to greater certainty of punishment.

<sup>253</sup> See, e.g., VT. STAT. ANN. tit. 12, § 519(a) (2002).

<sup>254</sup> See Eugene Volokh, *Duty to Rescue/Report Statutes*, VOLOKH CONSPIRACY (Nov. 3, 2009, 12:24 AM), <http://volokh.com/2009/11/03/duty-to-rescuereport-statutes/>.

<sup>255</sup> Because cyberspace is devoid of normal social cues, a communication intended as a joke may nonetheless be reasonably interpreted as a real threat of harm by both victims and bystanders. Although punishing a threat that was intended as a joke might be extreme in some circumstances, the consequences of threatening communications in an environment that eliminates context are equally severe. The proposed statute does excuse a bystander from reporting, however, if the bystander does not "reasonably believe" that the communication threatens the victim. This provision excuses a nonreporter with personal knowledge that the communication was not intended or received as a threat.

<sup>256</sup> See WRIGHTSMAN, *supra* note 154.

shared values, and the law communicates the community's definitive rejection of cyberbullying.<sup>257</sup>

#### IV. THE NEW AGE OF CYBER-SAMARITANS

##### A. *Breaking the Code of Silence*

The Cyber-Samaritan's Duty will reform the normative standards that promote silence in reaction to cyberbullying among young people. The duty attempts to prompt assistance from what Professor Volokh terms the "Legally Swayable Samaritan"—the person who would not assist a stranger in peril without a law but would be swayed to act by the law's effect in coercing or normatively encouraging compliance.<sup>258</sup> Although Volokh argues that few people will be legally swayable by the imposition of a legal duty to act, his argument rests on the ability of bystanders to escape identification as a witness if they simply remain silent.<sup>259</sup> The coercive effect of an affirmative legal duty is much stronger in cyberspace, however, because witnesses to a crime—including the covered cyberbullying communications—leave a virtual record of their presence that is traceable through their IP addresses.<sup>260</sup> The application of criminal liability to those who fail to report cyberbullying should increase the level of reporting and direct the attention of law enforcement to the most serious threats.<sup>261</sup>

The proposed Cyber-Samaritan's Duty would effectively break the code of silence and encourage reporting in the most harmful cases of cyberbullying by providing a clear normative standard and a means of fulfilling that standard. Rules of law that parallel moral duties function to educate citizens and guide behavior.<sup>262</sup> Indeed, empirical research indicates that people in jurisdictions where duties to rescue are legally required are more likely to regard such duties as morally required.<sup>263</sup> Well-publicized Bad Samaritan laws will promote action from those who would usually passively stand by while another is in danger.<sup>264</sup> The clear normative

---

<sup>257</sup> See *supra* text accompanying notes 185–86. The normative statement inherent in criminal law justifies the imposition of criminal liability for the failure to report, as opposed to civil liability owed directly to the victim. Criminal liability creates a clearer statement that witnessing cyberbullying without providing assistance is a public wrong.

<sup>258</sup> See Volokh, *supra* note 230.

<sup>259</sup> See *id.*

<sup>260</sup> For a simple explanation of how individual Internet activity may be tracked, see *Do Websites Track and Record IP Addresses?*, WISEGEEK, <http://www.wisegeek.com/do-websites-track-and-record-ip-addresses.htm> (last visited Feb. 24, 2013).

<sup>261</sup> *Contra* Volokh, *supra* note 230, at 107–08 (arguing that individuals who fail to immediately report abuse might be deterred from offering assistance after an opportunity for reflection because the failure to report earlier created legal guilt).

<sup>262</sup> See Honoré, *supra* note 172, at 240.

<sup>263</sup> See D'Amato, *supra* note 151, at 809.

<sup>264</sup> See Levy, *supra* note 166, at 627.

statement of the proposed statute gives young people direction as to what they can do to help the situation. It is important that the statute provide specific direction because many young people fail to act to assist victims of bullying because they do not know what they can do to help.<sup>265</sup>

Encouraging reporting from children is the most direct way to increase reporting of cyberbullying,<sup>266</sup> allowing law enforcement to become involved before serious physical harm occurs. In addition, demonstrations of condemnation by peers deter a bully from continuing her abuse. One empirical study found that when bystanders intervened in support of victims, bullying stopped quickly, which indicates that “increasing bystanders’ socially responsible behavior, and the skills and beliefs that support its execution, may help reduce . . . bullying.”<sup>267</sup> An avenue for reporting cyberbullying to law enforcement provides another opportunity for witnesses to support the victim, in addition to directly confronting the bully.

### *B. Reporting in Practice*

The imposition of the Cyber-Samaritan’s Duty requires a corresponding response from law enforcement authorities to whom young people report cyberbullying. The inconsistent response of law enforcement to reports of crimes plagues the effectiveness of affirmative duties to report. Many people refuse to assist victims of crime out of fear of retribution; if reporting is to be a viable alternative for these individuals, they must believe that police will respect their anonymity.<sup>268</sup> In addition, individuals must feel that police will take them seriously and respond to their reports.<sup>269</sup> This lack of serious response from police is an especially sensitive problem for reports of cyberbullying, as many students already experience inappropriate or no reactions from parents and educators, and may be deterred from reporting if there is no response.<sup>270</sup>

The social networking sites and other websites that provide the venue for cyberbullying and other abusive electronic behaviors might also contribute to the ability of young people to express disapproval of and report cyberbullying. Some websites have created a mechanism for

---

<sup>265</sup> See Coloroso, *supra* note 29.

<sup>266</sup> For the argument that the emphasis on reporting bullying to adults damages the development of problem-solving skills in children, see GULDBERG, *supra* note 46, at 93. She argues that adult involvement in children’s conflicts blows such playground disputes out of proportion and undermines their development of coping responses. *See id.* at 99. The violent threats and potential for serious harm to young people described in the proposed statute, however, are far more serious than the playground disputes Guldberg discusses and warrant adult intervention.

<sup>267</sup> Frey et al., *supra* note 19, at 480.

<sup>268</sup> See Gregory, *supra* note 159, at 35.

<sup>269</sup> *See id.*

<sup>270</sup> *See supra* text accompanying notes 80–81.

community moderation, such as flagging, whereby community members can identify particular communications as abusive or offensive.<sup>271</sup> Alternatively, websites promote private requests to remove offensive material by linking a complaint form directly to individual pieces of content, such as text or pictures.<sup>272</sup> Still other websites include a function allowing users to report abusive content directly to the site operators.<sup>273</sup> Reporting to site operators does not fulfill the Cyber-Samaritan's Duty, as this limited reporting does not notify law enforcement or public officials. However, in the future law enforcement authorities might collaborate with social networking sites to facilitate reporting directly to the authorities. This collaboration would streamline the reporting process and make it easier for young people to break the code of silence. These and other emerging technologies facilitate peer expressions of disapproval that deter future bullying. They also encourage teens to report serious cyberbullying to law enforcement who can step in before prolonged abuse results in physical harm.

#### CONCLUSION

Bullying, and more recently cyberbullying, plagues young people at school and home and creates a hostile and threatening environment. Bullying takes place within a complex group dynamic where bystanders to the bullying, through their silence, contribute to the power of the bully and the victimization of the target. Bad Samaritan laws, though traditionally resisted in common law jurisdictions, have gained traction in many American states. They provide the solution to promote action by the not entirely innocent bystanders of cyberbullying. As with all laws, devoting sufficient resources to effectively enforce the law remains problematic. But by requiring bystanders to report to law enforcement in circumstances that present a risk of physical harm to the victim, a Cyber-Samaritan's Duty breaks the code of silence that protects bullies and entraps victims. The Duty expresses a new normative code for cyberspace that does not tolerate harassment and abuse.

---

<sup>271</sup> See *supra* note 224.

<sup>272</sup> In the last year, Facebook has redesigned its privacy settings to allow users greater control over the content on their personal pages. Sarah Downey, *5 New Facebook Photo Changes You Need to Make to Protect Your Privacy*, ABINE: ONLINE PRIVACY BLOG (Sept. 15, 2011), <http://www.abine.com/wordpress/2011/5-new-facebook-photo-changes-you-need-to-make-to-protect-your-privacy/>. One new feature allows users to directly contact a person who posted a photo in order to ask the person to take the photo off the site. *Id.*

<sup>273</sup> *Id.* But reporting to site operators without more does not fulfill a Cyber-Samaritan's duty to report.