

December 2002

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Repository Citation

Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 Wm. & Mary Bill Rts. J. 3 (2002), <https://scholarship.law.wm.edu/wmborj/vol11/iss1/3>

THE WHITE-COLLAR POLICE FORCE: "DUTY TO REPORT" STATUTES IN CRIMINAL LAW THEORY

Sandra Guerra Thompson*

INTRODUCTION

The recent scandal within the American Catholic Church caused the Massachusetts legislature to rush to consider amending the child abuse reporting law in that state to include members of the clergy as "mandatory reporters" who must report to the police any suspicions of child sexual abuse committed by any person.¹ The Connecticut legislature — which has included members of the clergy as mandatory reporters in their child sexual abuse reporting law for many years — is now considering removing the exception for statements made during confessions, angering Catholics in the state.² These latest reactions to the child abuse scandals in the Catholic Church highlight the tendency legislators have shown to respond to such crises by requiring people in certain professions to report suspicions of criminality to the police. They have made the failure to report criminally punishable and, in some instances, allow for civil liability as well. Besides members of the clergy, other professionals such as educators, physicians, nurses, optometrists, physical therapists, psychotherapists, and sometimes attorneys are required to report their suspicions of child abuse.³

Child abuse, however, is only one example of the many reporting laws that exist throughout our penal codes. At both the federal and state levels, numerous laws require individuals to report suspicions of other types of criminal conduct, such as elder abuse, violent crimes including domestic violence, environmental offenses, and financial crimes.⁴ Reporting duties are imposed on people in many different types of professions, depending on the type of offense.

In the financial industry, reporting duties were created primarily to deter money laundering, but they require the reporting of any type of other financial offense as

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¹ See Michael Paulson, 'Confession' in Sex Abuse Case A Bind For Clergy, BOSTON GLOBE, Aug. 30, 2001, at A1; Michael Paulson, Sex Abuse Reporting Measure Hits Snag, BOSTON GLOBE, Mar. 7, 2002, at A1 (House and Senate leaders in Massachusetts agree reporting measure must exempt disclosures made during confessions).

² See Carrie Budoff & Lisa Chedekel, Abuse Measure Angers Catholics: Priests Would Be Forced To Reveal Confessions, HARTFORD COURANT, May 8, 2002, at B1.

³ See *infra* notes 50–56 and accompanying text.

⁴ See *infra* notes 81–123, 124–66, 167–81 and accompanying text.

well.⁵ In response to the attacks of September 11th, Congress has enacted new provisions in the USA PATRIOT Act that will increase the level of regulation of the financial industry.⁶ Whereas banks have had reporting duties for many years, the USA PATRIOT Act adds many other types of "so-called 'financial institutions'" to the list of regulated entities.⁷ The list now includes businesses dealing with financial transactions, such as money transmitters, check-cashing companies, credit-card companies, and issuers of travelers' checks and money orders.⁸ However, the list of "financial institutions" also includes many other ordinary businesses that sell goods to consumers, such as jewelers and automobile dealers.⁹ The regulations are intended to require businesses to assist in the detection of terrorists who may transact business in the United States. Businesses are required to keep various types of records and to report suspicious activities to the federal agency responsible for

⁵ See *infra* notes 169–83 and accompanying text.

⁶ The Act is entitled the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA PATRIOT Act of 2001), Pub. L. No. 107-56, 115 Stat. 26 (2001).

Also, in response to the tragedy of September 11th, the Justice Department is touting the creation of a new security program named Terrorism Information and Prevention System (TIPS). TIPS would establish a "workers corps" of utilities workers, truck drivers, port workers, meter readers, bus drivers, telephone repair persons, and many others who would be encouraged to report any suspicious activities they detect to the Justice Department. Adam Clymer, *Worker Corps to Be Formed to Report Odd Activity*, N.Y. TIMES, Jul. 26, 2002, at A18. By means of this apparently voluntary program, the government would enlist "thousands, even millions, of civilians" who would report "'anomalies,' like a truck parked in a neighborhood doing surveillance work." *Id.* The plan has received criticism both from conservative Republicans and from organizations like the American Civil Liberties Union (ACLU). Majority leader Dick Armey and Congressman Bob Barr have led the attack by conservative Republicans. Congressman Barr dubbed the program a "'snitch system,' saying [that] '[a] formal program, organized, paid for and maintained by our own federal government to recruit Americans to spy on fellow Americans, smacks of the very type of fascist or Communist government we fought so hard to eradicate in other countries in decades past.'" *Id.* ACLU national director Laura W. Murphy also complained that "[t]his is a program where people's activities, statements, posters in their windows or on their walls, nationality, and religious practices will be reported by untrained individuals without any relationship to criminal activity." *Id.* Although the proposal would not create a legal duty to report suspicious activities, it is still noteworthy that the federal government would create a vast, volunteer corps of workers who would be enlisted to keep a watchful eye on others. See also David Crary, *Vigilance, Paranoia: A Fine Line; No Easy Answers for Terror Tipsters*, HOUSTON CHRON., Sept. 17, 2002, at 10A (both conservatives and liberals oppose operation TIPS).

⁷ Andres Rueda, *International Money Laundering Law Enforcement & the USA Patriot Act of 2001*, 10 MICH. ST. U.-DETROIT C.L. J. INT'L L. 141, 150 (2001).

⁸ See *id.*

⁹ *Id.*

tracking the financial dealings of criminal organizations.¹⁰

To protect the environment from catastrophic discharges of hazardous substances, federal and some state laws also impose reporting duties on people in charge of vessels or facilities should they detect a discharge of hazardous substances.¹¹ In the case of such discharges, the duty to report requires a person to contact the governmental agency responsible for responding to environmental spills. As is sometimes true in the banking context, the report to the government may expose the company that employs the reporter to civil liability for its role in causing the harm that is reported. Thus, the environmental reporting laws are really what one might call "self-reporting" laws.¹²

This Article examines several types of reporting duties affecting numerous types of professionals. The aim of the Article is to examine the trend to turn people of many professions (and, increasingly, *all* people who may come upon incriminating information) into a white-collar police force. The Article suggests that reporting requirements are quietly and incrementally reshaping American criminal law traditions. For example, the typical substantive criminal law course in law school teaches students that common law countries do not punish for the failure to be a "Good Samaritan," referring to the laws that punish the failure to rescue a person in need of immediate assistance when such aid can be provided without endangering the rescuer. Although the emotional appeal of creating a mandatory duty to rescue is strong, we have resisted it in the majority of states and at the federal level.¹³ It is still fair to say that in this country the act of omission in failing to come to the assistance of a person in need of rescue (from a violent attacker, for instance) is not considered a criminal act. What most criminal law courses fail to recognize, however, is that we have gradually increased the number of laws creating duties to assist the police (or, one might say, to assist the victim or society at large) by *reporting* situations in which a crime is being committed. These laws require reporting not only of crimes in progress, but also of past crimes. Appreciating the extent to which we require people to intervene in criminal matters by imposing legal duties to report their suspicions of criminal acts is an important change in our understanding of American criminal law theory.

It also is useful to consider the growing reliance on reporting duties in the context of another aspect of criminal law theory — the "public welfare offense." While, on the one hand, we have shied away from Good Samaritan "duty to rescue" laws, we have, on the other hand, imposed many duties on people in regulated

¹⁰ *Id.* at 167–68. Businesses are required to report their clients' suspicious activities to the Financial Crimes Enforcement Network of the Department of the Treasury. *See infra* note 124 and accompanying text.

¹¹ *See infra* notes 171–73 and accompanying text.

¹² *See infra* notes 178–80 and accompanying text.

¹³ *See infra* notes 190–92 and accompanying text.

industries. To protect the public welfare, legislatures have provided criminal penalties for the failure to perform those duties.¹⁴ These statutes typically impose liability on a strict basis, without the need to prove a culpable intent by any particular corporate officer or employee.¹⁵ Liability also may be imposed vicariously on a corporate officer for the failings of an employee.¹⁶

Reporting duties, particularly when imposed on people in certain regulated industries, may be justified in the same way that we justify public welfare offenses. Reporting duties differ, however, in that the causation of harm is lacking.¹⁷ For example, when a drug company mislabels a drug that is put on the market for consumers to buy, we can justify imposing criminal penalties (perhaps even on the basis of strict and vicarious liability) because the company's error is the proximate cause of harm or danger to the public. If a drug company mislabels drugs, the omission can be said to have caused harm by endangering the public health. However, when a doctor fails to report suspicions of child abuse, it defies reason to say that the doctor proximately "caused" injury to the child.¹⁸

In environmental cases, the *failure to report* does not cause the harm — or even necessarily aggravate the harm — even if the person who fails to report is the same person who caused the discharge of hazardous substances. It is the act of discharging the dangerous substances, and perhaps the failure to clean it up properly, that causes the harm, not the failure to report. Nonetheless, most environmental reporting laws apply only to the actual polluters,¹⁹ so their causal connection to the harm seems clearly to justify the imposition of a reporting duty.

Legislatures are not likely to repeal laws requiring people within certain professions to assist the police or government agencies by reporting suspicions of criminality or dangerous conditions, even if presented with persuasive arguments in favor of their elimination. The politics of substantive criminal law tend to ensure a broadening of liability every time prosecutors and legislators seek to "do something" to appease a public enraged by a highly-publicized case.²⁰ Because the

¹⁴ See *infra* notes 199–210 and accompanying text.

¹⁵ *Id.*

¹⁶ See *infra* notes 207–08 and accompanying text.

¹⁷ The absence of any causal link to the harm is also one of the traditional arguments leveled against Good Samaritan laws. See *infra* notes 213–14 and accompanying text.

¹⁸ For a discussion of causation in reporting statutes, see *infra* notes 215–21 and accompanying text.

¹⁹ See *infra* notes 171–74 and accompanying text.

²⁰ See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (arguing that prosecutors and legislatures control the breadth of substantive criminal law and that institutional incentives push for ever-expansive criminal liability). In fact, the tendency to rely on the coercive nature of criminal law duties may be part of the overall broadening of substantive criminal law, a trend that marches on relentlessly despite scholars' insistence that the imposition of criminal sanctions should be circumscribed. For example, Congress has not heeded the ardent advice of scholars to stop federalizing

elimination of reporting laws is not a realistic goal (and in some cases may not be a wise goal), this Article has three more modest goals: (1) to raise awareness of the gradual transformation of our legal culture brought about by the increasing numbers of laws requiring professionals to report suspicions of criminality; (2) to place reporting laws in their proper context in criminal law theory; and (3) to provide some principled guidance in the way in which reporting duties are imposed. Of special concern in drafting reporting statutes is the fact that, in some areas of law, their primary use will be to create civil liability for non-reporters by creating a legal duty under criminal law. Non-reporters of child abuse, for example, are rarely prosecuted, but often are sued.²¹

This Article proposes a simple change in the way in which reporting laws are drafted that would ameliorate many of the shortcomings in the operation of reporting laws: requiring a higher standard of proof to trigger a reporting duty. Most reporting requirements currently are triggered by even slight evidence of possible criminality.²² Legislators, obviously enthusiastic to obtain as much information as possible by means of reports to the government, have set the standards extremely low in all areas covered by reporting duties. Numerous problems — traditionally associated with Good Samaritan laws and/or public welfare offenses that also apply to reporting laws²³ — are exacerbated by the low standard. In addition, since reporting laws abrogate many professional privileges and confidentiality rules, a low standard does the greatest damage to the previously protected nature of those relationships by maximizing the number of cases in which professionals must disclose their clients' or patients' information.

Part I of this Article examines four types of reporting requirements: child abuse reporting, elder abuse reporting, reporting by financial institutions, and reporting of hazardous waste discharges. The elements of each reporting offense are addressed, as well as the other policy issues relating to each category. Part I also reviews the extent to which reporters are shielded from civil liability for their acts of reporting and how reporting duties affect professional confidentiality and evidentiary privilege rules.

Part II of the Article examines the relationship of reporting laws within the context of two other areas of criminal law theory: Good Samaritan laws and public welfare offenses. This portion of the Article considers the theoretical issues that arise in each of those areas and demonstrates the way in which reporting statutes

traditionally state crimes. *Id.* at 508.

²¹ See *infra* note 64–68 and accompanying text.

²² See *infra* note 72 and accompanying text (child abuse); *infra* note 115 and accompanying text (elder abuse); *infra* note 130 and accompanying text (bank reporting); *infra* note 168 and accompanying text (environmental spills).

²³ See *infra* Part III at notes 210–327 and accompanying text (discussing problems of “line drawing,” moral culpability and infringing liberty).

find their place in substantive criminal law theory.

Part III of the Article considers three central issues that arise in relation to Good Samaritan and public welfare offenses: "line drawing" (referring to how clearly duties are defined), moral culpability, and liberty interests. Each issue is analyzed in relation to reporting statutes. In each case, the argument for imposing a reporting duty is strongest, as a matter of wise and just public policy, when the evidentiary standard that triggers the duty to report is set at a high level, such as "clear and unequivocal."

Part IV briefly examines the trade-off between obtaining important information through reporting statutes and the harm done to professional relationships when reporting statutes abrogate the privileges and confidentiality previously enjoyed. This portion of the Article shows that the harm done to professional relationships by imposing a duty to report can be minimized and that victims, as well as society as a whole, can best be served by raising the evidentiary trigger.

I. CONSCRIPTING POLICE INFORMANTS BY MEANS OF REPORTING DUTIES

The idea of requiring members of a community to participate in crime control dates back at least a thousand years. According to the tradition of the "frankpledge" in England, "each frankpledge group (originally one hundred households) was held responsible for making collective financial restitution for any property loss unless they came up with the perpetrators within a specified time."²⁴ According to Jonathan Simon, "[t]he system imposed on them a legal obligation to report offenses committed by other members of the group and to be financially obligated for any failure to produce the offender at presentment."²⁵

"English law recognized the crime of misprision that made it the duty of every citizen to disclose any treason or felony of which he had knowledge."²⁶ American federal law also includes the offense of misprision; however, it has been defined to require an affirmative act of concealment in addition to the failure to report the felony.²⁷ In addition, American law contains several other offenses criminalizing

²⁴ MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURE* 4 (Supp. 2001) (discussing the work of JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990*, at 18-20 (1993)).

²⁵ SIMON, *supra* note 24, at 18-20.

²⁶ Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 275 n.209 (1992) (quoting 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 388-89 (1927)).

²⁷ Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

the failure to assist the police, but these also require some form of active obstruction.²⁸ With the exception of a few states,²⁹ American law has not criminalized the mere failure to report a felony.

More recently, American legislatures gradually have threaded our criminal codes with laws requiring people to assist the police by disclosing their knowledge of certain crimes. The first generation of reporting laws typically applied only to people within certain professions in which they were likely to gain information regarding the type of offense the law sought to deter. For example, health professionals must report child or elder abuse as well as other types of incriminating

18 U.S.C. § 4 (2000); *see also* 18 U.S.C. § 792 (2000) (harboring or concealing persons); 18 U.S.C. § 1071 (2000) (concealing person from arrest); 18 U.S.C. § 1072 (2000) (concealing escaped prisoner); *United States v. Gravitt*, 590 F.2d 123, 125–26 (5th Cir. 1979) (detailing the elements for misprision); *United States v. Daddano*, 432 F.2d 1119, 1125 (7th Cir. 1970) (“[T]he offense of misprision . . . consists of an act of concealment in addition to failure to disclose.”).

²⁸ The failure of citizens to assist the police by reporting their suspicions of criminality should be contrasted with other offenses in which persons take affirmative action to hinder a police investigation. Federal criminal law punishes acts such as lying to the police during an investigation (misprision, false statement crimes, obstruction of justice), destroying documents (obstruction of criminal investigation), making a false report to the police, or giving advance notice of police presence to assist a felon’s getaway. *See, e.g.*, 18 U.S.C. § 1001 (2000) (criminalizing the act of making false statements to federal law enforcement officials); 18 U.S.C. § 1503 (2000) (criminalizing the influencing or injuring of an officer or juror); 18 U.S.C. § 1505 (2000) (criminalizing the obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1510 (2000) (criminalizing the obstruction of criminal investigations); 18 U.S.C. § 1511 (2000) (criminalizing the obstruction of state or local law enforcement in gambling cases). Many states also punish for misusing the emergency 9-1-1 telephone system. *See, e.g.*, ALA. CODE § 11-98-10 (2002); FLA. STAT. ANN. § 365.172 (West 2002); ME. REV. STAT. ANN. tit. 25, § 2931 (2002); MO. ANN. STAT. § 190.308 (West 2002); N.H. REV. STAT. ANN. § 106-H:15 (2002); N.C. GEN. STAT. § 62a-12 (West 2002). The question of moral culpability could not be clearer in cases in which people intentionally commit one of these offenses. These offenders are punished not simply for *failing* to assist the police, but for *erecting barriers* between the police and the suspected criminals, thereby causing the police to waste their resources.

²⁹ *See, e.g.*, OHIO REV. CODE ANN. § 2921.22 (West 2002) (“No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.”); S.D. CODIFIED LAWS § 22-11-12 (Michie 2002) (“Any person who, having knowledge, which is not privileged, of the commission of a felony, conceals the same, or does not immediately disclose such felony, with the name of the perpetrator thereof, and all the facts in relations thereto, to the proper authorities, shall be guilty of misprision of a felony.”); *see also* 720 ILL. COMP. STAT. ANN. 5/30-2 (West 2002) (“A person owing allegiance to this State commits misprision of treason when he conceals or withholds his knowledge that another has committed treason against this State.”); LA. REV. STAT. ANN. § 14:114 (West 2002) (“Misprision of treason is the concealment of treason, or the failure to disclose immediately all pertinent facts to proper authorities, by a person who has knowledge of the commission of the crime of treason.”).

information, such as gunshot wounds, serious burn injuries, and pregnant women who have abused alcohol or controlled substances.³⁰ Legislatures increasingly require health professionals to report suspicions of domestic violence.³¹

A variety of specialized reporting statutes that require the reporting of particular offenses exist in some states. For example, Illinois punishes the failure to report an offer to bribe the participants of a sporting event.³² Analogous to reporting statutes are those that require sex offenders to register their addresses with law enforcement each year or when moving into a particular jurisdiction.³³ Though they do not

³⁰ Numerous state laws require physicians to report gunshot wounds and even prenatal exposure to alcohol or drug abuse. *See, e.g.*, MINN. STAT. § 626.52 (2001) (stating that health professionals must report gunshot wounds, wounds by dangerous weapon or serious burn injuries); MINN. STAT. § 626.5561 (2001) (stating that health professionals must report pregnant woman who abuses controlled substances knowing she is pregnant); MINN. STAT. § 626.5563 (2001) (stating that health professionals must immediately report if pregnant woman has abused alcohol knowing she was pregnant); OHIO REV. CODE ANN. § 2921.22 (West 2002) (stating that health professionals must report gunshot and stab wounds).

³¹ Most of the laws apply more broadly to all injuries caused by violence, but were enacted with domestic violence victims and/or elderly victims in mind. *See, e.g.*, FLA. STAT. ANN. § 790.24 (West 2001) ("Any physician, nurse or employee thereof and any employee of a hospital, sanitarium, clinic, or nursing home knowingly treating any person suffering from a gunshot wound or other life-threatening wound indicating an act of violence . . . shall report the same immediately to the sheriff's department."); N.M. STAT. ANN. §§ 27-7-30 to 27-7-31 (Michie 2002) (requiring anyone who has reasonable cause to believe that an adult has been abused to report this knowledge or be guilty of a misdemeanor). For a comprehensive review of the reporting laws as applied to domestic violence, see James T.R. Jones, *Battered Spouses' Damage Actions Against Non-Reporting Physicians*, 45 DEPAUL L. REV. 191 (1996) (arguing in favor of imposing civil liability on non-reporting physicians as a means of deterring domestic violence). Some commentators oppose the new reporting requirements. *See, e.g.*, Mia M. McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1 (1999) (arguing that mandatory reporting may be contrary to the wishes of the patient and may endanger her safety); Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence Injuries*, FLA. B.J., Jan. 2000, at 78 (reasoning that victims may avoid seeking medical care or abusers will prevent victims from getting medical help if reporting is required). New York's State Commission on Domestic Violence Fatalities endorsed a limited reporting requirement for cases involving life-threatening or serious physical injury. *See* COMM'N ON DOMESTIC VIOLENCE FATALITIES, THE ROLE OF THE MEDICAL PROFESSION IN DOMESTIC VIOLENCE (1997); *see also* Jennifer Brown-Cranstoun, *Kringen v. Boslouth and Saint Vincent Hospital: A New Trend for Healthcare Professionals Who Treat Victims of Domestic Violence?*, 33 J. HEALTH L. 629 (2000) (arguing generally in favor of new guidelines, protocols, and laws aimed at identifying and treating victims of domestic violence).

³² *See* 720 ILL. COMP. STAT. ANN. 5/29-1 (West 2002).

³³ *See, e.g.*, *People v. Martinez*, No. BA160923, 2001 Cal. App. Unpub. LEXIS 1956 (Cal. Ct. App. Nov. 5, 2001) (involving a convicted sex offender who failed to register with chief of police within fourteen days of coming into Los Angeles County as required by

involve reporting suspicions of criminality, such laws require prior sex offenders to report themselves to law enforcement as potential dangers, i.e., the presence of a possibly dangerous person in the jurisdiction.

In most cases, the reporting statutes designate certain categories of professionals as mandatory reporters. Others include a "catch-all" provision that extends reporting duties to "any other person" who may receive incriminating information.³⁴ Thus, the reach of the duty to report is not always limited to people in professions likely to receive the information, but extends in some cases to anyone who happens to obtain information. Once enacted, statutes without catch-all provisions also tend to expand in scope by the addition of new categories of mandatory reporters.³⁵

The most recent reporting statutes apply to all *eyewitnesses* who might be in a position to aid a crime victim *during or immediately after* the commission of the offense, thus creating a variant of a true "duty to rescue" statute. In response to the brutal rape and murder of seven-year old Sherrice Iverson in which a witness neither came to her aid nor called the police, California and Nevada both adopted legislation requiring witnesses to report crimes against children.³⁶ Congress considered a bill to enact a reporting requirement for individuals who witness acts of sexual abuse against a minor.³⁷ Massachusetts, Rhode Island, and Pennsylvania

section 288 of California Penal Code); *People v. Ramirez*, No. F034944, 2001 Cal. App. Unpub. LEXIS 1589 (Cal. Ct. App. Nov. 15, 2001) (same). There is some indication that these laws may not be working as a matter of keeping track of convicted sex offenders. See Kim Curtis, *Sex Offenders Failing to Register: Survey Says States Can't Account for Many Missing from Database*, HOUSTON CHRON., Feb. 7, 2003, at 23A.

³⁴ Such is the case with some child abuse reporting laws. See Mosteller, *supra* note 26, at 217 (listing Texas, Rhode Island, Wyoming, Florida, Tennessee, Utah, Delaware, and New Hampshire as states that have varying catch-all provisions that impose the duty to report child abuse on "any person," "any other person," or "any person, including but not limited to [certain categories of reporters]").

³⁵ See *id.* at 212; see also *infra* notes 124–67 and accompanying text (addressing the expansion of mandatory reporters under financial reporting laws).

³⁶ See The Sherrice Iverson Child Victim Protection Act, CAL. PENAL CODE ANN. § 152.3 (West 2002); NEV. REV. STAT. ANN. 202.882 (Michie 2001); see also Angela Hayden, *Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws Good Ideas?*, 6 NEW ENG. INT'L & COMP. L. ANN. 27, 41 (2000); Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required To Call For Help*, 33 IND. L. REV. 571 (2000); Jessica R. Givelber, Note, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169 (1999); Justin T. King, Comment, *"Am I My Brother's Keeper?" Sherrice's Law: A Balance of American Notions of Duty and Liberty*, 52 OKLA. L. REV. 613, 614 (1999).

³⁷ See King, *supra* note 36, at 614. As of the writing of this Article in 2002, Congress has not taken any major action regarding this bill since its referrals to Senate and House to committees in 1998. See S. 2452, 105th Cong. (1998); H.R. 4531, 105th Cong. (1998).

have had such laws since the early 1980s, adopted in response to a highly-publicized gang rape of a woman in a barroom in which none of the on-lookers notified the police or came to her aid.³⁸ Other states have adopted similar statutes that apply either exclusively to crimes involving assaults on children or more broadly to all violent offenses.³⁹

In the financial industry, federal regulations require banks and other financial institutions to keep records and make inquiries about their clients' businesses and to report suspicions of money laundering — or any other federal offense — to the appropriate authorities. Thus, Congress has created an *investigative* duty for financial institutions, in addition to the *reporting* duty. Not only does the law require the reporting of suspicious activity that happens to come to the bank's attention, but it also requires the financial institution to gather and maintain certain information about the people who do business with the institution.⁴⁰

Of the currently existing reporting statutes, the most broadly-applied types of reporting laws enacted to date can be categorized into two groups: (1) those protecting helpless victims; and (2) those aimed at preventing widespread or systemic harms. Section A examines two types of reporting statutes within the first category of protecting helpless victims: child abuse reporting and elder abuse reporting. Section B addresses two types of reporting laws in the second category of preventing widespread or systemic harms: the suspicious activity reporting laws imposed on financial institutions and laws requiring the reporting of hazardous waste spills.

A. Protecting Helpless Victims

The first category of reporting statutes concerns victims who might be considered "helpless" in the sense that they are not capable of protecting themselves from further harm either by escaping from their assailants or by seeking the protection of law enforcement. Children and the elderly, considered to be physically weaker and dependent on others, have been singled out for the special protection of statutes requiring persons in positions to detect abuse and to report it to the proper government agencies.⁴¹

³⁸ See MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2002); see also Bagby, *supra* note 36, at 571–74 (discussing Massachusetts case and statutes requiring eyewitnesses to report crimes or requiring witnesses to rescue).

³⁹ See Bagby, *supra* note 36, at 574 (describing state statutes and pending legislation).

⁴⁰ See *infra* notes 145–56 and accompanying text.

⁴¹ The vulnerability of elderly persons has been the subject of some debate. As one writer noted:

Many elders, particularly those over seventy-five, experience increased frailty, primarily in their declining ability to carry out routine activities. Impaired hearing or vision, slowed motor and mental response, decreased coordination,

1. Child Abuse Reporting Statutes

The enactment of child abuse reporting laws followed quickly on the heels of this country's awareness of the problem. Although child abuse in this country dates back to the late 1600s and concerns about child protection grew throughout the 19th century,⁴² it was not until the early 1960s that the problem garnered widespread public attention.⁴³ By 1967, legislatures in all fifty states, the District of Columbia and the Virgin Islands had seized upon reporting statutes as a way of protecting children against child abuse.⁴⁴ Then in 1974, Congress sought to bring additional

and many other physical and mental impairments — and the anxiety they cause — make elders vulnerable to abuse and can affect the nature and effects of abuse when it occurs.

Robert A. Polisky, Note, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377, 379–80 (1995) (footnotes omitted). On the other hand, critics of mandatory reporting laws that do not require a finding of lack of competence on the part of the elder violate the elder's right to self-determination and to reflect an ageist response to this social problem. See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect — The Legal Framework*, 31 CONN. L. REV. 77, 108–13 (1998) (addressing the arguments made by proponents and critics of mandatory reporting of elder abuse and neglect). Similar arguments have been expressed with respect to domestic violence reporting laws. See, e.g., McFarlane, *supra* note 31, at 25–29.

⁴² Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 189 (1998).

⁴³ Writers on the subject credit the publication of Dr. C. Henry Kempe's article — *The Battered Child Syndrome* — as the event that brought child abuse into the public spotlight. See C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962); see also Steven J. Singley, Comment, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. JUV. L. 236, 238–40 (1998) (addressing the historical background of child reporting statutes); Trost, *supra* note 42, at 189–95 (same).

⁴⁴ Today all U.S. territories have laws making it a crime for persons within certain professions to fail to report suspected child abuse. The following are the statutes now in effect in the states and territories: ALA. CODE § 26-14-3 (2000); ALASKA STAT. § 47.17.020 (Michie 2000); ARIZ. REV. STAT. ANN. § 13-3620 (West 2002); ARK. CODE ANN. § 12-12-507 (Michie 2001); CAL. PENAL CODE § 11166 (West 2002); COLO. REV. STAT. ANN. § 19-3-304 (West 2001); CONN. GEN. STAT. ANN. § 17a-101 (West 2002); DEL. CODE ANN. tit. 16, § 903 (2000); D.C. CODE ANN. § 2-1352 (1996); FLA. STAT. ch. 415.504 (1997); GA. CODE ANN. § 19-7-5 (1999); HAW. REV. STAT. § 350-1.1 (2001); IDAHO CODE § 16-1619 (Michie 2001); 325 ILL. COMP. STAT. 5/4 (WEST 2001); IND. CODE ANN. § 31-33-5-1 (West 2002); IOWA CODE ANN. § 232.69 (West 2002) (amended by 2002 Iowa Legis. Serv. 2394 (West)); KAN. STAT. ANN. § 38-1522 (2000); KY. REV. STAT. ANN. § 620.030 (Michie 1999); LA. REV. STAT. ANN. § 14:403 (West 2002); ME. REV. STAT. ANN. tit. 22, § 4011-A (West 2001); MD. CODE ANN., FAM. LAW § 5-704 (2002); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2002); MICH. COMP. LAWS ANN. § 722.623 (West 2002); MINN. STAT. ANN. § 626.556 (West 2002); MISS. CODE ANN. § 43-21-353 (2001); MO. ANN. STAT. § 210.115 (West 2002); MONT. CODE ANN. § 41-3-201 (2001); NEB. REV. STAT. § 28-711 (2001); NEV. REV. STAT. ANN. 432B.220 (Michie 2002); N.H. REV. STAT. ANN. § 169-C:29 (2001); N.J. STAT. ANN.

attention and funding to the problem of child abuse through the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).⁴⁵ CAPTA aimed to assist the states in implementing programs to address a continued problem of under-reporting and to ensure that states created programs for proper intervention and treatment.⁴⁶ Federal grants were available to states only if they enacted reporting laws and demonstrated that a number of necessary procedures and programs were put into place.⁴⁷ In addition, federal authorities created a reporting statute applicable to potential reporters on federal land or in a federally operated or contracted facility.⁴⁸ Thus, by the mid-1970s, every state, U.S. territory, and the federal government had adopted reporting statutes and other programs to encourage people in a position to assist the helpless victims of child abuse by reporting their suspicions to the police.

Generally, child abuse reporting statutes have similar elements: "(1) purpose of the statute; (2) definitions; (3) professionals required to report; (4) standard of certainty reporters must attain; (5) penalties for failure to report; (6) immunity for good faith reports; (7) abrogation of certain communication privileges; and (8) reporting procedures."⁴⁹ Nonetheless, most state statutes include slightly different provisions.

For example, the categories of persons who qualify as "mandatory reporters" differ from one state to another.⁵⁰ Robert Mosteller pointed out that the categories of professionals subject to reporting requirements expanded quickly from the initial

§ 9:6-8.10 (West 2002); N.M. STAT. ANN. § 32A-4-3 (Michie 2002); N.Y. SOC. SERV. LAW § 413 (Consol. 2002); N.C. GEN. STAT. § 7A-543 (1993) (repealed by S.L. 1998-202, § 5, eff. July 1, 1999); N.D. CENT. CODE § 50-25.1-03 (1999); OHIO REV. CODE ANN. § 2151.421 (West 2002); OKLA. STAT. ANN. tit. 10, § 7103 (West 2002); OR. REV. STAT. § 419B.010 (1995); 23 PA. CONS. STAT. ANN. § 6311 (West 2001); 8 P.R. LAWS ANN., § 406 (1996); R.I. GEN. LAWS § 40-11-3 (2001); S.C. CODE ANN. § 20-7-510 (Law. Co-op. 2002); S.D. CODIFIED LAWS § 26-8A-3 (Michie 2001); TENN. CODE ANN. § 37-1-403 (2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2002); UTAH CODE ANN. § 62A-4a-403 (2000); VT. STAT. ANN. tit. 33, § 4913 (2001); 5 V.I. CODE ANN. § 2533 (2001); VA. CODE ANN. § 63.1-248.3 (Michie 2002); WASH. REV. CODE ANN. § 26.44.030 (West 2002); W. VA. CODE § 49-6A-2 (2001); WIS. STAT. § 48.981 (2) (1997) (amended by 2001-2002 Wis. Legis. Serv. Act 59 (West) and 2001-2002 Wis. Legis. Serv. Act 69 (West)); WYO. STAT. ANN. § 14-3-205 (Michie 2001).

⁴⁵ Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5106 (1994)).

⁴⁶ See generally Trost, *supra* note 42, at 192-93 (discussing the federal statutes' influence on state reporting statutes).

⁴⁷ See Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4th 782, § 2(a) (1989).

⁴⁸ See 42 U.S.C. § 13,031 (2000).

⁴⁹ Singley, *supra* note 43, at 239.

⁵⁰ See Mosteller, *supra* note 26, at 212-13.

statutes limited to physicians and medical personnel.⁵¹ He explained that the statutes follow two basic patterns. One type of statute lists the types of professionals required to report, such as many medical professionals, including such groups as dentists, optometrists, and physical therapists, as well as education professionals and law enforcement personnel.⁵² Mental health professionals, including psychotherapists and social workers, also are typically included as mandatory reporters.⁵³ Other professionals, such as members of the clergy⁵⁴ and attorneys,⁵⁵ often are included as mandatory reporters due to the role they may play in counseling either the abused child or the abuser. The federal statute also includes foster parents and commercial film and photo processors as mandatory reporters.⁵⁶

The second type of statute uses a catch-all provision that extends the duty to "any person" or "any other person" in addition to the list of specified reporters.⁵⁷ Texas prosecutors recently have begun using such a statute in child abuse cases in which an adult knew of the abuse but failed to report it.⁵⁸ In one case, a mother whose two daughters were molested by a man was convicted because she waited two months after learning of the offenses to inform authorities and did so only after the police contacted her with regard to other, unrelated offenses.⁵⁹ Another woman was convicted for failing to report that her husband had molested one of her daughters, despite the fact that he had threatened to kill her if she told anyone of the abusive activities.⁶⁰ In another case, a woman and her husband had obtained custody of the husband's young daughter from another relationship.⁶¹ The woman later was convicted of five counts of failing to report that the child had suffered

⁵¹ *Id.* at 212.

⁵² *Id.* at 212-13. Some state laws require individual police officers or other law enforcement personnel, as well as judges and prosecuting attorneys, to file official reports when they receive information of possible child abuse. Thus the laws remove the discretion of these officials not to file reports. *See, e.g.*, ARK. CODE ANN. § 12-12-507 (2002). Law enforcement personnel are also made mandatory reporters under elder abuse reporting laws. *See, e.g., infra* note 85 (quoting Nevada's elder abuse reporting statute).

⁵³ *Id.*

⁵⁴ *See* J. Michael Keel, Comment, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 687 (1998) (addressing exceptions to many reporting statutes for statements made during confessions or for all statements covered by the priest-penitent privilege).

⁵⁵ Mosteller, *supra* note 26, at 217 (listing 22 states that designate attorneys as mandatory reporters).

⁵⁶ 42 U.S.C. § 13,031(b)(7)-(8) (2000).

⁵⁷ Mosteller, *supra* note 26, at 213.

⁵⁸ TEX. FAM. CODE ANN. § 34.07 (Vernon 1986 & Supp. 1992).

⁵⁹ *State v. Harrod*, No. 05-01-01748-CR, 2002 WL 1470322 (Tex. Crim. App. July 10, 2002).

⁶⁰ *Monroe v. State*, No. 07-00-0523-CR, 2002 WL 15547 (Tex. Crim. App. Jan. 4, 2002) (unpublished).

⁶¹ *White v. State*, 50 S.W.3d 31 (Tex. Crim. App. 2001).

severe bruising, most likely caused by her husband, although some evidence suggests that she also abused the child.⁶² In a fourth case, Texas prosecutors filed charges against two non-English speaking, recent immigrants who were living with a woman who was seriously abusing her five-year-old son.⁶³

The Texas cases are unusual in that prosecutors in most states do not invoke their reporting laws against non-reporters, especially not non-reporters who are not professionals within certain categories of mandatory reporters.⁶⁴ Rather, most of the case law involves civil suits brought by victims against health professionals or educators who fail to report.⁶⁵ Many states — but not all — have held that the statutorily created duty to report, enacted as a criminal provision, gives rise to a private cause of action for a negligent tort.⁶⁶ Some of those states require plaintiffs to show that the child sustained injury as a proximate cause of the reporter's failure to report.⁶⁷

Though there are many differences between child abuse reporting statutes, it is fair to say that most of the statutes require some level of "reasonable suspicion," often phrased as "reasonable cause," to trigger the duty to report.⁶⁸ Most statutes

⁶² See *id.* Interestingly, to the extent that the State's case offered evidence that she might have caused some of the bruises, most of the evidence suggested that her husband had abused the daughter. The defendant could have challenged the charges on the ground that the reporting law required her to violate her Fifth Amendment right against self-incrimination. She did not challenge the law in this manner.

⁶³ *Rodriguez v. State*, 47 S.W.3d 86 (Tex. Crim. App. 2001).

⁶⁴ In a recent Indiana case that received nationwide attention, a woman was filmed by a store security video camera as she repeatedly hit and shook her five year old daughter. The woman's sister, who was also present, was convicted of failing to report the child abuse, a misdemeanor under Indiana law that requires all persons to report. See *Associated Press, Mom Given Probation for Videotaped Beating*, HOUSTON CHRON., Feb. 15, 2003, at 21A.

⁶⁵ See *Veilleux*, *supra* note 47, § 2(a), 17 (listing cases).

⁶⁶ See *generally* *Singley*, *supra* note 43 (arguing against civil liability of mandatory child abuse reporters).

⁶⁷ Compare *Ham v. Hosp. of Morristown, Inc.*, 917 F. Supp. 531, 535 (E.D. Tenn. 1995) (holding that a plaintiff may sue doctors for failing to report suspicions of child abuse if it can be established that the defendants' omission was the proximate cause of the child's injuries), and *Lurene F. v. Olsson*, 740 N.Y.S.2d 797, 799 (N.Y. App. Div. 2002) (stating that a minor child may sue a music teacher for negligent infliction of emotional distress caused by the teacher's failure to report child abuse by school employee), with *Paulson v. Sternlof*, 15 P.3d 981, 984 (Okla. Civ. App. 2000) (holding that the child abuse reporting statute does not create a private right of action, only criminal liability).

⁶⁸ See, e.g., IND. CODE § 31-33-5-1 (1998) (stating that a "reason to believe" child abused triggers reporting duty); N.C. GEN. STAT. § 7B-301 (West 2001) (declaring that a "cause to suspect" child abused triggers reporting duty); OHIO REV. CODE ANN. 2151.421 (A)(1) (West 2002) (requiring a report if a child has a physical or mental wound, injury, disability or condition that "reasonably indicates" abuse or neglect of child); OKLA. ST. ANN., tit. 10, § 7103(A)(1) (West 2002) (stating that a "reason to believe" child abused triggers reporting duty).

do not require a heightened level of certainty, akin to the "beyond a reasonable doubt" standard in criminal trials, or even the "clear and convincing evidence" or "preponderance of the evidence" standards applied in civil trials. Instead, the lower level of certainty of "reasonable suspicion" triggers the mandatory reporting duties of these criminal statutes. By analogy, police need only a "reasonable suspicion" of criminality to conduct brief investigative stops of individuals they encounter on the street, but they must have probable cause to effectuate a custodial arrest⁶⁹ and proof beyond a reasonable doubt to convict.⁷⁰ Though it may make sense for an individual to decide to share concerns with law enforcement, even if one does not have hard evidence to support the concerns, it is another matter for the law to *criminalize* the failure to report under circumstances in which the person has only unsubstantiated, albeit "reasonable," suspicions.

The treatment of privileges is another area in which laws vary considerably. The attorney-client privilege is most frequently, but not always, preserved in child abuse statutes.⁷¹ The statutes typically abrogate other privileges for physicians, spouses, clergy, psychiatrists, psychologists, psychotherapists, counselors, social workers, and nurses.⁷² Commentators have devoted significant attention to the problems faced by professionals who normally present themselves as providing confidentiality to their clients' or patients' communications, but because of reporting statutes cannot provide complete confidentiality.⁷³

Frequently, professionals required to report do in fact report their suspicions. Just as frequently it seems, they are sued for doing so. The reporting statutes give reporters immunity from civil or criminal liability based on their making of a report.⁷⁴ Most states extend immunity to mandatory reporters, although most do so

⁶⁹ See *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968) (stating that a brief investigative stop is justified by police officer's reasonable suspicion of criminality).

⁷⁰ *In re Winship*, 397 U.S. 358, 364 (1970).

⁷¹ See Mosteller, *supra* note 26, at 216–21 (demonstrating that twenty-eight states do not include attorneys as mandatory reporters, and of the other twenty-two that do include them as reporters, most preserve the attorney-client privilege); Veilleux, *supra* note 47, § 2(a).

⁷² Veilleux, *supra* note 47, § 2(a); see also Thomas R. Malia, Annotation, *Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect*, 44 A.L.R. 4th 649, § 2(a) (1986) (stating that state reporting statutes abrogate physician-patient privilege in child abuse cases).

⁷³ See, e.g., Alison Beyea, *Competing Liabilities: Responding to Evidence of Child Abuse that Surfaces During the Attorney-Client Relationship*, 51 ME. L. REV. 269 (1999); Keel, *supra* note 54; Malia, *supra* note 72; Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998); Mosteller, *supra* note 26. With regard to physician-patient confidentiality and domestic violence reporting, see McFarlane, *supra* note 31, at 29–31 (arguing that victims, already in a vulnerable situation, may not be forthcoming with their physicians if they do not trust that information will be maintained as confidential).

⁷⁴ The Child Abuse Prevention and Treatment and Adoption Reform Act (CAPTA), 42

only if the reporters act in good faith.⁷⁵ In some cases, however, members of certain professions designated as mandatory reporters are presumed to have acted in good faith.⁷⁶ Thus, a plaintiff seeking civil damages for an erroneous or knowingly false report must overcome this presumption by meeting a higher evidentiary standard. A few extend absolute immunity to all reporters whether acting in good faith or not.⁷⁷

In sum, the low evidentiary threshold that triggers the duty to report, combined with either good faith or absolute immunity from liability based on the act of reporting, creates an incentive for health professionals, educators, and other mandatory reporters to file reports of their suspicions. The fact that non-reporters can be sued in many states for their failure to report adds to the impetus to report. Several scholars have voiced concerns about overreporting, citing statistics about the low rates of substantiated claims.⁷⁸ On the other hand, the fact that reporters must defend against defamation or negligence suits for their acts of reporting — even if ultimately they prevail in their immunity defense — has led at least one physician/author to believe that reporters will be deterred from reporting.⁷⁹ The extremely low rate of prosecutions of non-reporters also eliminates some of the

U.S.C. §§ 5101–5106 (2000), requires that states grant immunity from prosecution to reporters in order to qualify for federal assistance under the Act.

⁷⁵ Veilleux, *supra* note 47, § 2(a); *see also* Yuille v. State, 45 P.3d 1107, 1110 (Wash. Ct. App. 2002) (reasoning that immunity applies only for good faith reports).

⁷⁶ *See, e.g.,* Aylward v. Bamberg, No. 98-2119, 1999 WL 515203, at *3 (7th Cir. July 6, 1999) (noting that an Indiana reporting statute presumes that a reporter acted in good faith which plaintiff must rebut); Dobson v. Harris, 530 S.E.2d 829 (N.C. 2000) (stating that a reporting statute endows a reporter with a mandatory presumption that she acted in good faith and plaintiff has burden proving bad faith). *But see* Yuille, 45 P.3d at 1110 (stating that a reporter has the burden to prove report of abuse was made in good faith). *See generally* Ellen Wright Clayton, *To Protect Children From Abuse and Neglect, Protect Physician Reporters*, 1 HOUS. J. HEALTH L. & POL'Y 133 (2001) (arguing for absolute immunity for physician reporters); Curt Richardson, *Physician/Hospital Liability for Negligently Reporting Child Abuse*, 23 J. LEGAL MED. 131 (2002) (addressing liability of physicians and hospitals for good faith, negligent reports).

⁷⁷ *See* Veilleux, *supra* note 47, §§ 2(a), 15 (listing cases). *But see* State v. Harrod, No. 05-01-01748-CR, 2002 WL 1470322 (Tex. Crim. App. July 10, 2002) (holding that a mother who belatedly reported abuse of daughters was not granted broad immunity for criminal liability resulting from earlier failure to report).

⁷⁸ *See* Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL'Y & L. 165 (2000) (arguing that a great deal of over-reporting, particularly regarding poor children, occurs due to reporters' confusion about whether abuse or neglect is present, combined with the vagueness of reporting statutes); Singley, *supra* note 43, at 237; *see also* Associated Press, *Hurt Minority Children Often Checked for Abuse*, HOUSTON CHRON., Oct. 2, 2002, at 18A (study shows doctors more likely to suspect child abuse of Black and Hispanic children's fractures and may under diagnose white children's injuries).

⁷⁹ *See* Clayton, *supra* note 76, at 142–44.

coercive element of the criminal sanction. Thus, on balance, it is not clear whether child abuse reporting statutes produce the desired level of reporting, too much reporting, or not enough reporting.⁸⁰

2. Elder Abuse Reporting Statutes

In the 1980s, a growing awareness of the problem of elder abuse and neglect spurred the enactment of new mandatory reporting laws designed to encourage prompt intervention by the State.⁸¹ By 1993, all fifty states and the territories (with the exception of Puerto Rico) had adopted mandatory reporting laws for elder abuse.⁸² Many states modeled their elder abuse reporting statutes on their child abuse reporting laws.⁸³ As is true with many child abuse reporting laws, states that have considered the issue have not permitted a civil cause of action based on a failure to report as required by the criminal law.⁸⁴ They designate as mandatory reporters health professions, law enforcement, and those handling corpses.⁸⁵ Some

⁸⁰ Recent reports suggest that, at least with educational professionals, there may in fact be a tendency not to report, even in cases in which the abuse is egregious. See Jessica Portner, *Ariz. Principal Convicted of Failing to Report Suspected Abuse*, EDUC. WK. ON THE WEB (July 12, 2000), at <http://www.edweek.org/ew/ewstory.cfm?slug=42abuse.h19>; Diana Jean Schemo, *Silently Shifting Teachers in Sex Abuse Cases*, N.Y. TIMES, June 18, 2002, at A19.

⁸¹ Sana Loue, *Elder Abuse and Neglect in Medicine and Law*, 22 J. LEGAL MED. 159, 172 (2001). States also developed adult protection programs similar to children's protective services. *Id.*; see also *Easton v. Sutter Coast Hosp.*, 80 Cal. App. 4th 485, 491 (Cal. Ct. App. 2000) ("The focus of the [Elder Abuse and Dependent Adult Civil Protection] Act has always been to encourage reporting of abuse or neglect.").

⁸² See Loue, *supra* note 81, at 173 (listing statutes).

⁸³ See *id.* at 180.

⁸⁴ See *Mora v. S. Broward Hosp. Dist.*, 710 So. 2d 633, 634 (Fla. Dist. Ct. App. 1998) (rejecting private cause of action based on failure to report elder abuse); *Hoppe v. Kandiyohi County*, 543 N.W.2d 635, 638 (Minn. 1996) (disallowing a civil cause of action for failure to report elder abuse).

⁸⁵ For example, Nevada's statute designates as mandatory reporters:

Every physician, dentist, dental hygienist, chiropractor, optometrist, podiatric physician, medical examiner, resident, intern, professional or practical nurse, physician assistant, psychiatrist, psychologist, marriage and family therapist, alcohol or drug abuse counselor, driver of an ambulance, advanced emergency medical technician or other person providing medical services licensed or certified to practice in [Nevada,] . . . [a]ny personnel of a hospital or similar institution[,] . . . coroner[s,] . . . [e]very person who maintains or is employed by an agency to provide nursing in the home[,] . . . [a]ny employee of the department of human resources[,] . . . [a]ny employee of a law enforcement agency[,] . . . [a]ny person who maintains or is employed by a facility or establishment that provides care for older persons[, and] . . . [a]ny person who owns or is employed by a funeral home or mortuary.

statutes classify the clergy as mandatory reporters, but make an exception for information learned in a confession.⁸⁶ Attorneys are designated as reporters in some states, but sometimes an exception is made for statements protected by the attorney-client privilege.⁸⁷ For attorneys in Ohio, however, the obligation to report seems to attach to the status of being an attorney, regardless of the manner in which the information was obtained — even if, for instance, it was obtained casually in conversation with a neighbor.⁸⁸

Like child abuse reporting laws, the standards for triggering an elder abuse reporting duty also vary considerably from state to state. At least one writer commented on the difficulty faced by health care professionals (which presumably affect other categories of mandatory reporters as well) from the vague standards that are set.⁸⁹ In some cases, statutes define “abuse” without reference to the intent of the person inflicting the abuse.⁹⁰ Thus, reporters have no guidance regarding the extent to which the evidence must show intentional “abuse.” Likewise, most states do not specify the frequency with which a neglecting person must act or fail to act to constitute “neglect.”⁹¹ At what point does a caregiver’s failure to provide, in the reporter’s opinion, adequate care rise to the level of neglect? Not surprisingly, since elder abuse reporting laws are modeled after child abuse reporting laws, they also typically require reporting if there is “reasonable cause to believe” that an elder has suffered abuse or neglect.⁹²

One reported case, *Easton v. Sutter Coast Hospital*,⁹³ highlighted the troubling aspect of reporting laws that mandate reports whenever there is “reasonable cause to believe” there might be abuse or neglect. In *Easton*, the surviving son and daughter-in-law of an elderly woman, Margaretha Winchester, sued a nurse and physician who had reported their suspicions that the son and daughter-in-law were neglecting the mother.⁹⁴ The nurse, Don Moreau, had reported the suspected neglect after unsuccessfully attempting to persuade the son to bring his mother to the hospital to be treated for a urinary tract infection that had been diagnosed the

NEV. REV. STAT. ANN. 200.5093 (Michie 2002); Loue, *supra* note 81, at 178 (quoting NEV. REV. STAT. 200.5093 (1987)).

⁸⁶ Loue, *supra* note 81, at 178.

⁸⁷ *Id.* at 179.

⁸⁸ *Id.*

⁸⁹ *Id.* at 173.

⁹⁰ *Id.* at 173–74.

⁹¹ *Id.* at 176.

⁹² See Moskowitz, *supra* note 41, at 94–95.

⁹³ 80 Cal. App. 4th 485 (Cal. Ct. App. 2000), *cert. denied*, 531 U.S. 1084 (2001).

⁹⁴ *Id.*

week before.⁹⁵ The son also refused to allow her prescriptions to be filled.⁹⁶ The nurse had visited the home in which the elderly person lived with her son and daughter-in-law on four occasions.⁹⁷ The evidence depicted a woman whose health was failing and whose son did not want to "prolong her life a few days or weeks longer."⁹⁸ The son argued that his mother did not consent to go to the hospital.⁹⁹ He claimed that the Emergency Medical Technicians (EMTs) took the elderly woman from her home, even after she shook her head to indicate "no" when asked whether she wanted to go to the hospital.¹⁰⁰ Other evidence, however, suggested that she was unable to understand the risks to her health or to realize that there was an immediate risk to her life.¹⁰¹ The physician also reported suspicions that the son might be using Winchester's pension in an improper manner, although the reported decision does not state the basis for this suspicion.¹⁰²

The plaintiffs contended that the nurse and physician made the report in bad faith, causing them emotional distress.¹⁰³ They also sued the EMTs and their employers for forcibly removing the mother from their home.¹⁰⁴ By law, the nurse and physician were required to report the case to the government if they had reasonable cause to believe that she was a victim of neglect.¹⁰⁵ The EMTs also were obligated by law to remove her for evaluation and treatment based on the report.¹⁰⁶

The reported cases do not reach the merits of the plaintiffs' claims because the defendants were shielded from liability by the provision of immunity. The court simply dismissed the case against the reporting nurse and physician who were immunized from civil liability based on the filing of the report.¹⁰⁷ The EMTs who acted on the report by removing the woman against the will of her relatives, and possibly even against her own will, were also immune from liability.¹⁰⁸ The court disagreed with the plaintiffs' argument that immunity for the nurse and physician should only protect them if they reported in good faith.¹⁰⁹ The court considered the legislative history of the Act — along with its plain meaning — and concluded that

⁹⁵ *Id.* at 489.

⁹⁶ *Easton v. Maready*, No. A093279, 2001 WL 1511263, at *1 (Cal. Ct. App. Nov. 28, 2001), *cert. denied*, 123 S. Ct. 94 (2002).

⁹⁷ *Sutter Coast Hosp.*, 80 Cal. App. 4th at 489.

⁹⁸ *Easton*, 2001 WL 1511263, at *1

⁹⁹ *Id.* at *3.

¹⁰⁰ *Sutter Coast Hosp.*, 80 Cal. App. 4th at 495–96.

¹⁰¹ *Easton*, 2001 WL 1511263, at *1.

¹⁰² *Id.*

¹⁰³ *Sutter Coast Hosp.*, 80 Cal. App. 4th at 490.

¹⁰⁴ *Id.* at 489–90.

¹⁰⁵ *Id.* at 493.

¹⁰⁶ *Id.* at 495.

¹⁰⁷ *Id.* at 494.

¹⁰⁸ *Id.* at 495.

¹⁰⁹ *Sutter Coast Hosp.*, 80 Cal. App. 4th at 494 n.4.

the California legislature intended to confer absolute immunity on mandatory reporters, stating that "the truth or falsity of the report is of no moment — the privilege is absolute."¹¹⁰ Thus, the complaints against the nurse and physician were dismissed. The court also rejected the tort claims filed against the EMTs on the grounds that the Act clearly gives local law enforcement (who escorted the EMTs) the authority to take an endangered adult into temporary emergency protective custody and to take the person to the hospital for medical evaluation and any necessary treatment.¹¹¹

This case illustrates two things: (1) the likelihood that a possibly erroneous report will be filed and the series of events that such a report will trigger; and (2) the lack of any remedy for caregivers or the affected elder from possibly erroneous reports and groundless investigation and intervention. The report in this case caused the EMTs, aided by law enforcement, forcibly to remove the elderly woman from her home, possibly against her will. She was taken to the hospital where she was intubated and treated for three days.¹¹² She died shortly thereafter, thus spending some of her last days in a hospital setting when she may have preferred to have been in her own home.

Was Ms. Winchester the victim of neglect, or did the nurse and physician err in believing such to be the case? No court of law will ever decide these questions. What we certainly do know is that, even if the report was erroneous, it was required by law. Even when health care providers have some question in their minds as to whether or not a particular set of facts indicates abuse or neglect, the law nonetheless requires that they file a report if there is "reasonable cause to believe" abuse or neglect to have occurred.¹¹³

A second case also highlights the fact that elders and their guardians have no recourse when a clearly erroneous report is filed. In *Muller v. Olympus Healthcare Group, Inc.*,¹¹⁴ a physician filed an erroneous report of possible elder abuse of a father by his son, based on a negligent interpretation of the elder's arsenic levels. In fact, the son had not poisoned his father, as was established by a toxicological test revealing normal levels of arsenic in the father's blood.¹¹⁵ The doctor did not forward the accurate findings to the son or to the Probate Court supervising the now-deceased father's conservatorship.¹¹⁶ The son sued the physician for failing to file a correction to his earlier erroneous report, which had caused the son to incur economic expenses, as well as loss of reputation, and had caused his father's estate

¹¹⁰ *Id.* at 492.

¹¹¹ *Id.* at 496.

¹¹² *Id.*

¹¹³ See *supra* text accompanying note 92.

¹¹⁴ No. CV0072945S, 2001 Conn. Super. LEXIS 1211 (Conn. Super. Ct. May 1, 2001).

¹¹⁵ *Id.* at *2.

¹¹⁶ *Id.*

to suffer financially. The court upheld the dismissal of the claims based on the immunity granted to reporters by the mandatory reporting laws.¹¹⁷

One unique difficulty with the elder abuse reporting laws is the intersection between self-neglect and mental capacity. Over one-half of the elder abuse reporting laws require reporters (again, mainly health care providers) to report self-neglect as well as neglect by caregivers. Ohio law, for example, defines "self-neglect" as the "failure . . . to provide . . . the goods or services necessary to avoid physical harm, mental anguish, or mental illness" to oneself.¹¹⁸ The inclusion of self-neglect as conduct giving rise to a reporting duty obviously is well-intentioned. Elderly persons can inflict harm upon themselves as readily as others might inflict it upon them. Unlike the case of child neglect, however, the state does not have a "parens patrie" power to intervene on behalf of a competent adult who refuses to provide proper nourishment or medical treatment for herself.¹¹⁹ Since most of the reporting statutes apply to persons based on their age (typically sixty or sixty-five years of age), the reporting duty is triggered without regard to the person's mental capacity, in effect, "presum[ing] incompetence on the part of the elder."¹²⁰

This aspect of elder abuse reporting laws is criticized as violating basic notions of adult autonomy and dignity, and has been criticized as "reflective of 'ageism.'"¹²¹ The elder may perceive greater harm from the ensuing investigation than from the physical or mental injury she might have incurred due to her self-neglect. Of course, if the elder is suffering from mental incapacity, then her self-neglect may inflict injury that she would not choose to suffer if competent.¹²² Medical professionals may have the training to distinguish between mentally competent and mentally incompetent adults. Few reporting statutes, however, limit their discretion to report self-neglect to cases of mental incompetence. In most statutes, the duty is triggered by *any* suspicions of self-neglect of any person over the age limit, regardless of their competency.¹²³

In sum, elder abuse reporting statutes, having been modeled on child abuse reporting laws, have many of the same features as those pertaining to child abuse. Immunity is provided to reporters, and non-reporters can be sued in some states. Some professional privileges are preserved, but most are abrogated. Elders' communications with their health professionals are not confidential. This lack of

¹¹⁷ *Id.* at *3-*5.

¹¹⁸ OHIO REV. CODE ANN. § 5101.60(k) (West 1994).

¹¹⁹ For a discussion of the parens patrie power of the state in child abuse and elder abuse cases, see Loue, *supra* note 81, at 180-82.

¹²⁰ Loue, *supra* note 81, at 180-81.

¹²¹ *Id.* at 182; see also Moskowitz, *supra* note 41, at 108-13 (addressing controversy surrounding the perceived vulnerability of elders as a group).

¹²² Loue, *supra* note 81, at 185-86 (addressing the disagreement among ethicists regarding proper weight to be given to the wishes expressed by a competent person).

¹²³ See *id.* at 176-77.

confidentiality raises a concern that these individuals or their care-givers may be deterred from seeking medical treatment for fear of being reported to the authorities and subjected to involuntary investigation and treatment. Also, like the child abuse statutes, the elder abuse laws present issues of ambiguity in defining abuse or neglect and similarly low evidentiary thresholds to trigger a reporting duty. The majority of elder abuse statutes typically fail to take into account the competency of the elder. This becomes problematic as applied to the “self-neglect” provisions of reporting laws, as it requires health professionals to report to the authorities the conduct of a competent adult toward herself. The filing of such a report then triggers a series of investigative actions. Thus, unlike the child abuse laws, the elder abuse laws raise additional concerns regarding the dignity and autonomy of competent elders.

B. Preventing Widespread or Systemic Harms

1. Financial Institutions, Businesses, and Attorneys: “Suspicious Activity Reports” and Record-Keeping

Banks and other financial institutions are required by law to report their suspicions of criminality by their customers or “insiders” within the institution. In 1992, Congress enacted the Annunzio-Wylie Act, giving the Secretary of the Treasury the power to require the reporting of suspicious activities by customers or “insiders” of any banks or other financial institution.¹²⁴ Financial institutions are required to file uniform “Suspicious Activities Reports” (SARs) with the Financial Crimes Enforcement Network of the Department of the Treasury.¹²⁵ The regulations encourage, but do not require, financial institutions to file reports with state and local authorities as well.¹²⁶ Congress aimed to “uncover and punish money laundering, particularly in connection with drug trafficking,”¹²⁷ but the Act extends more broadly to any “suspected violation of Federal law or a suspicious transaction

¹²⁴ The Act was passed as the Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. No. 102-550, 106 Stat. 4044–47 (1992) (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., and 22 U.S.C.). Then Congress passed the Annunzio-Wylie Anti-Money Laundering Act of 1994, Pub. L. No. 103-325, 108 Stat. 2254 (1994) (codified as amended at 31 U.S.C. § 5318 (2000)). The provisions of the Act apply to all national banks, as well as any Federal branches and agencies of foreign banks licensed or chartered by the Office of the Comptroller of the Currency. 12 C.F.R. § 21.11(a) (2002). The regulations define a bank’s “insiders” as “one of its directors, officers, employees, agents or other institution-affiliated parties”. 12 C.F.R. § 21.11(c)(1) (2002).

¹²⁵ The implementing regulations are published at 12 C.F.R. § 21.11 (2002).

¹²⁶ 12 C.F.R. § 21.11(e) (2002).

¹²⁷ *Nevin v. Citibank, N.A.*, 107 F. Supp. 2d 333, 341 (S.D.N.Y. 2000) (explaining the legislative intent of the Annunzio-Wylie Anti-Money Laundering Act).

related to a money laundering activity or a violation of the Bank Secrecy Act."¹²⁸ The reporting of possible violations enables federal authorities to investigate possible financial crimes in order to initiate criminal charges as well as civil forfeiture actions against the funds in the accounts held by the financial institutions.¹²⁹

Like the child abuse and elder abuse reporting laws, it also contains provisions conferring on employees and their agents immunity from civil liability based on their having reported a possible criminal transaction.¹³⁰ Unlike the child abuse and elder abuse reporting statutes, however, the regulations requiring reporting of suspicious transactions or activities do not proscribe a minimum threshold of suspicion to trigger the reporting obligation. Any suspicion of "possible" criminality suffices to require reporting.¹³¹ Most of the courts also have interpreted the "safe harbor" immunity provisions as granting an unqualified immunity for any reports whether made in good or bad faith.¹³² The District Court of Puerto Rico

¹²⁸ 12 C.F.R. § 21.11(a) (2002). The regulations also provide certain minimum dollar amounts that trigger the reporting duty. For transactions aggregating \$25,000 or more in which the bank "believes that it was either an actual or potential victim of a criminal violation . . . or that the bank was used to facilitate a criminal transaction[.]" banks must report "even though there is no substantial basis for identifying a possible suspect or group of suspects." 12 C.F.R. § 21.11(c)(3) (2002). The threshold drops to \$5,000 if the bank "knows, suspects, or has reason to suspect" that the law has been violated. 12 C.F.R. § 21.11(c)(4) (2002).

¹²⁹ In addition to the arrest and prosecution of individuals suspected of money laundering, illegal proceeds deposited in financial institutions may be seized and forfeited to the United States government under civil forfeiture law. *See, e.g., Villalba v. Coutts & Co. (USA) Int'l*, 250 F.3d 1351, 1352 (11th Cir. 2001) (stating that the government filed a civil forfeiture complaint against \$200,000 in accounts at Coutts and other financial institutions, alleging that the funds were obtained from money laundering); *United States v. \$15,270,885.69 Formerly on Deposit in Account No. 8900261137 in the Name of Sobinbank at Bank of New York*, No. 99 Civ. 10255, 2000 U.S. Dist. LEXIS 12602, at *4 (S.D.N.Y. Aug. 25, 2000) (describing a forfeiture of over \$7 billion dollars transferred from Russia to the Bank of New York as a means of laundering the money).

¹³⁰ Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure

31 U.S.C. § 5318(g)(30) (2000).

¹³¹ *See Stoutt v. Banco Popular de Puerto Rico*, 158 F. Supp. 2d 167 (D.P.R. 2001) (finding that the bank enjoyed unqualified immunity for reporting any "possible violation" and rejecting the claim that regulations required the bank to have probable cause and to act in good faith).

¹³² *See Lee v. Bankers Trust Co.*, 166 F.3d 540, 542-44 (2d Cir. 1999) (stating that neither language, common sense, or legislative history support the good faith requirement for

expressed concern in one case about "what could be an overly offensive potential use [against a bank customer] of the disclosure and safe harbor provisions," but "ultimately [found] that the unambiguity of the statute [providing immunity even in case of bad faith reporting] overrides any court consideration."¹³³

Another difference between the SAR regulations and the criminal laws requiring child abuse and elder abuse reporting is that banks must abide by strict confidentiality requirements regarding the filing of SARs.¹³⁴ Courts have upheld the refusal of financial institutions to disclose to any person involved in the suspicious activity whether an SAR was filed, even when such request is made in the course of discovery.¹³⁵ The SAR confidentiality requirement overrides any disclosure requirement of Federal Rule of Civil Procedure 34.¹³⁶ A financial institution may invoke the immunity protection of the Act without violating the confidentiality requirement, as it is not necessary to admit to the filing of an SAR in order to assert the immunity defense.¹³⁷

In a decision that appears to undermine the confidentiality protection of the Act, one individual sued the FBI under the Freedom of Information Act (FOIA)¹³⁸ to obtain production of an SAR filed by a bank regarding his transactions with the bank.¹³⁹ The court ruled that, although the Privacy Act¹⁴⁰ exempted the SAR from discovery by the FBI, the Freedom of Information Act required its disclosure, noting

immunity); *Stoutt*, 158 F. Supp. 2d at 175 (following *Lee*). But see *Lopez v. First Union Nat'l Bank*, 129 F.3d 1186, 1191 (11th Cir. 1997) (finding that good faith is required in order to obtain immunity for filing SAR).

¹³³ *Stoutt*, 158 F. Supp. 2d at 175-76.

¹³⁴ Any national bank or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, citing this section, applicable law (e.g., 31 U.S.C. 5318(g)), or both, and shall notify the [Office of the Comptroller of the Currency].

12 C.F.R. § 21.11(k) (2002).

¹³⁵ See, e.g., *Dubai Islamic Bank v. Citibank, N.A.*, No. 99 Civ 1930, 2001 U.S. Dist. LEXIS 18525, at *4-*5 (S.D.N.Y. 2001). Supporting documentation to the SAR, however, is not shielded from discovery by the confidentiality requirement and must be disclosed. See *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001).

¹³⁶ See *Weil*, 195 F. Supp. 2d at 389 (holding that the enabling legislation of the Annunzio-Wylie Anti-Money Laundering Act is specific enough on the question of confidentiality to justify the intrusion into the federal rules governing discovery). Federal Rule of Civil Procedure 34 provides the rules for discovery in civil cases. Among other things, the Rule permits parties to serve requests to produce documents and other materials on each other. See FED. R. CIV. P. 34.

¹³⁷ *Gregory v. Bank One, Indiana, N.A.*, 200 F. Supp. 2d 1000, 1006 (S.D. Ind. 2002).

¹³⁸ 5 U.S.C. § 552 (1994).

¹³⁹ *Dupre v. Fed. Bureau of Investigation*, No. 01-2431 Section "J"(1), 2002 U.S. Dist. LEXIS 9622 (E.D. La. 2002).

¹⁴⁰ 5 U.S.C. § 552a (1994).

FOIA's "'strong presumption in favor of disclosure.'" ¹⁴¹ Thus, the FBI was ordered to disclose to the plaintiff a redacted portion of the SAR that contained information pertinent to the plaintiff's request. ¹⁴² This case involved a plaintiff who had criminal fraud charges pending against him, but the court did not rely on this fact in deciding the case. Since all SARs presumably contain suspicions of criminal activity, it stands to reason that many such reports will often result in the filing of criminal charges. Thus, SARs may not remain confidential in a great many cases.

After September 11, 2001, Congress focused its attention on the ability of terrorists to use the American financial industry to its advantage. The USA PATRIOT Act of 2001 ¹⁴³ includes provisions touted as providing more regulation of the "financial industry" so as to curb the ability of terrorists to use these institutions to invest their proceeds. ¹⁴⁴ The Act extends reporting duties, which previously had applied only to a circumscribed group of financial institutions, to a wide group of businesses that are "financial" only in the sense that they earn revenue. ¹⁴⁵ The list of "financial institutions" (literally running from A-Z) now

¹⁴¹ *Dupre*, 2002 U.S. Dist. LEXIS 9622, at *5 (quoting *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)).

¹⁴² *Id.* at *6.

¹⁴³ Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁴⁴ One writer has explained that Congress sought to deter global terrorism by preventing international money laundering:

The U.S. financial system is so big that foreign banks must interact with U.S. banks almost as a matter of business necessity. Congress took advantage of that enormous economic power to give the USA PATRIOT Act extra-territorial bite. The Act allows Treasury to impose blockages and boycotts on financial institutions or jurisdictions that in its judgment do not sufficiently cooperate in the struggle against global money laundering. For example, U.S. banks may be banned wholesale from dealings with a foreign bank that fails to answer a summons for information from U.S. authorities. The U.S. assets of foreign banks that participate in money laundering may be seized, even if the actual accounts that were used to launder money are located abroad.

Rueda, *supra* note 7, at 151-52 (footnotes omitted). The Act also requires foreign banks to submit to examination by U.S. regulatory, enforcement, and intelligence agencies in return for being permitted to maintain correspondent or pass through accounts with U.S. financial institutions. *Id.* at 186. This is one of "a series of measures that seek to strip away that level of anonymity that foreign banks holding pass through accounts in the U.S. have traditionally offered their clients," thus reducing the ability of criminals to launder money through these accounts. *Id.*

¹⁴⁵ The Act defines "financial institution" to include:

(A) an insured bank . . . ; (B) a commercial bank or trust company; (C) a private banker; (D) an agency or branch of a foreign bank in the United States; (E) any credit union; (F) a thrift institution; (G) a broker or dealer registered with the Securities and Exchange Commission . . . ; (H) a broker or dealer in securities or commodities; (I) an investment banker or investment company; (J) a currency exchange; (K) an issuer, redeemer, or cashier of travelers' checks, checks,

required to report and keep records of their client's activities includes sellers of cars, planes, or boats, travel agencies, dealers of jewels and precious stones, casinos, and real estate agencies.¹⁴⁶ It includes government agencies such as the United States Postal Service and any other federal, state, or local government that engages in any of the types of business listed in the definition.¹⁴⁷ The definition also provides for the Secretary of the Treasury to add "any business or agency which engages in any activity . . . which is similar to, related to, or a substitute for any activity in which any business [covered by the Act] is authorized to engage."¹⁴⁸ The Secretary also can add "any other business . . . whose cash transactions have a *high degree of usefulness in criminal, tax, or regulatory matters*."¹⁴⁹ This last phrase seems to give the Secretary carte blanche to sweep almost any business into the group of regulated businesses. If the list is supposed to include all high-dollar businesses or businesses selling products that people purchase as investments, it probably should have included antique dealers, and sellers of fine furs, art, or wines.¹⁵⁰ The objective of this narrative is to highlight the extraordinary expanse of "financial institutions" now required to maintain certain records of their clients'

money orders, or similar instruments; (L) an operator of a credit card system; (M) an insurance company; (N) a dealer in precious metals, stones, or jewels; (O) a pawnbroker; (P) a loan or finance company; (Q) a travel agency; (R) a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system; (S) a telegraph company; (T) a business engaged in vehicle sales, including automobile, airplane, and boat sales; (U) persons involved in real estate closings and settlements; (V) the United States Postal Service; (W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph; (X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than \$1,000,000 — which (i) is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or (ii) is an Indian gaming operation . . . ; (Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or (Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

31 U.S.C.A. § 5312(a)(2) (West, WESTLAW through 2002 legislation).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 5312(a)(2)(Y).

¹⁴⁹ *Id.* § 5312(a)(2)(Z) (emphasis added).

¹⁵⁰ One gets the sense that perhaps Congress simply ran out of letters of the alphabet.

transactions and to report their suspicions to law enforcement by filing Suspicious Activities Reports.

The USA PATRIOT Act also imposes law enforcement investigative duties on these "financial institutions." For example, the Act requires that they "implement programs to deter and identify instances of money laundering," and these "programs must, at a minimum, develop internal policies and controls, designate compliance officers, pursue ongoing employee training, and conduct independent audits to test effectiveness of implementation and design" of the anti-money laundering program.¹⁵¹ They also must implement a "Know Your Customer" program.¹⁵² Regulations imposing a duty to implement such programs had been proposed just prior to September 11th, but "[i]n March 2000, after receiving 200,000 negative public comments, the Treasury Department abandoned the proposed 'Know-Your-Customer' (KYC) regulations."¹⁵³ The USA PATRIOT Act ushered in a new set of "Know Your Customer" regulations that may be broader than the ones previously proposed.¹⁵⁴ Under the new regulations, financial institutions must do at least three things:

First, it must verify to a reasonable extent the identity of any person seeking to open an account. Second, it must maintain records of the information used to verify a person's identity, including name, address, and other comparable information. Third, it must consult a list of known or suspected terrorists or terrorist organizations, distributed by government agencies, to determine whether a person seeking to open an account appears on any such list.¹⁵⁵

The Act provides the same immunity and confidentiality of the Anti-Money

¹⁵¹ Rueda, *supra* note 7, at 150–51.

¹⁵² *Id.*

¹⁵³ *Id.* at 167; see also John J. Byrne et al., *Examining the Increase in Federal Regulatory Requirements and Penalties: Is Banking Facing Another Troubled Decade?*, 24 CAP. U. L. REV. 1, 59–60 (1995) (stating that KYC guidelines were mentioned in the 1970 Bank Secrecy Act, 86% of the banking industry had established KYC guidelines by 1990, and it was expected that the Treasury Department would issue KYC regulations by 1996); Daniel Mulligan, Comment, *Know Your Customer Regulations and the International Banking System: Towards A General Self-Regulatory Regime*, 22 FORDHAM INT'L L.J. 2324, 2364–66 (1999) (discussing Congress's decision to reject proposed KYC regulations in 1999).

¹⁵⁴ Rueda, *supra* note 7, at 167.

¹⁵⁵ *Id.* at 167–68 (footnotes omitted). In addition, covered financial institutions "must take 'reasonable steps' to ensure that a correspondent account provided for a foreign bank is not being used to 'indirectly provide banking services for a foreign' shell bank." R.J. Cinquegrana & Richard M. Harper II, *The USA PATRIOT Act: Affects on American Employers and Businesses*, BOSTON B.J., June 2002, at 10, 13; see USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

Laundering Act, plus it broadens the immunity provision to include any liability arising from an arbitration agreement.¹⁵⁶ Thus, as has been true for banks, the myriad businesses now subject to the reporting requirement also will be immune from any type of civil liability premised on the filing of an SAR and are prohibited from disclosing whether an SAR has been filed.

Recent legislation and other government proposals would require lawyers and accountants to report their clients' suspicious or illegal business transactions. The Financial Action Task Force (FATF) is "an international policy-making body formed in 1989 to help coordinate the fight against money laundering."¹⁵⁷ In May 2002, the FATF issued a Consultation Paper of "Forty Recommendations," including recommendations for requiring lawyers and other professionals to investigate and report suspicious transactions by their clients.¹⁵⁸ The American Bar Association Task Force on Gatekeeper Regulation and the Profession submitted comments on the FATF recommendations sharply opposing the proposals to require attorneys to report the suspicious financial transactions of their clients.¹⁵⁹ Within the United States Department of Justice, an interagency group is also working on drafting its own position on attorney "gatekeeper" responsibilities regarding their clients' transactions.¹⁶⁰ To date, Congress has not enacted any of the investigative or reporting requirements proposed either by FATF or the Justice Department.

In the aftermath of the Enron, WorldCom and other financial collapses, Congress did enact the Sarbanes-Oxley Act of 2002. The Act imposes greater disclosure requirements on corporate counsel, private attorneys that represent corporations, and accountants, in addition to other corporate officers.¹⁶¹ The Act empowered the Securities and Exchange Commission to implement the actual rules that will govern disclosures by corporate counsel, outside counsel, accountants, and corporate officers of public corporations.¹⁶² With regard to attorney disclosures, the

¹⁵⁶ See 31 U.S.C. § 5318(g)(3)(A) (2000).

¹⁵⁷ *ABA Task Force Opposes Requiring Lawyers To Report Suspicious Financial Transactions*, 71 Crim. L. Rep. 648, 648 (2002) [hereinafter *ABA Task Force*]. The FATF operates under the auspices of the Organisation for Economic Co-operation and Development, an international organization comprised of 30 member countries, including the United States. See FIN. ACTION TASK FORCE ON MONEY LAUNDERING, MORE ABOUT THE FATF AND ITS WORK, at http://www.1.oecd.org/fatf/AboutFATF_en.htm (last updated Jan. 27, 2003).

¹⁵⁸ See FIN. ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW OF THE FATF FORTY RECOMMENDATIONS: CONSULTATION PAPER (2002), available at http://www.fatf-gafi.org/40RecsReview_en.pdf.

¹⁵⁹ See *ABA Task Force*, *supra* note 157, at 648.

¹⁶⁰ *Id.*

¹⁶¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified at 15 U.S.C. 7201).

¹⁶² Jenny B. Davis, *Sorting Out Sarbanes-Oxley: Determining How to Comply with the New Federal Disclosure Law for Corporations Won't Be Easy*, 89 A.B.A.J. 44, 46 (Feb.

SEC's initially proposed rules required reporting of "evidence of a material violation" of a securities law.¹⁶³ The provisions came under intense protest by the organized bar.¹⁶⁴ The final rule increases the evidentiary threshold and requires reporting of "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."¹⁶⁵ The initial draft of the rules are also required lawyers to make a "noisy withdrawal" from representing the firms (which for corporate counsel requires that they resign). This requirement has been tabled, and the SEC extended the period for comment on that issue for an additional 60 days.¹⁶⁶ Thus, whether attorneys will be required to withdraw from representing clients has yet to be determined, but it is clear that attorneys representing public corporations will have less confidentiality in their relationships with clients when those clients violate the securities law.

2. Environmental Reporting Duties

Environmental law contains what appears to be one of the oldest regulatory reporting offenses in this country, dating back to the early 1970's with the adoption of the Clean Water Act.¹⁶⁷ Today, the Comprehensive Environmental Response,

2003).

¹⁶³ *Id.* at 48.

¹⁶⁴ Jonathan D. Glater, *A Legal Uproar Over Proposals to Regulate the Profession*, N.Y. TIMES, Dec. 17, 2002, at C1.

¹⁶⁵ Jenny B. Davis, *Reporting Rule Clarified: SEC Releases Final Attorney Conduct Rule, But Extends Comment Period on Noisy Withdrawal*, A.B.A.J. E-REP., Jan. 31, 2003, available at WL ABAJEREP Database.

¹⁶⁶ *Id.*

¹⁶⁷ Congress enacted the Federal Water Pollution Control Act (FWPCA) in 1972. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.). The Clean Water Act of 1977 supplemented the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566-1609 (1977) (codified as amended in scattered sections of 33 U.S.C.). Subsequent amendments to both acts are commonly referred to as "the Clean Water Act." The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) adopted the same type of reporting requirements that had been in effect under the Clean Water Act.

Senator Jennings Randolph, one of the original sponsors of the Senate version of CERCLA, outlined the reasons for adopting the reporting requirements from section 311 of the Clean Water Act into CERCLA:

Section 103 of [CERCLA] establishes the circumstances when notice must be given to the Government of a release of hazardous substances, including hazardous wastes. Notice of a release is the essential first step which enables the Government to respond quickly to the more significant releases, if the parties responsible fail to. The 8 years of experience with the spill response program established by section 311

Compensation, and Liability Act of 1980 (CERCLA) sets forth the reporting requirements for dumping "reportable" quantities of hazardous substances.¹⁶⁸ CERCLA requires that persons in charge of a vessel or facility from which hazardous substances are released must, under certain circumstances, immediately report the release to the appropriate agency of the United States Government.¹⁶⁹ Many state laws have similar reporting requirements.¹⁷⁰

of the Clean Water Act amply demonstrate the necessity of immediate notice if an emergency response program is to be effective in protecting public health, welfare, and the environment. The Government response program that would be established by this bill is modeled upon the experience with the Clean Water Act's spill response program.

United States v. Carr, 880 F.2d 1550, 1553 (quoting 1 SENATE COMM. ON ENV'T & PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, at 688 (Comm. Print 1983)) (quotations omitted) (alteration in original).

¹⁶⁸ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000). See 42 U.S.C. § 9602 (2000) (directing the Administration to designate reportable quantities of hazardous substances).

¹⁶⁹ *Id.* § 9603(a).

¹⁷⁰ See, e.g., ARK. CODE ANN. § 12-79-105 (2001) (stating that any fixed facility operator or transporter shall immediately report a release of hazardous or toxic materials environment); CAL. HEALTH & SAFETY CODE § 25270.12 (West 2002) (requiring the reporting of spills by owner or operator of any tank facility and providing for civil fines and injunctions for violations); CAL. HEALTH & SAFETY CODE § 25295 (West 2002) (requiring reporting of spills of hazardous materials in underground storage); COLO. REV. STAT. ANN. § 8-20-407 (West 2002) (requiring reporting by any person whose activity causes spill of oil or any other substance which may cause pollution); CONN. GEN. STAT. ANN. § 22a-450 (West 2002) (requiring reporting by master of any vessel or person in charge of any terminal for the loading or unloading of any oil, petroleum, chemical liquid, solid or gaseous products or hazardous waste, or reporting by any person in charge of any establishment or the operator of any vehicle which may cause a spill of hazardous waste, and providing for civil fines for violations); DEL. CODE ANN. tit. 7, § 6306 (2001) (stating that the transporter of hazardous waste must report a discharge); D.C. CODE ANN. § 8-1317 (2002) (requiring annual reports by businesses that release toxic chemicals or generate hazardous wastes); FLA. STAT. ANN. § 527.065 (West 2002) (requiring reports of accidents involving liquefied petroleum gas); FLA. STAT. ANN. § 376.12(11) (West 2002) (establishing a felony for persons responsible for vessels and terminal facilities to fail to immediately report discharges of more than five gallons of gasoline or diesel); GA. CODE ANN. § 12-14-3 (2002) (requiring the report of any oil or hazardous substance spill); KY. REV. STAT. ANN. § 224.01-400(5)-(7) (Banks-Baldwin 2001) (requiring reporting of releases or threatened releases of hazardous substances, pollutants, or contaminants by any person possessing or controlling the substances); ME. REV. STAT. ANN. tit. 25, § 2104-A (West 2002) (requiring the reporting of accidents involving death, serious illness, or serious personal injury or in discharge of a hazardous material); ME. REV. STAT. ANN. tit. 38, § 1318-B(1) (West 2002) (requiring the responsible party or person causing discharge of reportable quantity of hazardous material to immediately report the discharge to authorities).

The requirement that persons in charge of vessels or facilities report significant discharges of hazardous materials was designed as part of the "overall program to 'provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action.'"¹⁷¹ Thus, the statute also contains record keeping requirements that enable the government to track potential threats to the environment. The law requires owners or operators of facilities that store, treat, or dispose of hazardous substances to notify the EPA administrator of the existence of those hazardous materials, and to keep certain records of such things as the location, title or condition of the facility, and the identity, characteristics, origin, and quantity of the hazardous substances.¹⁷²

The CERCLA reporting statute has generated relatively few published cases. The case law reveals one important difference between the environmental reporting statutes and most others: The reporters in these cases are required to report on a discharge (and possible violation of law) for which *they themselves* are responsible. The law imposes the reporting duty only on those "persons in charge" of a vessel (such as an oil tanker) or facility (any corporate or government entity).¹⁷³ Thus, environmental reporting does not involve reporting the criminality of others, but rather it involves reporting one's own tortious, or even criminal, acts. In some of the reported cases, the reporting charge may be the only charge to which a defendant may plead guilty, even though the defendant intentionally dumped the hazardous materials and thereby engaged in more serious and substantive environmental crimes. This suggests that prosecutors use the reporting charge as a bargaining chip in less serious dumping offenses as a means of extracting guilty pleas.¹⁷⁴ In other, more egregious cases, the reporting charge is one among several

¹⁷¹ *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1306 (D.C. Cir. 1991) (quoting 1980 U.S.C.C.A.N. 6119).

¹⁷² 42 U.S.C. § 9603(c)-(d) (2000).

¹⁷³ Courts have interpreted "person in charge" to include corporate entities as well as lower level employees who may be "in charge" of activities at a facility at the time of a spill. *See, e.g., United States v. Buckley*, 934 F.2d 84, 86 (6th Cir. 1991) (stating that the jury was instructed that "person in charge" applies to any supervisory personnel even of relatively low rank who because he was in charge of a facility was in a position to detect, prevent, and abate a release of hazardous substances); *Apex Oil Co. v. United States*, 530 F.3d 1291, 1292-93 (8th Cir. 1976) (holding that a corporation can be held criminally liable as "person in charge" under Water Pollution Control Act (predecessor of CERCLA)).

¹⁷⁴ In *United States v. Liebman*, 40 F.3d 544 (2d Cir. 1994), for example, the defendant and his family owned a company that had entered into an agreement to sell its mill in Rockville, Connecticut. The sale of the property was delayed by the discovery of asbestos in and around a boiler room. The defendant was aware that it was necessary to properly dispose of the asbestos, but nonetheless hired some local salvagers who dumped three truckloads (approximately three tons) of asbestos into a gravel pit in the woods. *Id.* at 547. Liebman pled guilty only to the failure to notify charge. Though the opinion does not say whether there were other charges, one can imagine that he might have been charged with

other substantive environmental crimes.¹⁷⁵

In many of these failure to report cases, the release of hazardous wastes into the environment was done intentionally in violation of environmental criminal laws. In order to avoid the obvious self-incrimination dilemma of requiring individuals to report their own criminality to government authorities, CERCLA contains an immunity provision. The law provides that "[n]otification received . . . or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."¹⁷⁶ Thus, a self-reporter can obtain immunity for herself by reporting her criminal acts of dumping hazardous wastes, and thereby avoid a possible lengthy sentence.¹⁷⁷ However, a self-reporter cannot avoid civil fines imposed by the government or civil liability to other private parties.¹⁷⁸

In conclusion, environmental reporting laws are designed to encourage the prompt reporting of hazardous waste releases in order to allow the federal government to respond to the spill as quickly as possible. Clearly, Congress had concerns about catastrophic incidents that could pollute bodies of water, water supplies, or air in a community, endangering the people of the community. Unlike the child and elder abuse laws, which aim to protect certain vulnerable victims, the environmental statutes have the interests of the general public in mind.

other substantive environmental violations, including violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6986 (2000), which were dropped in exchange for his guilty plea. *See also* *United States v. Bogas*, 920 F.2d 363, 364–65 (6th Cir. 1990) (noting that the defendant, who intentionally dumped liquid wastes, jet fuel, and paint into a large pit in the ground, pled guilty to failure to report charge and making a false statement to federal investigators, but not to substantive dumping charge).

¹⁷⁵ *See, e.g., United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001) (explaining that the officers and operations manager of a chemical plant were convicted of numerous environmental offenses, including a CERCLA reporting charge, for dumping untreated, mercury-contaminated wastewater into Purvis Creek for a one-year period); *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993) (stating that the owner of a railroad-tie-treating business was convicted of a RCRA substantive violation and a CERCLA failure to report for handling creosote — a hazardous substance — without a permit and intentionally dumping a load of it and attempting to cover it up).

¹⁷⁶ 42 U.S.C. § 9603(b) (2000).

¹⁷⁷ The defendants in *Hansen*, for example, received sentences that included long prison terms, ranging from 46 to 108 months, and fines of \$20,000 for two of the defendants. *Hansen*, 262 F.3d at 1232. Had any of them reported their illegal dumping, they would have obtained immunity from prosecution for those acts. *See* 42 U.S.C. § 9603(b) (2000).

¹⁷⁸ *United States v. Ward*, 448 U.S. 242 (1980) (holding that imposing civil penalties on a person who self-reports spilling oil into a creek does not violate Fifth Amendment's right against self-incrimination); *United States v. LeBeouf Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976) (noting that the Fifth Amendment right against self-incrimination does not apply to corporations and that the right applies only in criminal cases, although Congress labeled the sanction for failure to report a "civil penalty").

Because of their nature as "self-reporting" requirements, however, the immunity provision operates differently than those found in the child or elder abuse laws or in reporting laws affecting financial institutions. In the case of environmental reporting, only criminal immunity is provided. Since environmental reporters typically cause the harm, the law provides for them to be made civilly liable for the cleanup costs and fines.¹⁷⁹ Other types of reporting laws protect reporters from both criminal and civil liability based on the information they report.

In short, environmental reporting laws may be viewed as so distinct from other reporting laws as to be considered *sui generis*. De facto, they generally require the same persons who caused the harm to report the harm, since they are the only persons in a position to know of the spills. In recognition of the de facto self-incriminating nature of environmental spills reporting, the statutes grant criminal — but not civil — immunity to reporters *for offenses related to the environmental harm they have caused*.¹⁸⁰ Alternatively, the other types of reporting statutes discussed in previous sections grant civil, and sometimes also criminal, immunity *for liability based on the act of reporting*.¹⁸¹ Since environmental reporting statutes are so unique in this sense, the following discussion relating to Good Samaritan laws and public welfare offenses will not apply in its entirety to environmental reporting laws. Still, some useful insights can be drawn from a comparison of those areas of law to the environmental reporting laws, and a well-rounded discussion of reporting laws would be incomplete without a discussion of environmental reporting laws.

II. REPORTING LAWS IN THE CONTEXT OF SUBSTANTIVE CRIMINAL LAW THEORY

Reporting laws imposed on professionals in certain industries find their place in substantive criminal law theory among two related areas: "Good Samaritan" laws and "public welfare offenses." One of the tenets of traditional criminal law is that Common Law legal systems do not punish for "bad Samaritanism" or the failure to render aid to a person in peril.¹⁸² It is often said that we have shown a reluctance to mandate that strangers help others in need of rescue, preferring instead to leave that decision to each individual's sense of moral or civic duty. Reporting laws create a variant of Good Samaritan laws by requiring individuals to assist victims — or the general public — by conveying information about possible harms or injuries to the appropriate government agencies. Thus, whereas it is still fair to say that

¹⁷⁹ See *supra* notes 173–78 and accompanying text.

¹⁸⁰ *Id.*

¹⁸¹ See *supra* notes 74–75 and accompanying text (child abuse reporting), notes 107–10 and accompanying text (elder abuse reporting), and note 130 and accompanying text (suspicious financial transactions reporting).

¹⁸² See *infra* notes 190–93 (reviewing the literature).

American criminal law does not require strangers to come to each other's rescue, reporting laws have imposed a limited duty to "rescue" by means of reporting information to government agencies so that they may intervene.

Alternatively, it is well-established that people who choose to work within certain industries must follow regulatory schemes to ensure the public safety. In other words, the government imposes many duties on persons working within certain industries in order to safeguard the public from harm. The failure to take the measures required by law can be punished criminally as a "public welfare offense." Thus, we have favored the idea that the law can properly impose duties on professionals within certain industries to act on behalf of the public welfare.

Reporting laws fit within this paradigm as well, but again, not neatly. Duty-to-report laws also impose affirmative duties on persons within certain professions, and they do so in order to protect certain vulnerable victims from harm or to protect society from widespread harms such as environmental disasters or the erosion of confidence in the banking system. The difference is, of course, that the duties imposed on professionals to report are not actions required of them in order to prevent *them* from causing harm to society through their negligent acts.¹⁸³ Rather, they are simply being called upon to act as the eyes and ears of law enforcement.

Thus, as a conceptual matter, reporting laws take their place within criminal law theory somewhere between the chapters on Good Samaritan laws and public welfare offenses. The theoretical comparison to both illuminates our understanding of the place that reporting laws have taken in our criminal law jurisprudence. The important differences between reporting laws, on the one hand, and both Good Samaritan and public welfare offenses, on the other, are instructive as well and suggest that we reconsider the path upon which we have embarked. The following sections examine the theoretical threads that tie reporting duties to both Good Samaritan laws and public welfare offenses.

A. The Relationship to "Good Samaritan" Laws

Any discussion of "Good Samaritan" laws must begin with a discussion of punishing crimes of omission. The standard black letter law regarding omissions teaches that, as a general matter, American criminal law does not punish for acts of omission, but only for acts of commission. As Joshua Dressler has written, "the law punishes people for their wrongdoings, and not for their wrongful *not*-doings."¹⁸⁴ Though the line-drawing is far from clear, "[a] 'not-doing' may be a moral wrong,

¹⁸³ Environmental reporting statutes are the exception in this case, as the reporting duties apply only to those who cause the hazardous waste spills. See *supra* note 173 and accompanying text.

¹⁸⁴ Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971, 975 (2000) (footnotes omitted).

but a not-doing is not (usually) a legal wrong."¹⁸⁵ Situations in which there is a legally-recognized duty to act constitute the only exceptions. A legal duty to act arises in certain circumstances:

(a) there is a special relationship between the omitter and the victim, such as a parent and her child; (b) there is a contract (express or implied) to act, such as when a doctor agrees to care for her patient; (c) a person creates a risk of harm to another person or property and then fails to act to prevent the harm from occurring; and (d) a person who has no original duty to act voluntarily comes to the aid of one in peril, but then omits further aid and, as a result of the omission, puts the at-risk individual in a worse position than if no assistance had been undertaken.¹⁸⁶

By way of example, parents, by virtue of their family relationship, have a duty to provide care and nourishment for their children; hosts owe duties of care to their guests, since they have invited them onto their property; a tavern keeper has a duty to protect a patron from harm, such as from driving away from the tavern in a drunken state.¹⁸⁷ However, strangers or others not in any legally recognized relationship to one another typically have no duty to care for each other. Thus, when a person fails to make any attempt to rescue a stranger in need of help, the "bad Samaritan" cannot be punished for this omission, unless the legislature has enacted a duty-to-rescue, or "Good Samaritan," law.

By statute, legislatures can create legal duties to act. True Good Samaritan criminal statutes that impose a duty to rescue another exist in only eight American states, although in some of those states, the duty to rescue may be limited to witnesses of sexual assault or serious violent felonies, rather than a generalized duty to aid in any emergency situation.¹⁸⁸ In contrast, most European and Latin

¹⁸⁵ *Id.* (footnotes omitted).

¹⁸⁶ *Id.* at 975-76 (footnotes omitted).

¹⁸⁷ See Hayden, *supra* note 36, at 33 n.47 (citing numerous examples).

¹⁸⁸ See FLA. STAT. ANN. § 794.027 (West 2002) (establishing a duty to report sexual battery if one has reasonable grounds to believe that such an act has occurred, has the ability to seek assistance for the victim, would not be exposed to threat or harm to self, is not an immediate family member of the victim, and is not the victim his or herself; failure to report is punishable as a first degree misdemeanor); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2002) (establishing a duty to report crimes of rape, murder, manslaughter, or armed robbery if at the scene of the crime and can report without danger to self; any failure to do so is punishable by a fine of \$500.00 to \$2,500.00); MINN. STAT. ANN. §§ 604A.01, 609.02.4a (West 2001) (establishing a duty to assist at the scene of an emergency if one can do so without danger to self, any violators of which may be found guilty of a petty misdemeanor, punishable by a fine not to exceed \$300.00); OHIO REV. CODE ANN. § 2921.22 (West 2002) (establishing a duty to report a felony if one knows it is being committed, as well as other reporting duties pertaining to health care professionals and others with regards to stab

American countries impose a statutory duty to rescue on all people in the jurisdiction.¹⁸⁹

Over the years, the question of whether such statutes represent wise or just policy has filled the pages of law journals,¹⁹⁰ with influential legal philosophers on both sides of the debate.¹⁹¹ By and large, however, most American states and the federal government have resisted the call to enact broad duty-to-rescue statutes.¹⁹² Legislators have rejected Good Samaritan laws, even in situations in which there is the loud outcry of a public angered by the callous indifference of a "soulless individual" (to borrow Dressler's phrase) who witnesses a violent crime and does nothing at all to help.¹⁹³ What we have chosen to do instead is to encourage

wounds, gunshot wounds, discovery of a dead body, and burn injuries); R.I. GEN. LAWS § 11-56-1 (2001) (establishing a duty to assist at the scene of an emergency if one can do so without danger to self, any violators of which may be found guilty of a petty misdemeanor punishable by imprisonment not to exceed six months, a fine no greater than \$500.00, or both); VT. STAT. ANN. tit. 12, § 519 (2001) (establishing a duty to render aid to one in grave harm, if aid can be given without danger or peril to self, with a willful violation punishable by a fine of no more than \$100.00); WASH. REV. CODE ANN. § 9.69.100 (West 2002) (establishing a duty to report for any witness of a violent or sexual offense against a child or any violent offense, violations of which are punishable as a misdemeanor); WIS. STAT. ANN. § 940.34 (West 2002) (establishing a duty to summon law enforcement and render assistance to a victim if the person knows that a crime is being committed and the victim is exposed to bodily harm, any violators of which may be found guilty of a Class C misdemeanor).

¹⁸⁹ See Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451, 452 n. 2 (2000) (citing survey of thirteen European countries) (citation omitted). Most Latin American countries also have duty to rescue statutes. *Id.* (citation omitted).

¹⁹⁰ See, e.g., Dressler, *supra* note 184; Hayden, *supra* note 36; Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Liam Murphy, *Beneficence, Law and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605 (2001); Tomlinson, *supra* note 189, at 452 n.6 (listing articles); King, *supra* note 36, at 619 n.42 (listing articles); Mark K. Osbeck, Note, *Bad Samaritanism and the Duty to Render Aid: A Proposal*, 19 U. MICH. J.L. REFORM 315, 316 n.8 (1985) (listing articles); Shaya Rochester, Note, *What Would Have Seinfeld Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L.Q. 1185 (2001).

¹⁹¹ Compare Lord Thomas Macaulay, *Notes on the Indian Penal Code*, in 7 WORKS OF LORD MACAULAY 493-97 (Trevelyan ed. 1866), reprinted in THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 159-63 (1983) (arguing against a duty to rescue), with 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 150-59 (1984) (arguing in favor of a duty to rescue).

¹⁹² Angela Hayden provided a thorough synopsis of the current state of Good Samaritan laws in the United States: "Minnesota, Rhode Island, and Vermont all have statutes that impose a general duty to assist an injured person, whether that person is injured as a result of an accident, crime, or other circumstances. Wisconsin also imposes a general duty to help, but applies it only to crime victims." Hayden, *supra* note 36, at 35.

¹⁹³ Dressler, *supra* note 184, at 971 (discussing David Cash's failure to render aid to

voluntary reporting by providing immunity from civil liability for persons who come to the rescue of another person or provide emergency medical treatment.¹⁹⁴ Most states, therefore, impose no liability on people who *fail* to rescue, but provide an immunity shield for those who do attempt to rescue.

The fact that only a few states have enacted duty-to-rescue statutes has led us to believe that American criminal law generally does not impose a duty to "get involved" when one obtains information relating to a crime. In fact, this is not so. As Part I of this Article has demonstrated, legislatures have not shied away from requiring witnesses to notify the authorities. Statutes that mandate the filing of a report of suspected child or elder abuse, suspicious banking transactions,

seven-year-old Sherrice Iverson, who was raped and murdered by Cash's friend in a Las Vegas casino restroom). A great deal of hand-wringing and anger followed the stabbing murder of Kitty Genovese in the 1960s. Many of her neighbors, safely inside their apartments, are said to have heard her screams for help for more than half an hour, but no one helped her. *Id.* at 972-73.

¹⁹⁴ Every state has a statute providing immunity from civil liability for any person — typically also specifying medical personnel — who provides emergency assistance at the scene of an accident, casualty, or disaster. See ALA. CODE § 6-5-332 (2002); ALASKA STAT. § 09-65-090 (Michie 2001); ARIZ. REV. STAT. § 36-2263 (2002); ARK. CODE ANN. § 17-95-101 (Michie 2001); CAL. BUS. & PROF. CODE § 2395 (West 2002); COLO. REV. STAT. ANN. § 13-21-108.1 (West 2002); CONN. GEN. STAT. § 52-557b (2002); DEL. CODE ANN. tit. 16, § 6801 (2002); D.C. CODE ANN. § 7-401 (2001); FLA. STAT. ANN. § 768.13 (West 2002); GA. CODE ANN. § 26-2-374 (2002); HAW. REV. STAT. § 663-1.5 (2001); IDAHO CODE § 39-4421 (Michie 2002); 745 ILL. COMP. STAT. 49/1-120 (2002); IND. CODE § 34-30-12-2 (2002); IOWA CODE § 613.17 (2002); KAN. STAT. ANN. § 65-2891 (2002), *amended by* 2002 KAN. SESS. LAWS ch. 203; KY. REV. STAT. ANN. § 311.668 (Michie 2002); LA. REV. STAT. ANN. § 9:2793 (West 2002); ME. REV. STAT. ANN. tit. 14, § 164 (2002); MD. CODE ANN., CTS. & JUD. PROC. § 5-603 (2002); MASS. GEN. LAWS ANN. ch. 258C, § 13 (West 2002); MICH. COMP. LAWS ANN. § 691.1501 (West 2002); MINN. STAT. ANN. § 604A.01 (West 2002); MISS. CODE ANN. § 73-25-38 (2001); MO. ANN. STAT. § 537.037 (West 2002); MONT. CODE ANN. § 27-1-714 (2001); NEB. REV. STAT. § 25-21,186 (2001); NEV. REV. STAT. ANN. 41.500 (Michie 2002); N.H. REV. STAT. ANN. § 508:12 (2002); N.J. STAT. ANN. § 2A:53A-13 (West 2002); N.M. STAT. ANN. § 24-10-3 (Michie 2001); N.Y. PUB. HEALTH LAW § 3000-a (McKinney 2002); N.C. GEN. STAT. § 90-21.14 (2002); N.D. CENT. CODE § 32-03.1-02 (2001); OHIO REV. CODE ANN. § 2305.23 (West 2002); OKLA. STAT. ANN. tit. 76, § 5 (West 2002); OR. REV. STAT. § 30.800 (2001); 42 PA. CONS. STAT. ANN. § 8331 (West 2002); R.I. GEN. LAWS § 9-1-27.1 (2001); S.C. CODE ANN. § 15-1-310 (Law. Co-op. 2001); S.D. CODIFIED LAWS §§ 20-9-3, 20-9-4.1 (Michie 2002); TENN. CODE ANN. § 63-6-218 (2002); TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-.002 (Vernon 2002); UTAH CODE ANN. § 78-11-22 (2001); VT. STAT. ANN. tit. 18, § 907(d)(1) (2001); VA. CODE ANN. § 8.01-225 (Michie 2002); WASH. REV. CODE ANN. § 4.24.300 (West 2002); W. VA. CODE § 55-7-15 (2002); WIS. STAT. ANN. § 895.48 (West 2002); WYO. STAT. ANN. § 1-1-120 (Michie 2001).

Note that Hawaii, the District of Columbia, and Vermont impose a duty to render aid only to those involved in automobile accidents. See HAW. REV. STAT. § 291C-14 (2001); D.C. CODE ANN. § 50-1001 (2001); VT. STAT. ANN. tit. 23, § 3905 (2001).

environmental spills, or on-going crimes do, in a sense, require the reporters to act as "Good Samaritans" in coming to the aid of the particular victims, law enforcement, and society as a whole by alerting the government to the need to act.

Some argue that the case for reporting laws is stronger than that for duty-to-rescue laws in that reporters are not actually required to intervene directly and physically when there is a crime-in-progress or when a victim is in need of assistance. Reporting laws require a simple phone call (and perhaps a written report as well).¹⁹⁵ However, Good Samaritan laws may be viewed as less intrusive in the sense that they do not implicate any professional privileges or confidentiality rules, whereas reporting laws typically abrogate most professional privileges.¹⁹⁶ Thus, in one sense society demands less of reporters as compared to rescuers since all that society requires is a phone call. In another sense, however, the damage to confidential relationships is a weighty social cost that should be considered in balancing the costs and benefits of reporting laws.

B. Relationship to Public Welfare Offenses

The transformation of criminal law theory ushered in by the regulatory state and "public welfare offenses" consisted of two fundamental changes, only one of which has been closely scrutinized. First, the creation of public welfare offenses imposed affirmative duties on people within certain professions or industries by means of regulations, many of which carry criminal penalties.¹⁹⁷ Second, public welfare offenses often, but not always, permit conviction for the failure to perform those duties without requiring proof of a guilty mind and without proof that the defendant actually committed the proscribed omission to act.¹⁹⁸ The strict and vicarious liability nature of public welfare offenses has captured the attention of scholars for decades.¹⁹⁹ It also has been the main focus of legal challenges to public welfare

¹⁹⁵ The Arkansas Code, for example, requires mandatory child abuse reporters to notify the child abuse hotline. See ARK CODE ANN. § 12-12-507(b) (2002).

¹⁹⁶ See, e.g., *supra* notes 71–73 and accompanying text (privileges abrogated by child abuse reporting laws).

¹⁹⁷ See *infra* notes 204–08 and accompanying text.

¹⁹⁸ See *infra* note 205 and accompanying text.

¹⁹⁹ See generally Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737 (1981) (arguing against criminal sanctions); John C. Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (arguing for reform at the sentencing phase); Stuart P. Green, *Why It's A Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (arguing that identical conduct should be dealt with either criminally or civilly); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 422–25 (1958) (arguing against the use of strict liability offenses in criminal law); Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*,

offenses.²⁰⁰ The moral justification for the imposition of affirmative duties, on the other hand, has received scant scrutiny. Reporting laws highlight the fundamental importance of the theoretical question regarding the proper justification for imposing affirmative duties on certain categories of individuals.

The Supreme Court justified the utilization of crimes of omission in the nature of "regulatory measure[s]" as a means of "achievement of some social betterment" in the early 1920s.²⁰¹ Thirty years later, in *Morrisette v. United States*,²⁰² the Court gave a more complete justification for the imposition of affirmative duties under the criminal law:

The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such

30 U. CHI. L. REV. 423 (1963) (explaining economic regulation legislation relevant to the use of criminal sanction); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996) (arguing for a sharpening of the criminal-civil distinction); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (arguing that moral credibility should be taken into account when creating criminal law); Alan Saltzman, *Strict Liability and the United States Constitution*, 24 WAYNE L. REV. 1571 (1978) (arguing against strict criminal liability); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) (comparing the development of strict liability public welfare offenses in the United States and England); Richard A. Wessersatrom, *Strict Liability in Criminal Law*, 12 STAN. L. REV. 731 (1960) (arguing in favor of strict liability statutes in criminal law).

²⁰⁰ See, e.g., *United States v. Park*, 421 U.S. 658 (1975) (holding that a corporate agent in a responsible relation to the commission of an offense may be convicted of the offense that dispenses with the consciousness of wrongdoing); *Morrisette v. United States*, 342 U.S. 246 (1952) (distinguishing public welfare offenses that require no culpable state of mind from federal larceny statute that required proof of an intent to steal); *United States v. Dotterweich*, 320 U.S. 277 (1943) (upholding conviction of corporate agent under statute that does not require consciousness of wrongdoing); *United States v. Balint*, 258 U.S. 250 (1922) (acknowledging defendants charged with unlawfully selling opium and coca leaves challenged indictment on the ground that it did not charge them with knowledge of the nature of the substances they sold).

²⁰¹ *Balint*, 258 U.S. at 252.

²⁰² 342 U.S. 246 (1952).

dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.²⁰³

It stands to reason that persons "in control of particular industries, trades, properties or activities that affect public health, safety or welfare,"²⁰⁴ and who stand to profit from such activities, should be held accountable for their negligent and perhaps even their innocently harmful acts. (Whether we do so by means of civil fines or criminal punishment is another matter.) Courts have upheld criminal laws that permit punishment without regard to whether the person or corporate entity can be shown to have acted with a culpable *mens rea*.²⁰⁵ They have done so, in part, on the ground that people entering into regulated industries have a duty to inform themselves of what is required of them.²⁰⁶ The assumption that underlies the justification for public welfare offenses — both the imposition of affirmative duties as well as the strict and vicarious liability nature of the laws — is that people and corporate entities in these industries may be required to follow certain procedures in order to prevent themselves from harming "the innocent public who are wholly helpless."²⁰⁷ Vicarious liability has been justified on the grounds that society may properly impose a "duty to implement measures that will insure that violations will not occur."²⁰⁸ Thus, corporate officers may be punished for the failings of lower level employees, on the ground that officers should implement compliance programs that ensure that violations do not occur.

With regard to reporting requirements or investigative duties, we are dealing with the other side of the public welfare offense coin, not the strict/vicarious liability side. Since most reporting statutes require proof of a culpable *mens rea*,²⁰⁹ the issue is not one of justifying criminal liability for acts or omissions that are not morally blameworthy. A mandatory reporter who fails to report may be viewed as morally blameworthy in the sense of knowingly or willfully failing to report. The issue, however, is whether people in certain professions or vocations (or anyone, for

²⁰³ *Id.* at 253–54.

²⁰⁴ *Id.* at 254.

²⁰⁵ *See supra* note 200.

²⁰⁶ *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

²⁰⁷ *Id.*

²⁰⁸ *United States v. Park*, 421 U.S. 658, 672 (1975); *see also Allen, supra* note 199, at 745 (discussing the "morality of means" of vicarious liability justification in the *Park* case).

²⁰⁹ Reporting statutes have been held to give fair notice to potential reporters of their duty to report upon obtaining "reasonable cause" to believe a report is required. *See, e.g., Morris v. State*, 833 S.W.2d 624, 627 (Tx. Ct. App. 1992). The voluntary choice not to report one's reasonable belief of child or elder abuse or of suspicious financial transactions can be viewed a morally culpable choice.

that matter) should be *required by law* to do the act in question.

In Part III of this Article, the principal concerns relating to both Good Samaritan laws and public welfare offenses are applied to reporting offenses. With regard to each consideration raised, the Article addresses the importance of reforming reporting laws to set a higher evidentiary threshold for triggering a duty to report.

III. RAISING THE EVIDENTIARY THRESHOLD: AN IMPORTANT LESSON DRAWN FROM GOOD SAMARITAN LAWS AND PUBLIC WELFARE OFFENSES

Is it anomalous to show a general distaste of Good Samaritan laws while simultaneously embracing the expansion of strict liability regulatory offenses? Interestingly, one sees parallels in the study of both of these areas of law, and yet we have taken divergent roads with regards to each. In considering the applicability of the lessons learned from experiences with both Good Samaritan laws and public welfare offenses, one discerns a simple change that by itself would greatly improve the operation of reporting statutes: The threshold evidentiary standard that triggers a reporting duty should be higher than the current low standards that typify reporting laws. The following sections consider the issues of greatest concern surrounding Good Samaritan statutes and public welfare offenses, demonstrating how raising the evidentiary standard that triggers a reporting duty — preferably to “clear and convincing evidence” — allays most of those concerns relating to reporting laws.

A. Line-Drawing

Good Samaritan laws have been challenged on the grounds that people will have difficulty discerning in a given situation whether they owe another person a duty to rescue. “The most persuasive statement of the line-drawing objection” is said to have been made by Lord Macaulay, who asked: “‘What was a good English gentleman in nineteenth century India to do when confronted by crowds of starving beggars whose immediate needs would quickly consume his available resources?’”²¹⁰ Did the duty to rescue apply to such a situation, and if so, “[h]ow much money” or “exertion” would a person be required to sacrifice “to save a life when each extra step [required to be taken, considered in isolation], is trivial?”²¹¹ Clearly, legislatures can minimize the line-drawing problems by carefully drafting statutes that limit the situations in which one must rescue to those involving serious injuries or violent crimes. However, “[t]he question remains: What response should we expect from the defendant who is an eyewitness to a life-threatening

²¹⁰ Tomlinson, *supra* note 189, at 455.

²¹¹ *Id.* (quoting Lord Macaulay).

peril?"²¹² No matter how carefully one drafts Good Samaritan statutes to reduce the vagueness of the duties, there will still be imprecision in the factors on which we decide liability: What is "reasonable assistance"? Is the victim in "grave" physical harm? Can the assistance "be rendered without any 'danger or peril' to the actors or others?"²¹³ While we might leave these issues for juries to determine, the notion of legality — that there should be no punishment without a clear notice of the law's expectations — still concerns many scholars.²¹⁴

The reporting laws also involve vagueness or line-drawing problems. However, the ambiguity that may confront a reporter is clearly resolved in favor of the broadest duty to report. To take one example from the child abuse reporting statutes, if a hospital emergency room doctor treats a child whose injuries obviously were inflicted intentionally by another (e.g., cigarette burns to skin), the duty to report is perfectly clear. But what if the situation presents factual issues that do not clearly indicate abuse? In *Ham v. Hospital of Morristown, Inc.*,²¹⁵ a child was brought to see an emergency room doctor for severe diarrhea. She also had blisters on her fingers and an abrasion on her forehead.²¹⁶ The child's mother explained the cause of the injuries in a plausible manner, making the question of whether the doctor had a duty to report a murky factual issue.²¹⁷ If it had been a criminal prosecution of the doctor for failing to report, the State would have had to prove that the doctor had reasonable cause to believe that the child was the victim of abuse and that he willfully failed to report his suspicions.²¹⁸ The difficult legal issue would be whether such symptoms, if equally consistent with natural or accidental causes as with intentional physical abuse, provides "reasonable cause" to believe the child is the victim of child abuse.²¹⁹

The law clearly promotes a regime in which the doctors should err on the side

²¹² *Id.* at 456.

²¹³ Dressler, *supra* note 184, at 984 (italics omitted).

²¹⁴ See, e.g., Allen, *supra* note 199, at 742–43 (discussing the legal concerns raised by Dean Sanford H. Kadish in his writings on public welfare offenses).

²¹⁵ 917 F. Supp. 531 (E.D. Tenn. 1995).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Since this was in fact a civil action in negligence, the court inquired into the standards of care of the reasonable emergency-room physician to determine whether the reasonable emergency-room physician would have had suspicions of child abuse based on the symptoms exhibited by the child. See *id.* at 537–38. The physicians failed in their motion for summary judgment. The court found a genuine issue of fact as to the reasonableness of the doctors' conclusions that there had been no child abuse based on these facts. *Id.* Had the physicians reported suspicions of child abuse on these facts, they surely would have prevailed by asserting the immunity defense.

²¹⁹ Presumably, since the statutes require a subjective intent not to report, a jury would have to find not only that a reasonable person would have suspected child abuse, but that the non-reporting defendant did in fact suspect child abuse and willfully failed to report it.

of reporting any time a child's condition *might be* the result of abuse, not only in cases in which there is clear and convincing evidence of abuse.²²⁰ It does so by setting a low evidentiary trigger for the reporting duty — "reasonable cause to believe" — coupled with the provision of full immunity for erroneous reports.²²¹ In the case of financial institutions, reports must be filed whenever a transaction appears "suspicious," and reporters are granted immunity for erroneous reports and have the shield of confidentiality rules as well.²²² The message is clear: Reporters should report anytime a situation might cause a reasonable person to become suspicious, and not only in situations in which matters clearly are illegal. In exchange for their information, the law pledges to protect reporters from civil liability should their suspicions prove to be unfounded.²²³

To take an example from the banking area, in *Lee v. Bankers Trust Company*,²²⁴ Let W. Lee, a Vice President for Global Retirement and Security Services and Managing Director at Bankers Trust, sued Bankers Trust for defamation over its conduct in investigating his handling of certain accounts — leading up to his being asked to resign — and of its alleged filing of an SAR.²²⁵ The reporting regulations require a bank to file an SAR if the bank "knows, or suspects, or has reason to suspect" that a particular person has violated the law and the transaction involves \$5,000 or more.²²⁶

In this case, Lee had asked two Bankers Trust employees, Plante and Callaghan, to look into some older "custody credit" accounts that had been languishing unclaimed for long periods.²²⁷ According to Lee, he asked Plante to do four things: "(1) to clear all dealings with Bankers Trust's compliance department; (2) not to transfer any money that was not properly documented; (3) not to transfer any funds that might possibly be escheatable; and (4) to keep a detailed list of funds in the reserve account."²²⁸

When Bankers Trust learned of Plante's activities, they questioned him, and "Plante claimed that Lee had told him to transfer escheatable funds into the reserve

²²⁰ See, e.g., *Ham v. Hosp. of Morristown, Inc.*, 917 F. Supp. 531 (E.D. Tenn. 1995).

²²¹ See, e.g., *id.*

²²² See, e.g., *id.*; *supra* notes 124–66 and accompanying text.

²²³ Of course, even if reporters ultimately are immune from liability, they nonetheless face the prospect of fending off lawsuits. See Clayton, *supra* note 76, at 134–35 (lamenting that physician reporters must still expend time, effort, and money to resolve lawsuits, even though they ultimately prevail); Trost, *supra* note 42, at 187–88 (arguing that defending against lawsuits for unsubstantiated reports deters mandatory reporters from filing reports).

²²⁴ 166 F.3d 540 (2d Cir. 1999).

²²⁵ *Id.* at 542–43.

²²⁶ See 12 C.F.R. § 21.11(c)(4); see also *supra* notes 124–28 and accompanying text (addressing reporting laws pertaining to financial institutions).

²²⁷ *Lee*, 166 F.3d at 542.

²²⁸ *Id.*

account," a charge that Lee denied.²²⁹ Other Bankers Trust employees met with Lee for five hours, after which they presumably concluded that Lee had engaged in improper conduct.²³⁰ After this meeting, he was asked to stay out of his office so that it could be searched.²³¹ Approximately two months later, Lee was asked to resign.²³² Although Bankers Trust made no public statement concerning Lee, the press reported that Lee left Bankers Trust amid allegations of wrongdoing.²³³

The litigation over Lee's resignation leaves many questions unanswered. Lee claimed that Bankers Trust had filed an SAR with federal authorities and that it contained defamatory statements.²³⁴ He must have known, given his experience in banking, that an SAR would be filed, since Bankers Trust believed he had engaged in suspicious activities.²³⁵ Bankers Trust refused to deny or confirm the filing of an SAR, and likewise, they refused to disclose such SAR, if it indeed existed.²³⁶ The law requires that a bank keep confidential whether it has filed an SAR, and the actual SAR itself may not be disclosed.²³⁷

Lee claimed that immunity from liability for the filing of an SAR should only apply to good-faith reporters, but the Second Circuit disagreed.²³⁸ The court affirmed the decision to refuse to disclose any information regarding the alleged filing of an SAR and affirmed the dismissal of Lee's defamation claim.²³⁹ The *Lee* case amply demonstrates that banks may (and, indeed, are required to) file SARs based on *any* suspicions they may have — whether well-founded or not, and, at least in some Circuits, whether in good faith or not — and the person named in an SAR has no access to the information contained in such a report.²⁴⁰ The filing of an SAR can lead to a federal investigation of the person's activities that in and of itself can cause embarrassment, expense, and inconvenience to the person, as well as damage to the person's reputation in the community and in the profession.²⁴¹ The

²²⁹ *Id.* at 542.

²³⁰ *Id.* at 542–43.

²³¹ *Id.* at 543.

²³² *Id.*

²³³ *Lee*, 166 F.3d at 543.

²³⁴ *Id.*

²³⁵ *See id.* at 543 (“[R]egulations . . . require financial institutions like Bankers Trust to file an SAR ‘ . . . after the initial detection of a known or suspected violation of federal law.’”).

²³⁶ *Id.* at 543.

²³⁷ *See supra* notes 134–37 and accompanying text (discussing confidentiality requirements of SARs).

²³⁸ *Lee*, 166 F.3d at 544; *see supra* notes 32–33, 37 and accompanying text (discussing safe harbor immunity for banks that file SARs).

²³⁹ *Lee*, 166 F.3d at 547.

²⁴⁰ *See supra* notes 108–10 and accompanying text.

²⁴¹ *See, e.g.,* Besharov, *supra* note 78, at 190 (noting that unfounded reports of child abuse suspicions trigger an “unavoidably traumatic investigation that is, inherently, a breach of

bank, on the other hand, protects itself from liability based on the acts of its customers, and even to an extent, on the acts of its insiders, by reporting any suspicious activities.²⁴²

In contrast, the environmental reporting provision of CERCLA does not have an evidentiary trigger that is too low. Since the duty to report spills is placed on those in charge of the vessel or facility from which the spill comes,²⁴³ one can rest assured that they will know for a fact that a spill has occurred. The issues, instead, are whether the spill is of sufficient magnitude to trigger the duty to report. Environmental reporting statutes, thus, do not create a potential overreporting problem such as those seen in other areas.²⁴⁴

In sum, in reporting cases — as opposed to duty to rescue cases — the line is clearly drawn. The question of what circumstances trigger a duty to report is decided heavily in favor of reporting. The problem is that, with the exception of environmental reporting, reporters are required to report even in cases in which the evidence of criminality may be weak.²⁴⁵ By allowing victims to sue non-reporters and to prosecute non-reporters, in conjunction with providing blanket immunity for erroneous or even intentionally false reports, the laws encourage the generation of a great number of reports, many possibly unfounded.²⁴⁶ Obviously, unfounded reports cause the waste of scarce investigative resources as well as damage to the reputations of the falsely accused.²⁴⁷

Ironically, in cases of child or elder abuse, the misdirection of investigative resources may undermine the ability of law enforcement to protect the very victims the reporting laws are designed to protect.²⁴⁸ The goal of mandatory reporting requirements — to obtain as much information as possible about as many cases of child or elder abuse as possible — may actually backfire, causing protective

parental and family privacy"); Clayton, *supra* note 76, at 134 (noting that "significant trauma . . . can accompany investigations by state agencies" as a reason to discourage mandatory reporting of child abuse).

²⁴² See *supra* notes 130–33 and accompanying text (focusing on disclosure liability).

²⁴³ See *supra* text accompanying notes 161–72 (discussing requirements of CERCLA).

²⁴⁴ See *supra* text accompanying note 173 (noting that CERCLA only requires people to report their own conduct).

²⁴⁵ See *supra* p. 9.

²⁴⁶ Professor Besharov estimated, for example, that three million reports of possible child abuse were reported to law enforcement in 1997. Of those three million, it is estimated that only about 800,000 cases of actual child abuse were substantiated. Besharov, *supra* note 78, at 180–81; see also Richardson, *supra* note 76, at 136 (noting that overreporting is "[o]ne major concern" and that "[a] 1996 report from the National Committee to Prevent Child Abuse showed a 31% substantiation rate among data collected from 37 states"); Singley, *supra* note 43, at 239–40 (discussing the same 1996 report on Child Abuse Prevention).

²⁴⁷ See Besharov, *supra* note 78, at 190 ("[Unfounded reports are] a massive and unjustified violation of parental rights.").

²⁴⁸ See *id.* at 191; Richardson, *supra* note 76, at 136; Singley, *supra* note 43, at 239–40.

agencies and law enforcement to miss opportunities at early intervention in serious cases.²⁴⁹ Another consideration is the well-being of the children or elders who may be removed from the custody of innocent guardians as a result of false, yet well-intentioned, reports. Finally, since the use of the courts is not a free good, we should also consider the economic burden placed on the use of the legal system due to erroneous and false cases. Raising the evidentiary threshold that triggers the duty to report to *clear and convincing evidence* can reduce the problem of overreporting and protect victims from the harmful consequences of erroneous reports.²⁵⁰

B. Moral Culpability

Another traditional argument levied against both Good Samaritan and public welfare offenses is that they criminalize conduct in circumstances in which the person may not have committed a morally wrong act.²⁵¹ Considering the arguments made in relation to both types of offenses, the imperative of setting a high evidentiary threshold for triggering a duty to report becomes apparent.

In the case of Good Samaritan laws, the refusal to rescue may not be morally wrong in circumstances in which the harm may not have been foreseeable or easily preventable.²⁵² Though generally opposing Good Samaritan laws, Dressler nonetheless opines that the best argument one could make for them is "retributive in nature."²⁵³ He speaks of "two types of retributivists, both of whom could justify such laws."²⁵⁴ The "culpability-retributivists" would impose punishment for morally culpable behavior.²⁵⁵ If a bystander fails to act to prevent a blind person from stepping off the curb into the path of an oncoming truck, is the bystander's failure to act a morally culpable omission?²⁵⁶ "Culpability-retributivists" would find the omission to be morally unacceptable, assuming that the bystander could have prevented the tragedy without exposing herself to danger.²⁵⁷ The second type of retributivist, the "harm-retributivist,"²⁵⁸ would punish the bystander if she has

²⁴⁹ See Besharov, *supra* note 78, at 191-92.

²⁵⁰ See, e.g., Singley, *supra* note 43, at 245-46, 269 (suggesting that the current reporting standard of reasonable suspicion leaves reporters uncertain about required reporting).

²⁵¹ See *supra* text accompanying note 41.

²⁵² For an example of unforeseen harm, see Dressler's blind person illustration. Dressler, *supra* note 184, at 982.

²⁵³ *Id.* at 980.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ "Culpability-retributivists" would argue that the decision of the bystander not to act is "as much a matter of free choice" as the decision to push the blind person into the truck. *Id.*

²⁵⁷ *Id.*

²⁵⁸ Dressler, *supra* note 184, at 980.

both the requisite culpability *and* if she causes some social harm.²⁵⁹ By defining "social harm" as including the concept of "endangerment," then we might conclude that the bystander *caused harm* to the blind person by intentionally failing to act.²⁶⁰ Assuming that we have strong, reliable evidence of the bystander's intent to allow the harm to occur, then the bystander deserves punishment by the standards of a harm-retributivist.

In the case of a duty-to-rescue law, a physician who fails to perform CPR on a heart attack victim whom she happens to encounter on a sidewalk would be morally culpable, justifying criminal punishment, assuming, of course, that the doctor can discern the nature of the problem and has received the requisite training to provide assistance without endangering herself. What justifications could a competent doctor give for failing to provide this type of basic emergency care when it is necessary to save a person's life (especially given that she would be immune from civil liability if she acts negligently)? While we would not say that the doctor *caused* the death if she failed to act in these circumstances, we may feel comfortable saying that her omission ultimately contributed to the cause of the death.²⁶¹ By failing to prevent the victim from dying when it was easily within her power to attempt to do so, she would have committed a moral wrong. The moral culpability argument is thus fairly strong in the case of duty-to-rescue laws, but only in circumstances when the need to rescue is clear and the would-be rescuer has it in her power to do so without endangering herself. Of course, the doctor who failed to rescue would not be considered guilty of homicide, as she would not be considered the proximate cause of the death, but only of failing to attempt a rescue (assuming that the law punishes this omission as a crime).²⁶²

The concern over convicting the morally innocent is a central theme in the literature of public welfare offenses as well.²⁶³ Public welfare offenses raise the familiar concern of imposing criminal liability based on strict liability for corporate officers or employees who fail to take all the measures required by law to protect the public.²⁶⁴ Since many of these types of laws impose liability without the

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 980–81.

²⁶¹ *Cf. Landeros v. Flood*, 551 P.2d 389, 395 (Cal. 1976) (holding that a physician may be liable in tort for negligence in failing to report child abuse if it was reasonably foreseeable that child would subsequently be abused again).

²⁶² *See id.* Leo Katz explained the distinction between an act (killing) and an omission (failing to aid) as follows: "If the defendant did not exist, would the harmful outcome in question still have occurred in the way it did?" Leo Katz, *Crimes of Omission*, in FOUNDATIONS OF CRIMINAL LAW 159, 161 (Leo Katz et al. eds., 1999). Clearly, if the doctor in that example did not exist, the heart attack victim would still have died; as such, the doctor did not cause the death.

²⁶³ *See discussion supra* Part II.B.

²⁶⁴ *See id.*

requirement of proving criminal intent, the question arises whether we are punishing the morally innocent.²⁶⁵ The jurisprudential justification finds moral culpability in the officer or employee's *responsible relation* to the harm as well as the person's responsibility to take measures to prevent any violation.²⁶⁶ Any deficiency in this justification is brushed away with the utilitarian argument that the threat of criminal liability should be placed on those with the ability to minimize the risks of harm (from impure food, for example) to the innocent public.²⁶⁷ In other words, the duty to act in order to protect the public is placed on those who would *cause* the harm by producing a harmful product.

In the case of reporting statutes, the issue is not whether we can fault an educator for failing to provide educational services, or a medical professional for failing to treat a wound, or a bank for failing to handle its banking matters properly. Should professionals in any of these professions fail to provide their services in a safe manner, they can and do suffer legal liability. Rather, the issue is whether those actors act in a morally culpable manner when they fail to report the harms *caused by another* to the government. Of course, in environmental reporting, the reporter typically does cause the harm, and statutes that limit reporting duties to those responsible for hazardous waste spills (and grant immunity from criminal punishment) avoid the question of imposing reporting duties on one not responsible for causing harm.²⁶⁸

Interestingly, legislatures have not expressed a retributive imperative of punishing wrongdoing non-reporters. As the courts frequently point out, the legislative history of many reporting statutes express the purpose to "encourage" reporting.²⁶⁹ To encourage action is, of course, the opposite of deterring it. Thus, courts speak in the language of utilitarianism when they expansively interpret the duty to report, rather than focusing on the moral culpability of the non-reporters.²⁷⁰ If one views retribution as a proper basis (or *the only* proper basis) for criminal punishment, then there should be a finding of moral fault in the failure to report to justify criminal punishment. A purely utilitarian justification raises even greater concerns than the imposition of strict liability in public welfare offenses, since the non-reporter cannot be said to have *caused* the harm of child or elder abuse or the

²⁶⁵ See *supra* notes 150–51 and accompanying text (discussing public welfare offenses).

²⁶⁶ See *supra* text accompanying notes 154–56.

²⁶⁷ See *supra* text accompanying notes 201–08.

²⁶⁸ See *supra* text accompanying notes 179–80 (comparing reporting requirements of CERCLA with other areas).

²⁶⁹ See, e.g., *Easton v. Sutter Coast Hosp.*, 80 Cal. App. 4th 485, 491 (Cal. Ct. App. 2000), *cert. denied*, 531 U.S. 1084 (2001) ("The focus of the [Elder Abuse and Dependent Adult Civil Protection] Act has always been to encourage reporting of abuse or neglect.") (citation omitted).

²⁷⁰ See Dressler, *supra* note 184, at 981 (arguing that criminal law should punish people for their culpable acts, not their bad character).

misuse of the financial sector.²⁷¹

On the other hand, there is a sense that reporting suspicions of wrongdoing (as a means of providing some assistance to victims or law enforcement) may be a moral imperative under some circumstances, justifying the imposition of a legal duty. Returning a child who has suffered serious abuse into the hands of her abuser without taking any action to prevent further abuse would strike us as unacceptably callous. The thirty-eight neighbors of Kitty Genovese who failed to call the police when they heard her cries for help as she was being stabbed to death clearly failed in their moral obligation to help her.²⁷² So, too, did David Cash when he failed to call the police while his friend raped and killed seven-year-old Sherrice Iverson.²⁷³ Even banks that knowingly do business with money launderers fail in their moral obligation to society if they do not report their knowledge of criminality.²⁷⁴ In all of these examples, however, the moral culpability of the non-reporter becomes clear only when the evidence of criminality is clear and convincing.

Reporters also must have the ability to report without endangering themselves before they are considered to be morally culpable for failing to report. The neighbors of Kitty Genovese and David Cash had the ability to report without alerting the wrongdoer that they were reporting. The on-lookers of a barroom gang rape, on the other hand, may have had first-hand knowledge of a criminal act that might have been cut short by reporting the crime to the police,²⁷⁵ but they may not have been in a position to report the event without putting their own safety at risk.²⁷⁶ One of the gang rapists might have detected an attempt to report and assaulted the person making the report.

Thus, criminal punishment for non-reporting can be justified on retributive grounds only in cases in which the duty to report is imposed on one who causes the harm, as in environmental reporting, or on one who has sufficient reliable evidence of criminality, and only then if the non-reporter could have reported without endangering herself or anyone else.

When evidence of criminality is weak, the question of whether there is a moral imperative to report may be ambiguous, at best, even to the most conscientious and civic-minded person. For example, in *Pesce v. J. Sterling Morton High School*,²⁷⁷ a high school psychologist, Dr. Pesce, delayed reporting his suspicions of child sexual abuse of a student by a teacher for two weeks while he considered the legal

²⁷¹ See discussion *supra* Part II.

²⁷² See Dressler, *supra* note 184, at 972–73.

²⁷³ See *supra* note 193 and accompanying text.

²⁷⁴ See *supra* notes 128–29 and accompanying text (discussing the responsibility of banks to report suspected criminal activity).

²⁷⁵ See *supra* note 38 and accompanying text.

²⁷⁶ See *supra* note 188 and accompanying text.

²⁷⁷ 830 F.2d 789 (7th Cir. 1987).

and psychological implications of his decision whether to report.²⁷⁸ Initially, he had only unsubstantiated rumors that a male faculty member might be sexually abusing a student and that the student was consequently exhibiting suicidal tendencies.²⁷⁹ Dr. Pesce sought the advice of an attorney and a psychologist and “considered relevant state laws, school regulations and guidelines of the American Psychological Association” before deciding not to report the suspicions.²⁸⁰ He did, however, arrange for the student to be seen by a therapist.²⁸¹ Two weeks later, Dr. Pesce met with the student and the therapist to discuss the question of whether to report the suspicions.²⁸² At that meeting, the student admitted that there had indeed been sexual abuse by the teacher.²⁸³ Dr. Pesce then immediately filed an oral report.²⁸⁴

Although he might have been prosecuted for the delay, he was not, nor was he sued. The school board, however, suspended him for five days and then “demoted” him from “School Psychologist” to “School Psychologist for the Behavior Disorders Program.”²⁸⁵ Dr. Pesce sued the school, claiming a denial of his due process rights.²⁸⁶ The example starkly illustrates that reporters may (and perhaps generally do) struggle with the ethical and practical complexity of the decision whether to report. Presumably, Dr. Pesce was balancing the duty to report and avoiding liability for failing to report, as well as the benefits of a police investigation in preventing any possible future abuse, against the possibility that the rumors were false and the harm to a potentially innocent teacher’s reputation, as well as the harm to the student for violating the confidentiality of the psychotherapist-patient relationship.²⁸⁷

This case further illustrated that, depending on the quality of the information a potential reporter obtains, a reporter may in good faith determine that reporting is not a morally right decision, even if the flimsy evidence in his possession would be enough to trigger the reporting requirements.²⁸⁸ When Dr. Pesce’s information

²⁷⁸ *Id.* at 790; see also Singley, *supra* note 43, at 254–56 (discussing the *Pesce* case).

²⁷⁹ *Pesce*, 830 F.2d at 790.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Pesce*, 830 F.2d at 791.

²⁸⁶ *Id.*

²⁸⁷ For a discussion of evidentiary privileges and confidentiality rules, see *supra* notes 71–80 and accompanying text.

²⁸⁸ In *Kimberly S.M. v. Bedford Cent. Sch.*, 649 N.Y.S.2d 588 (N.Y. App. Div. 1996), the court rejected a teacher’s defense for failing to report in which she claimed that she believed she did not have a duty to report suspicions of child abuse because the alleged abuser lived in another state and did not have custody of the child. The statute only requires reporting child abuse that is directly caused or allowed to be caused by a “person ‘legally responsible’”

consisted of unsubstantiated rumors, he concluded that reporting was not necessary.²⁸⁹ It was not until he received first-hand information from the victim that the moral propriety of reporting became apparent to him or, perhaps, that the legal duty to report became clear to him (thus, imposing on him a moral duty to obey the law)²⁹⁰ and/or the benefits of reporting seemed to him to outweigh the costs. Thus, the decision may have been based on both moral and utilitarian grounds, but the point is that the moral imperative of reporting is not always clear. One's view of the moral rightness of reporting may change overtime as better evidence becomes available to the potential reporter.

C. Infringes Individual Liberty

Both Good Samaritan and public welfare offenses evoke concerns about infringing political freedoms by weakening or dismantling the traditional protections against overreaching government power. Because "criminal law is the heavy artillery of society," Francis Allen reminded us that the "very weight of criminal sanctions requires societies valuing individual volition to erect principles of containment in order that the powers of government employed in law enforcement may be prevented from overreaching their bounds and destroying or impairing basic political values."²⁹¹

Allen urges us to evaluate the body of penal prescriptions from the perspective of the "morality of means," and not just the "morality of ends."²⁹² The morality of ends refers to the social objectives that motivate legislators to enact new criminal provisions — protecting society from impure food, deterring child or elder abuse, etc. In the context of reporting statutes, one could hardly argue against the importance of the goals of those statutes. Clearly, the ends of protecting vulnerable victims or preventing widespread harms have compelling moral force.

On the other hand, Allen urges that we consider as well the morality of means:

for the child. *Id.* at 590 (quoting Family Court Act § 1012(e)(iii)). The court stated that if the teacher had "'reasonable cause' to suspect" child abuse, the teacher has a duty to report the suspicion.

It is not the duty of the mandated reporter to assess whether the [statute would apply to the suspected abuser]. . . . If she has reasonable cause to suspect that a child has been sexually abused, the reporter must report immediately. *It is the duty of the investigating agency to determine whether the report was founded.*"

Bedford, 649 N.Y.S.2d at 591 (emphasis added).

²⁸⁹ *Pesce*, 830 F.2d at 790.

²⁹⁰ Stuart Green pointed out that with *malum prohibitum* offenses, the moral wrongfulness of the offense may derive from a person knowingly failing to perform a duty required by law, even if the omission is not in itself intrinsically wrongful in the sense of violating social norms of morality. Green, *supra* note 199, at 1612–13.

²⁹¹ Allen, *supra* note 199, at 738–39.

²⁹² *Id.* at 740.

“the propriety — the effectiveness and decency — of devices proposed to achieve social objectives.”²⁹³ In addressing the rise of the welfare state and the adoption of public welfare offenses, he argued that the laudable social objectives that prompted the passage of many strict liability regulatory offenses should have been weighed against the possibility that “there are alternative civil sanctions more likely to achieve the legislative purpose and at less social cost.”²⁹⁴ Public welfare offenses often relax or eliminate the “traditional requirements of clarity in the definition of offenses, the maxim that guilt is personal, and the proposition that proof of guilt requires a showing by the government that the offender acted with criminal knowledge or purpose.”²⁹⁵ Yet, these same “principles evolved by our law to contain the powers of government in the criminal arena, a containment thought to be mandated by basic political values.”²⁹⁶ Thus, Allen expressed concern that the loosening of requirements in public welfare offenses will lead to unfair denials of liberty through government overreaching.²⁹⁷

Liberty concerns apply with equal force to Good Samaritan laws and reporting offenses. In part, the liberty argument with regard to Good Samaritan laws and reporting statutes centers on the fact that these laws punish for omissions. Leo Katz explained the deeper, moral reason why acts of omission offend us less than acts of commission.²⁹⁸ He explained:

Compare these two situations. (1) Bert will die unless Berta gives him one of her kidneys. Berta is ailing and doesn't want to risk an operation. So she lets Bert die. (2) Berta will die unless Bert gives her his only kidney. She kills Bert and takes his kidney. In both 1 and 2 Berta brings about Bert's death to assure her own survival; in 1 she does it by an omission, in 2 by an act. Why are we less offended by her conduct in 1 than in 2? Because in 1 she simply holds on to her own kidney, whereas in 2 she appropriates somebody else's kidney. We value personal autonomy and Berta's conduct in 2 offends against that value, while her conduct in 1 doesn't. . . . The person who fails to prevent harm that would occur even if he didn't exist simply fails to give away something he owns. The person who brings about harm that wouldn't occur if he didn't exist takes away something owned by someone else. Both persons may be callous, but only the latter offends our sense of personal

²⁹³ *Id.*

²⁹⁴ *Id.* at 740.

²⁹⁵ *Id.* at 742–43.

²⁹⁶ *Id.* at 743.

²⁹⁷ Allen, *supra* note 199, at 742–43.

²⁹⁸ See Katz, *supra* note 262.

autonomy.²⁹⁹

The omission of "fail[ing] to give something away" may say something important about a person's moral character,³⁰⁰ but it may not justify criminal punishment. As Dressler explained:

A penal law that *prohibits* a person from doing X (e.g., unjustifiably killing another person) permits that individual to do anything other than X (assuming no other negative duty). In contrast, a law that *requires* a person to do Y (e.g., help a bystander) bars that person from doing anything other than Y. . . . [I]n a society that generally values personal autonomy, we need to be exceptionally cautious about enacting laws that *compel* us to benefit others, rather than passing laws that simply require us not to harm others.³⁰¹

Reporting statutes, like Good Samaritan laws, clearly infringe on the liberty of

²⁹⁹ *Id.* at 162–63.

³⁰⁰ *Id.* at 163.

³⁰¹ See Dressler, *supra* note 184, at 986–87. John Coffee expressed concern about a second type of infringement of liberty interests: the power given to prosecutors through expansive public welfare offenses. He wrote:

To the extent that liability is imposed for omissions (i.e., failure to detect and correct dangerous conditions), such fear [of prosecution] will affect a broad class of employees, most of whom will never be prosecuted or even threatened with prosecution. In addition, there is a cost to civil libertarian values, because statutes that apply broadly can never be enforced evenly. Hence, some instances of "targeting" or selective prosecutions (based on whatever criteria influence the individual prosecutor) become predictable. These costs would be more tolerable if the conduct involved were inherently blameworthy, but negligence, like death and taxes, is inevitable.

Coffee, *supra* note 199, at 220. On the question of selective prosecutions in Good Samaritan cases, Dressler noted that:

[O]mission criteria are far less helpful in determining whether and against whom a prosecution should be initiated than are identifiable acts of commission. There is a significant risk with [Good Samaritan] laws that the decision to prosecute will be based on a prosecutor's perceived need to respond to public outrage, . . . (which in turn, may be founded on inappropriate factors, such as race, background, or even the physical attractiveness of the victim and/or the supposed poor character of the bystander).

Dressler, *supra* note 184, at 984–85.

Concern about selective prosecution applies equally to reporting statutes. When an assault victim is brought to an emergency room with injuries, the reporting statutes, if triggered, will apply to every employee involved in the treatment of that victim. Which employee will be prosecuted, if any? Prosecutors have the ability to determine the criteria by which they decide which employee to prosecute, thus setting the standards for liability.

mandatory reporters by requiring them to report their suspicions to the government — upon pain of prosecution for the failure to do so — when they might reasonably have preferred to take a different course of action. At least in the case of public welfare offenses, one might say, as has the Supreme Court,³⁰² that corporate officers or employees who fail in their regulatory duties may properly be faulted for having failed to prevent the harm to society. By entering into the business of the corporation, those officers and employees understood they would be held responsible to uphold those duties to ensure the safety of the public. With reporting statutes, on the other hand, mandatory reporters cannot be faulted for having *caused* the harm that the law aims to deter by their failure to report. They enter the professions of medicine or banking, for example, with the intentions of curing people and providing financial services to customers, respectively, but not necessarily with the understanding that they would be required to serve as an arm of law enforcement.³⁰³ The question is whether depriving them of this liberty interest is morally acceptable as a means of achieving the goals of reporting laws.

The Supreme Court's decision in *Lambert v. California* shed some light on this question.³⁰⁴ The appellant in *Lambert* was convicted for failing to register with local law enforcement as was required by the Los Angeles Municipal Code of all felons who resided in the city.³⁰⁵ In effect, the ordinance was a reporting statute: It required this felon to volunteer information to the police that she — a person who may pose a future threat (based on past criminality) — resided at a certain residence.³⁰⁶ The Court's opinion is recognized for articulating the fundamental requirement of due process that a person's liberty cannot be denied without providing fair notice of the duty imposed by law.³⁰⁷ The Court contrasted the felon registration ordinance that it struck down with various public welfare offenses that it had upheld. It noted that public welfare offenses punish the failure to act only in "circumstances that should alert the doer to the consequences of his deed,"³⁰⁸ whereas "circumstances which might move one to inquire as to the necessity of registration [by a felon] are completely lacking."³⁰⁹ Although arguably in mere dicta, the Court then seemed to engage in a balancing of costs and benefits of the statute in determining whether the harm to the appellant's liberty interests were

³⁰² See *supra* notes 202–08 and accompanying text.

³⁰³ See *supra* text accompanying notes 20–21, 99.

³⁰⁴ 355 U.S. 225 (1957).

³⁰⁵ *Id.* at 226–27.

³⁰⁶ See *id.* at 226.

³⁰⁷ The decision also is recognized for being as close as the Court has ever come to constitutionalizing a mens rea requirement as a fundamental prerequisite to criminal punishment. See Louis D. Billionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1271 (1998).

³⁰⁸ *Lambert*, 355 U.S. at 228.

³⁰⁹ *Id.* at 229.

outweighed by the government's interests in obtaining the information:

At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded Nevertheless, this appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent.³¹⁰

Thus, the Court weighed the cost of a person for "wholly passive"³¹¹ conduct under circumstances in which the person cannot be faulted for not having acted against the benefits of a law that provided information to the police merely as a "convenience of law enforcement."³¹²

A balancing test makes sense both for purposes of evaluating the due process question as well as for determining good public policy. In the case of reporting statutes, reporters clearly provide information to law enforcement that might not otherwise be available, and the information concerns suspicions of recent crimes that may call for immediate governmental response. In contrast, the ordinance requiring the registration of all felons at issue in *Lambert* only produced information about the whereabouts of persons whose crimes had already been adjudicated.³¹³ Thus, on the one hand, the value of the information provided by mandatory reporters serves a purpose greater than a mere "convenience of law enforcement." On the other hand, the value of this information should be weighed against the infringement of the liberty interests of mandatory reporters and against other costs associated with required reporting by professionals who traditionally may have enjoyed confidential relationships with clients or patients.

IV. THE TRADE-OFFS OF REPORTING STATUTES: GOVERNMENT INTERVENTION VS. CONFIDENTIALITY IN PROFESSIONAL RELATIONSHIPS AND INDIVIDUAL AUTONOMY

The development of wise public policy demands that policymakers consider both the costs and the benefits of proposed statutes. In drafting the current reporting statutes, it is clear that legislators considered many of the "costs" of reporting statutes, such as the concern that reporters might be sued for negligence

³¹⁰ *Id.*

³¹¹ *Id.* at 228.

³¹² *Id.* at 229.

³¹³ *See id.* at 226.

in filing an erroneous report. Without exception, legislatures have granted immunity from civil liability and usually from criminal liability as well.³¹⁴ The effect on evidentiary privileges has been taken into account as well, with most reporting laws abrogating most privileges.³¹⁵ Thus, legislators have determined that the value of the information gathered through mandatory reports outweighs the loss of confidentiality between patients/clients and the professionals who serve them. Without taking issue with decisions to abrogate some privileges and to impose duties on certain professions, this Article submits that the purposes of reporting statutes would be even better served — and the harm to professional relationships minimized — by changing the evidentiary trigger from “reasonable cause” or “suspicions” to “clear and convincing,” or at a minimum “more likely than not.” Legislators eager to continue to encourage reporting may enact a rule making it permissible — but not mandatory — to report on the basis of reasonable suspicions. Criminal sanctions would only apply to cases in which clear and convincing evidence exists. Civil immunity from lawsuits based on the act of reporting should continue to apply broadly, both to permissive and mandatory reports, so as to provide reporters with protection from retaliatory lawsuits.

As shown in Part III, a higher standard eases the dilemma of mandatory reporters such as medical professionals, educators, lawyers, or bankers who may not feel comfortable reporting mere suspicions, but may feel compelled to do so if the law demands it when there is “reasonable cause” or “suspicious activity.” A higher evidentiary trigger also would reduce the number of lawsuits filed against reporters (even though these are ultimately dismissed due to immunity protections). It would be hard to bring a non-frivolous lawsuit against a reporter who had “clear and convincing” evidence of criminality to report. A higher evidentiary trigger would further require the filing of a report only in circumstances in which the failure to report clearly would be considered a moral failing. In those cases, professionals who are bound by rules of confidentiality may be pleased to have the freedom to notify the authorities, as their consciences may dictate, if it would protect a vulnerable client or patient. Finally, the liberty interests of professionals are shown more respect by a standard that mandates that they report only if the evidence is “clear and unequivocal.” Legislators should show a modicum of restraint in conscripting professionals to act on behalf of the government by limiting the cases in which they must act to those that are more compelling.

Notwithstanding the fact that abrogating a professional privilege, arguably, may be justified in some cases, the overall damage to professional relationships caused by the enactment of reporting statutes should not be underestimated. The issue of

³¹⁴ See *supra* note 74 and accompanying text (discussing civil and criminal immunity for child abuse reporters).

³¹⁵ See *supra* notes 71–73 and accompanying text (discussing abrogation of privileges in child abuse reporting).

confidentiality arises mostly in the areas of child abuse, elder abuse, or domestic violence, and situations in which health professionals, members of the clergy, and in many states, lawyers, are obligated to report. These types of reporting laws implicate the evidentiary privileges that may exist between mental health professionals and patients, clergy and penitents, physicians and patients, and lawyers and clients, as well as between spouses.³¹⁶ They also implicate the confidentiality of a patient's medical records.

The threat posed by reporting statutes to mental health professionals is particularly acute. In *Jaffee v. Redmond*,³¹⁷ the Supreme Court upheld the existence of a psychotherapist-patient privilege under federal law, making the following observations:

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." . . . Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.³¹⁸

The Court's decision actually involved a social worker who was acting in her capacity as a therapist. Thus, the privilege applies broadly to all types of mental health providers. The Court noted that the benefits of successful treatment obviously serve the private interests of the patient, but that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance" as well.³¹⁹ Both victims and abusers may be deterred from discussing an abusive situation with mental health professionals — and getting the help they can provide — unless they are assured complete confidentiality. Without the assurance of confidentiality, it would be "difficult if not impossible" for mental health professionals to provide successful treatment.³²⁰ Even a rule that requires disclosure only in cases in which the abuse is clear and unequivocal does not

³¹⁶ For a general discussion of evidentiary privileges, see 81 AM. JUR. 2D *Witnesses* §§ 285–556 (1992).

³¹⁷ 518 U.S. 1 (1996).

³¹⁸ *Id.* at 10 (citation omitted).

³¹⁹ *Id.* at 11.

³²⁰ *Id.* at 10 (quoting the Judicial Conference Advisory Committee regarding the proposed psychotherapist-patient privilege).

eliminate the possibility that people may avoid getting help from mental health professionals, but at least it reduces the overall amount of reporting and possibly the deterrent side-effect as well.

Members of the clergy serve in a therapeutic counseling capacity as well. The same arguments for preserving the confidentiality between mental health professionals and their patients apply with equal force to the relationship of clergy with members of their congregation who confide in them and seek counseling. Moreover, laws that mandate the reporting of a person's confidences by members of the clergy may infringe upon religious freedoms.³²¹

The recent scandals in the Roman Catholic Church do not necessarily confirm the wisdom of mandatory reporting laws that abrogate the clergy-penitent privilege.³²² Rather, they reveal certain complications that arise when the "penitent" is also a priest who is an employee of the clergy member (e.g., a bishop). In cases in which a clergy member counsels a person who is *not* employed by the Church, the clergy member has no legal obligation (absent a reporting duty) to act upon the person's confession of past criminality.³²³ Like mental health professionals, the clergy member would offer advice and guidance (not to mention forgiveness and the imposition of a penance) with the intent of healing the person so as to prevent any future criminal activity. Absent a reporting statute, clergy would have no legal obligation to take any action in response to the revelation of criminal acts. A Cardinal, however, as the head of an archdiocese, does have a legal obligation to safeguard parishioners of the archdiocese from employees who are known to present a danger.³²⁴ Members of the American Catholic Church most likely would have been satisfied if the leadership within the Church had found effective ways to safeguard children from future abuse by priests who confessed to pedophilia — even if they did not report the priests' crimes to the police. The problem is that they appear to have failed miserably in their moral and legal obligation to protect the

³²¹ See generally Keel, *supra* note 54, at 692 (arguing that mandatory reporting violates the Establishment and Free Exercise Clauses of the First Amendment).

³²² See *supra* notes 1–2 and accompanying text.

³²³ An exception for statements of intent to commit future crimes or frauds applies to the clergy-penitent privilege. Presumably, if a priest expressed an intent to commit future crimes against children, the evidentiary privilege would not exist. One difficulty in this area is that pedophilia increasingly is considered long-term compulsive behavior that is not easily cured. The concern that such behavior may in fact be a character trait led to the adoption of new Federal Rules of Evidence 413–14, which freely admit evidence of child sexual assaults as character evidence. See Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1745–47 (1999).

³²⁴ See, e.g., Michael Rezendes, *Judge Accepts Geoghan Settlement*, BOSTON GLOBE, Sept. 20, 2002, at A8 (Cardinal and archdiocese of Boston agree to \$10 million settlement of 84 lawsuits against defrocked priest and church officials).

children of their parishes.³²⁵ As a result, some have called for simply mandating that they report *all* confessions of child abuse to the police.³²⁶ As with mental health professionals, removing the protection of confidentiality between members of the clergy and their penitents would have the unfortunate effect of deterring people from disclosing their criminality and seeking spiritual guidance. Limiting the reporting duty to clear and unequivocal cases at least minimizes the number of cases in which clergy will be required to violate their relationships of trust with penitents.

Similarly, attorneys have long enjoyed confidentiality in their legal consultations with their clients. Indeed, the attorney-client privilege is "considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good."³²⁷ Requiring an attorney to disclose a client's admission regarding illegality may well result in deterring clients from confiding with attorneys in the first place. Thus, by abrogating the privilege and requiring attorneys to report their clients, the law may simply reduce the overall number of incriminating statements made to attorneys, and thereby reduce the ability lawyers might have to promote lawful behavior.

Mosteller pointed out, however, that the argument for preserving the attorney-client privilege in states that require child abuse reporting makes little sense unless the psychotherapist-patient privilege is also preserved. The same arguments would surely apply to elder abuse reporting as well. For one thing, "psychotherapists at least have a treatment regimen that holds some hope for changing behavior [while] [l]awyers by contrast cannot claim any special ability to induce legal behavior through therapeutic conversation."³²⁸ For another, he noted:

The folly of preferential treatment for attorneys may readily be seen by imagining a scenario in which a lawyer has secured the confidential admission of her client regarding past abuse. She wishes to advise the client to seek treatment in hopes of preventing future abuse, but understands that any other professional to whom the client is referred will be required to report the prior conduct in disclosed during therapy. In that situation, preserving the privilege for the lawyer alone has limited

³²⁵ See, e.g., Pam Belluck, *Complaints on Boston Priests Dated to '79, Documents Say*, N.Y. TIMES, Sept. 13, 2002, at A18 (describing how complaints about a priest molesting children reached the Archdiocese of Boston in 1979, but the priest was not removed until 1991; complaints of child abuse by the priest were made throughout 1980s).

³²⁶ See Budoff & Chedekel, *supra* note 2.

³²⁷ Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061-64, 1068-70 (1978), reprinted in YOUNGER, GOLDSMITH, & SONENSHEIN, *PRINCIPLES OF EVIDENCE* 786 (4th ed. 2000).

³²⁸ Mosteller, *supra* note 26, at 265.

utility and little theoretical cogency.³²⁹

As the proliferation of state and federal reporting laws shows, legislatures do not seem inclined to preserve the privilege for either group, at least as regards child and elder abuse. The proposal to raise the evidentiary threshold that triggers the duty to report at least strikes a better balance in protecting the competing interests of protecting vulnerable groups, on the one hand and encouraging open dialogue between victimizers or victims and the professionals who have traditionally provided confidential consultations, on the other.

In contrast to those who provide mental or spiritual guidance, physicians, nurses, and other types of medical professionals may have a less compelling need for an evidentiary privilege. The Supreme Court noted that "[t]reatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests."³³⁰ Therefore, the need for frank discussion of sensitive issues may not be as important. However, though there may not be an evidentiary privilege that precludes a doctor's testimony regarding a patient's statements, both the public and the medical profession generally regard it as a rule that a patient's medical information should be kept confidential unless the patient consents to its release.³³¹ Though physicians may be required to testify in court, they are otherwise under an ethical duty not to reveal their patients' medical information.³³²

The growing list of conditions that must be reported to the authorities by medical professionals threatens to make confidentiality the exception rather than the rule. Commentators frequently voice the concern that the lack of confidentiality due to mandatory reporting will deter people — both victims and abusers — from seeking treatment in the first place.³³³ Mandatory reporting means that medical

³²⁹ *Id.* at 266.

³³⁰ *Jaffee*, 518 U.S. at 10.

³³¹ See Robert M. Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy*, 62 N.C. L. REV. 255, 257 (1984) (noting that a physician's duty to keep patients' information confidential has been recognized "since time immemorial").

³³² *Id.* at 267–68.

³³³ See, e.g., Brown-Cranstoun, *supra* note 31, at 629 n.97 (stating that domestic violence victims may be deterred from seeking medical assistance); Daire, *supra* note 31, at 79 (observing that mandatory reporting can discourage battered women from seeking medical care or from confiding in their physicians); Gellman, *supra* note 214, at 274 (arguing that, without assurances of confidentiality, patients may refuse treatment or not seek treatment in the future); McFarlane, *supra* note 31, at 23–24 (noting that spousal abusers may deny their victims medical treatment, and victims who do not want the information reported at that time for safety reasons may avoid medical treatment); Moskowitz, *supra* note 41, at 109 (stating that opponents of elder abuse statutes fear mandatory reporting will deter elders from seeking treatment). But see Jones, *supra* note 31, at 238–40 (arguing that battered women may not

professionals will be required to *take the initiative* to disclose their patients' information and to put in motion the legal process of investigation, resulting in possible prosecution. As such, the impact on a patient's life is direct and immediate, as compared to the distant possibility that a physician may be compelled to testify at some later time in a legal matter initiated by someone other than the physician. Again, in order to minimize the deterrent side-effect of reporting laws, the law should limit the cases in which medical professionals are required to report to those that involve clear and convincing criminal activity.

Another difference between the effect of the evidentiary trigger on medical professionals as opposed to mental health professionals is that medical professionals may be expected to file reports based on evaluations of a patient's physical condition alone. If a patient has a gunshot wound, the duty to report is clear to the medical professional. As discussed above, however, there may be ambiguity in determining whether a child or elder is the victim of abuse or neglect. A higher evidentiary trigger thus clarifies the duty to report, making the professional's job easier. It also has the benefit of not deterring people from seeking medical assistance when injuries are minor for fear that the injured person's condition may be misinterpreted by a physician as abuse when in fact it is not.

Bankers, too, must ordinarily keep their client's financial information confidential,³³⁴ but the disclosure of a client's financial dealings does not have the same harmful side effects as such disclosures have in the medical or mental health professions. People need banking services to secure their funds and to make them easily transferable. With the exception of those individuals with smaller amounts of money, most people will not be deterred from using banking services by the threat of disclosure. Still, bankers and, after the adoption of the USA PATRIOT Act, many other business people, should not be burdened with the duty to maintain records and file reports whenever a customer engages in a "suspicious" activity. The task of reporting the activities of their clients solely for the benefit of law enforcement is a deprivation of their liberty that should be justified by a higher evidentiary standard. Even a "probable cause" standard would better serve the ends of preserving the liberty of bankers and other business people.

Professionals whose relationships ordinarily are not cloaked in confidentiality, such as educators who are required to report child abuse or businesses that handle hazardous wastes, would benefit from a higher evidentiary trigger as well. Educators should be free to educate children without the burden of serving as police informants, except in those cases in which a child clearly is being abused. Note that

know of their right to confidentiality, so they may not be deterred from seeking assistance and that it is unlikely that the injured will shun physicians).

³³⁴ See, e.g., Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422 (2000).

the failure to report in cases of clear abuse should not be tolerated.³³⁵

In the context of environmental legislation, Congress had the good sense to require reporting only of "reportable" (i.e., substantial) amounts of hazardous wastes as determined by the EPA.³³⁶ The nature of environmental reporting is different because polluters are required to self-report their own spills,³³⁷ so there is no question that a spill has occurred. Still, the law recognizes that this burden should not be imposed — and the failure criminalized — unless the spill is serious enough to pose a threat to the environment.

CONCLUSION

No one would question the urgency of combating child or elder abuse, of remedying hazardous waste spills, or of preventing the laundering of money by terrorists or drug dealers. Legislators have sought to harness the resources of people in positions to assist the government in fighting these serious social problems by requiring them to report their suspicions upon threat of criminal punishment. Alternatively, they might have chosen to offer financial incentives,³³⁸ or they might have developed other programs to promote greater awareness and enlist voluntary cooperation.³³⁹ Instead, with respect to these particular problems, legislators have chosen to use the coercive threat of criminal punishment.

The proliferation of reporting statutes calls upon scholars to incorporate them into our understanding of criminal law theory. This Article has demonstrated that reporting offenses share many common theoretical threads with Good Samaritan as well as public welfare offenses. Yet reporting offenses represent a unique category

³³⁵ See generally *supra* note 80 (addressing the failure of principals to report teachers that abuse students).

³³⁶ See *supra* notes 168–70 and accompanying text.

³³⁷ See *supra* note 168 and accompanying text.

³³⁸ See, e.g., Joan H. Krause, "Promises to Keep": Health Care Providers and the Civil False Claims Act, 23 CARDOZO L. REV. 1363, 1367 (2002) (explaining how the federal government fights health care fraud by permitting "whistleblowers" to file *qui tam* actions that allow private parties who bring the actions to retain fifteen to thirty percent of proceeds of suit). Besides assisting in law enforcement, the government can encourage good behavior by its citizens through a variety of financial incentives. See Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1320–25 (2002) (arguing in favor of allowing taxpayers to earmark donations to charities to benefit a named person). See generally Levmore, *supra* note 180, at 891 (addressing the most efficient mix of rewards and penalties to encourage rescue by Good Samaritans).

³³⁹ See, e.g., Clymer, *supra* note 6 (discussing the TIPS program proposed by the Justice Department). The government might have funded educational programs, proposed model protocols for detection of the problems they are trying to combat, and promoted voluntary adoption of professional guidelines that call for reporting as well.

that has grown sufficiently large so as to deserve attention in its own right.

The tendency to prefer reporting statutes as a means of enlisting assistance for law enforcement in the detection of offenses also behooves us to question whether these statutes have been drafted in a manner that best serves the compelling ends legislatures intend. Many reporting statutes show little regard for the value of confidential relationships between professionals and their patients or clients, whereas traditionally the privacy of those relationships was considered sacrosanct. Eliminating confidentiality in those relationships can have serious negative consequences, some of which, ironically, undermine the very goals of the reporting statutes. Moreover, reporting statutes represent an infringement on the liberty of the people designated as reporters, and legislatures should have to fully justify any deprivation of an individuals' liberty. As argued in the Article, one way to maximize the benefits of reporting statutes while minimizing the harm to traditionally confidential professional relationships is to raise the threshold for imposing a reporting duty from "reasonable cause" or "suspicious activity" to "clear and convincing," or, at a minimum, "more likely than not." Such a change would not preclude a legislature from making the reporting of lesser suspicions permissive rather than mandatory. Moreover, civil immunity for the act of reporting should continue to apply broadly in order to shield reporters who might otherwise be deterred by the fear of liability. A higher threshold shows greater respect for the liberty interests of professionals in these fields as well. Finally, a higher threshold also would make the enforcement of reporting statutes more practical, since it is easier to prove that a physician failed to report a "clear and convincing" case of child abuse than it is to prove that a doctor had "reasonable cause to believe" a child had been abused and did not report it. More vigorous prosecution of reporting statutes would have the effect of ensuring that serious cases would not go unnoticed by the government agencies in a position to intervene.