FAILING TO PROTECT THE VULNERABLE: THE DANGERS OF INSTITUTIONAL COMPLICITY AND ENABLERS

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Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door![1]

Criminal liability has typically been reserved for those who have both actus reus and mens rea. Liability for true omissions is infrequent in modern criminal codes and even less frequently enforced. Despite wide public support for aiding those in peril, Western democracies have historically refused to impose any penalty upon those who fail to aid someone in danger.

But recent high profile abuse scandals—including those of the USA gymnastics team, University of Michigan, and the Catholic Church—have caused scholars and policymakers to rethink these assumptions. In recent years, some jurisdictions have slowly come to criminalize those who witness

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1. Emma Lazarus, *The New Colossus*, POETRY FOUND., https://www.poetryfoundation.org/poems/46550/the-new-colossus (last visited Nov. 13, 2021) [https://perma.cc/S4GA-KHZQ].

another in peril and fail to provide aid. Governments, however, remain silent on whether to punish actors not present who learn of ongoing peril to someone they have power to protect but nevertheless choose not to act on their behalf. Indeed, unlike other threats to society, current legislation does not effectively criminalize these enablers of crime.

What is more, the failure of governments to recognize omission as a crime has directly led to the phenomenon of institutional complicity. Institutional complicity, as defined in this Article, is where an individual turns a blind eye to abuse out of a sense of duty to an institution. This Article proposes a legal framework and definitional language to allow prosecution of actors who discover sexual assault and yet fail to contact law enforcement. It also distinguishes between enablers and bystanders of crime and facilitates the consideration of these issues of omission by legislatures.

In examining the issue from the perspective of the person in peril, this Article provides a path towards more effectively redressing the harms suffered by crime victims.

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These questions have been at the forefront of philosophical discourse for centuries; they have been the subject of an endless litany of books, articles, arguments, and wars. These questions are at the core of the human existence. And yet, answers today are as shrouded in uncertainty, debate, and murkiness as they were when confronted by the ancient Hebrews and Greeks. There is a sense of revisiting, reexamining, restating, and rearguing in even raising these questions. The expression "been there, done that" comes to mind, like a rerun of a movie watched decades ago.

Notwithstanding extraordinary progress greatly benefitting broad segments of society, there is an issue that demands our attention. It is an issue we have failed to compellingly address, the question being: what duty do bystanders and enablers owe to the person in peril? It is a dilemma that has proved perplexing to resolve; a variety of reasons have been proffered to explain this moral and legal gap.

While debate may be healthy under some circumstances, failing to impose a duty to act on bystanders and enablers has one practical result: it ensures perpetrators can act with confidence knowing those positioned to provide assistance to the victim have no obligation to do so. This results in the abandonment of the person in peril; it is their voice that we must hear when examining bystander-enabler duty to act.

II. INTRODUCTION

On the face of it, in an enlightened society providing assistance to the person in peril should be, for lack of a better word, obvious.[2] Examples abound, however, of individuals who, for various reasons, turn a blind eye to those in distress.[3] That is particularly the case when sexual assault occurs in an institution, and institutional actors protect the institution, rather than the person in peril.[4] Examples are everywhere to be found in the Catholic Church,[5] Michigan

2. Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 612–14 (2010).

3. *See, e.g.*, Michelle Boorstein, *Scandals, Compensation Programs Lead Catholic Clergy Sex Abuse Complaints to Quadruple in 2019*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/religion/2020/06/26/scandals-compensation-programs-lead-catholic-clergy-sex-abuse-complaints-quadruple-2019/ [https://perma.cc/SJV2-BCND].

4. *See id.*

5. Allegations of child sex abuse by Roman Catholic clergy has skyrocketed in recent years. Boorstein, *supra* note 3. The details of a sex abuse coverup will be outlined later in this Article.

State University (MSU),[6] Pennsylvania State University,[7] USA Gymnastics,[8] Ohio State University (OSU),[9] and the University of Michigan (UM).[10] The mind-numbing repetitiveness is extraordinary. That complicity-defining institutional actors continue to cast their die with the institution continuously exacerbates the peril of the person to whom a primary duty of care must be owed.[11] Their failure to act must be understood as a crime of omission.

Examples abound, stories are recounted endlessly, survivors are in abundance, and scars—physical and emotional—are deep and entrenched. We must individually and collectively say, "enough is enough." It is what we owe those harmed twice: initially by the perpetrator, then by those who made the decision to ignore and diminish the harm. It is a two-fold trauma; for many survivors, the inaction of the bystander-enabler is more profound than the action of the perpetrator.[12]

Ignoring this reality accentuates the peril. While there is no doubt regarding the harm caused by the perpetrator, our focus is on a broader issue, going well beyond the so-called common criminal. What we shall examine is the actor who decided not to protect the vulnerable, thereby enabling the perpetrator.[13] The decision to not act on behalf of the person in peril equates to acting on behalf of the perpetrator. From the perspective of the endangered individual, the enabler has, in essence, supported the perpetrator. A wall surrounds the perpetrator rather than the person most in need of protection.

The theme of the wall is particularly relevant when we consider the crime of omission in an institutional context, and complicity is at its core.[14] Complicity can run deep within institutions; it is embedded, institutionalized, and

6. Multiple investigations have unearthed a definite "rape culture" at MSU where survivors are discouraged from brining claims—especially against football and basketball players—and investigating authorities refuse to press charges. Lindsay Gibbs, *It's Not Just Larry Nassar: Michigan State University Has a Problem with Rape Culture*, THINK PROGRESS (Aug. 27, 2019, 8:31 AM), https://archive.thinkprogress.org/years-after-larry-nassar-michigan-state-universitys-rape-culture-persists-d3c62ed1f567/ [https://perma.cc/3VH9-SPMC].

7. Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (June 21, 2012, 6:01 PM), https://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline [https://perma.cc/XD9J-9X38].

8. In January 2018, 156 women gave victim impact statements at the sentencing of Dr. Larry Nassar, stating they had been abused by him—sometimes hundreds of times—under the guise of medical treatment. Many accused USAG of ignoring, dismissing, or minimalizing their claims of abuse and otherwise failing to protect them. Eric Levenson, *Larry Nassar Sentenced to Up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018, 9:29 PM), https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html [https://perma.cc/4HN5-PHJE].

9. Billy Witz, *Ohio State Pays $41 Million to Settle Claims from Doctor's Abuse*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/08/sports/ohio-state-strauss-settlement.html [https://perma.cc/M4MV-RU9M].

10. Kim Kozlowski, *How UM Failed for Decades to Heed Warnings About Doctor's Alleged Sex Abuse*, DET. NEWS (Oct. 22, 2020, 4:32 PM), https://www.detroitnews.com/in-depth/news/local/michigan/2020/10/21/how-university-michigan-failed-doctor-robert-anderson-alleged-sex-abuse/4894925002/ [https://perma.cc/H3M2-TY2N].

11. *See* AMOS N. GUIORA, ARMIES OF ENABLERS: SURVIVOR STORIES OF COMPLICITY AND BETRAYAL IN SEXUAL ASSAULTS 43 (2020).

12. *See id.* at 33–51.

13. *See* discussion *infra* Part V.

14. AMOS N. GUIORA, THE CRIME OF COMPLICITY: THE BYSTANDER IN THE HOLOCAUST 105–39 (2020).

pervasive.[15] It creates a culture whereby the perpetrator is guaranteed protection and enablers understand their primary obligation is to protect the institution rather than the individual in peril.[16]

This wall has been propped up over centuries by those with a direct interest in its continued existence, with the willing assistance of many, causing harm to an untold number.[17] The continued existence of this wall is a blight on every society which tolerates it. Until this wall is crushed, vulnerable members of society will continue to be just that: vulnerable members of society. The complicity of institutions ensures that.

We need to break down the wall of institutional complicity and punish enablers and bystanders who protect both the institution and perpetrator. Doing so requires recognizing there are two crimes occurring simultaneously, symbiotic in a sense: the actor's crime of commission and the bystander-enabler's crime of omission. Until we recognize the power of the crime of omission, survivors will confront preparators who are emboldened by institutions and protected by enablers and bystanders. The time has come to say, "enough is enough."

The triangle of institutional complicity-enablers-bystanders has a stranglehold on the person in peril.[18] That needs to be countered; to that end, this Article *proposes criminalizing omission* as an essential tool in that critical effort.[19] It does not focus on the actions of the perpetrator. That we leave to others. Rather it focuses on the actor whose omission enables the perpetrator. That actor is the enabler: the person who knew or should have known of the perpetrator's conduct.[20] The conduct of the enabler is particularly acute when the crimes are committed in an institutional setting.[21] The person in peril almost always knows the enabler and has the expectation, presumptively reasonable, that the enabler will chose to protect them rather than the institution.[22]

As we shall come to see, however, in example after example, it is the institution that is protected rather than the person in peril.[23] In recommending the criminalization of the enabler, we seek to rearticulate the relationship between enabler-perpetrator-survivor-institution. This is an unacceptable failing in the law. Rather than protecting an individual, jurisprudence tolerates protecting the institution. We aim to convince the reader that this historical model must no

15. *See* GUIORA, *supra* note 11, at 43.

16. *Id.* at 44.

17. Some would argue that the #MeToo movement is the result of sexual assault allegations not being taken seriously in formal channels, thus the desire to bring accusations in informal channels. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1167–74 (2019).

18. Bryan R. Blackmore, *Sexual Assault Prevention: Reframing the Coast Guard Perspective to Address the Lowest Level of the Sexual Violence Continuum—Sexual Harassment*, 221 MIL. L. REV. 75, 105 (2014).

19. *See* discussion *infra* Parts V, VII.

20. *See* GUIORA, *supra* note 11, at 6, 135–77.

21. *See* Blackmore, *supra* note 18, at 104.

22. *See* Anna Clark, *"By Not Acting, You're Enabling." Why Survivors are Abandoned to Protect Institutions*, MICH. RADIO (Aug. 25, 2020), https://www.michiganradio.org/post/not-acting-youre-enabling-why-survivors-are-abandoned-protect-institutions [https://perma.cc/6K5T-RBS8].

23. *Id.*

longer be tolerated given the harm it has overwhelmingly caused. It is a lacuna that must be decisively addressed.

III. WHO DESERVES PROTECTION?

The criminalization of enablers and bystanders reflects recognition that failure to aggressively prosecute those who failed to act ensures that perpetrators will continue to act with impunity and immunity.[24] That is the direct consequence of failing to act on behalf of survivors.[25] The issue, however, goes beyond the particular survivor, for the broader question cuts to the heart of what society is and to whom it owes a duty. In advocating criminalization of bystanders and enablers, the underlying premise is enablers and bystanders owe a duty to the person in peril.[26]

For some, this is an untenable proposition, suggesting a significant, unwarranted expansion of the social contract by imposing a duty to act when another is in peril at the hands of someone other than the bystander or enabler.[27]

Restated: Why penalize an individual who did not cause the harm and bears no direct responsibility for injury to another? Recommending expansion of the social contract causes discomfort for some, reflecting an unnecessary expansiveness of prosecutorial power and government overstep that may portend unintended consequences.[28] The deep discomfort with criminalizing omission fails to understand the benefit to the individual in need. Moreover, in an institutional setting, the hesitation to criminalize bystanders-enablers who choose to protect an institution reflects prioritizing the needs of the institution over the needs of the individual.[29]

At its essence, that hesitancy reflects the complicity which has caused extraordinary harm to those attacked by the perpetrator who benefits from the protection afforded by the bystander-enabler.[30] The combination of crime of commission and crime of omission leaves the survivor injured on two distinct levels: physically by the perpetrator and emotionally-psychologically by the bystander-enabler.[31]

When considered through the lens of the survivor—the means by which bystander-enabler omission is most persuasively examined—these words carry significant weight. The wall that protects the perpetrator directly, and the institution indirectly, ensures the abandonment of the person in peril.[32] From a metaphorical perspective, that person is akin to the "wretched refuse" that Emma

24. *See id*.

25. *See id.*

26. *See generally* Matthew E. Dyson, *Always on Duty: Can I Order You to Report Crimes or to Intervene?*, 224 MIL. L. REV. 176, 182 (2016).

27. *See* Clark, *supra* note 22.

28. *See* discussion *infra* Section VII.D.

29. *See* Heather Udowitch, *The Larry Nassar Nightmare: Athletic Organizational Failures to Address Sexual Assault Allegations and a Call for Corrective Action*, 16 DEPAUL J. SPORTS L. 93, 131 (2020).

30. *See id.* at 143.

31. *See* GUIORA, *supra* note 11, at 45, 167–68.

32. *Id.* at 173.

Lazarus referenced in her sonnet, "The New Colossus."[33] In considering the plight of "the homeless, tempest-tossed to me," we can, by analogy, consider victims of priests who were enabled by their fellow priests and the Church hierarchy who ensured, by their complicity; the plight of their victims, "yearning to breathe free."[34] That same powerful analogy applies to Larry Nassar's victims at MSU and USA Gymnastics,[35] Richard Strauss's victims at OSU,[36] and Robert Anderson's victims at the UM.[37] As distressing as that is, far more disconcerting is the reality that we do not know how many other survivors meet the test of "your tired, your poor."[38]

Which raises the question who—and what—deserves protection? The seemingly obvious answer is the individual in peril whose distress is amplified by the failure of a bystander or enabler to act on their behalf.[39] The immediate beneficiary of bystander complicity is the criminal guilty of a crime of commission.[40] The additional beneficiary, in an institutional setting, is the institution benefitting from the bystander-enabler decisions to protect the organization rather than the at-risk individual.[41] This, then, is a stark paradigm: protect the individual or protect the criminal and, when relevant, the institution.

There is, from the survivor's perspective, no gray area. This is not akin to a question that justifies finesse and nuance.[42] This is, quite the opposite, a question of two starkly contrasting answers: protect me or protect the assailant and institution.[43] In examining the question from the perspective of the person in peril, the answer is obvious, for the ramifications of nonintervention are potentially devastating.[44] Minimizing the consequences of the bystander-enabler decision ensures that the trauma of betrayal after the trauma of abuse continues unabated.[45] From the survivor's perspective, the pain of the attack is reinforced by the pain of the abandonment by the bystander-enabler.[46]

33. Walt Hunter, *The Story Behind the Poem on the Statue of Liberty*, ATLANTIC (Jan. 16, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/the-story-behind-the-poem-on-the-statue-of-liberty/550553/ [https://perma.cc/55MQ-SXUS].

34. *Id.*

35. Udowitch, *supra* note 29, at 95.

36. Strauss abused over 177 male students between the years of 1979 and 1996. The University had knowledge of allegations in 1979. Rick Maese, *Ohio State Team Doctor Sexually Abused 177 Students over Decades, Report Finds*, WASH. POST (May 17, 2019), https://www.washingtonpost.com/sports/2019/05/17/ohio-state-team-doctor-sexually-abused-students-over-decades-report-finds/ [https://perma.cc/2UV2-32FJ].

37. Like Larry Nassar, Robert Anderson escaped liability for digitally penetrating athletes under the guise of medical treatment for decades as he served as a doctor at the University of Michigan. Justin Tinsley, *Jon Vaughn and the Cost of Being a Michigan Man*, UNDEFEATED (July 24, 2020), https://theundefeated.com/features/jon-vaughn-and-the-cost-of-being-a-michigan-man/ [https://perma.cc/K2XE-DDRH].

38. Hunter, *supra* note 33.

39. *See* GUIORA, *supra* note 14, at 117–19.

40. *See* GUIORA, *supra* note 11, at 167–68.

41. *See* Clark, *supra* note 22.

42. Jacobo Dopico Gómez-Aller, *Criminal Omissions: A European Perspective*, 11 NEW CRIM. L. REV. 419, 421–22 (2008).

43. *Id.*

44. *See id.* at 449.

45. *See* GUIORA, *supra* note 11, at 33, 135–77.

46. *Id.* at 33–45.

The word "abandonment" is intended to represent both the bystander-enabler's physical and emotional abandonment from the survivor's perspective.[47] On the premise that society's primary duty is owed to the vulnerable and weak, directly countering this abandonment is essential, otherwise the harm caused will be significantly magnified.[48] The question is, in its clearest terms, who deserves our protection? Efforts to protect require penalizing all actors who directly and indirectly contributed to that harm.[49] It is, then, for that reason that criminalizing the bystander-enabler is warranted.

Doing so requires addressing the concerns, if not opposition, to criminalizing omission, which has proven a significant roadblock in this effort.[50] The following discussion of omission from a historical-philosophical-theological perspective is intended to frame the issue in a broader context.

IV. HISTORY AND PHILOSOPHY OF THE CRIME OF OMISSION

The crime of omission is not a new concept; it has been recognized for millennia.[51] In one of his writings, the ancient Greek philosopher Plato suggested that prison or banishment was an appropriate punishment for one who witnessed a crime but did nothing to stop it.[52] Likewise, the Roman scholar Cicero once wrote, "[h]e who does not, when he can, ward off or repel wrong is guilty of injustice . . . what is to be thought of him who, so far from repelling, abets the wrong?"[53]

It is unclear the full extent to which these suggestions were legislated anciently, but there are some examples of codification.[54] Ancient Roman law punished homicide caused by failure to provide food to another or, for doctors, failure to finish a surgery.[55] Other punishable offenses included the failure of a slave or solider to protect their superiors and the failure of certain family members to protect each other.[56] Later, under Roman Catholic canon law, St. Thomas Aquinas championed the idea that certain omissions could be greater sins than some commissions and even stated, "non-action is a kind of action."[57]

Aside from legal theories, condemnations of the crime of omission have also found their way into popular literature, including Vera Claythorne

47. *See* Clark, *supra* note 22.

48. *See* Gómez-Aller, *supra* note 42, at 421.

49. *See id.* at 425.

50. *Id.* at 424.

51. *See id.*

52. 5 PLATO, THE DIALOGUES OF PLATO TRANSLATED INTO ENGLISH WITH ANALYSES AND INTRODUCTIONS 880 (Benjamin Jowett trans., 3d ed. 1892), https://oll.libertyfund.org/titles/769 [https://perma.cc/VV9N-X9RJ].

53. MARCUS TULLIUS CICERO, ETHICAL WRITINGS OF CICERO: DE OFFICIIS; DE SENECTUTE; DE AMICITIA, AND SCIPIO'S DREAM (Andrew P. Peabody trans., Boston: Little, Brown, and Co. 1887) https://oll.libertyfund.org/titles/542 [https://perma.cc/DL7D-8QY3].

54. Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 615 (1942).

55. *Id.*

56. Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 590 (1958).

57. Kirchheimer*, supra* note 54, at 616 n.8.

knowingly allowing a boy to drown in *And Then There Were None*[58] and Jay Gatsby taking the blame for Daisy's murder of Myrtle rather than reporting to the authorities in *The Great Gatsby*.[59] Both characters had something to gain from their omissions, but their failure to aid or report is inextricably tied to their fatal character flaws, eventually leading to their own deaths.[60]

Most major religions have also upheld the character of those who charitably act to aid another, even in the absence of familial or contractual duty. The Book of Psalms in the Bible states in no uncertain terms, "[R]escue the weak and the needy; deliver them from the hand of the wicked."[61] The quintessential example is Jesus's parable of the Good Samaritan whose message is clearly that we are all "neighbors" and thus have an inherent duty to aid each other regardless of the circumstances.[62]

Despite all of this, as European jurisprudence matured, it quickly divorced itself from the idea of punishing omissions.[63] Indeed, St. Thomas was also among the first to champion the idea that liability for omissions could only be found if there was a duty to act; his thoughts on punishing certain omissions more severely than some commissions also never gained footing.[64] By the eighteenth and nineteenth centuries, most European jurisdictions had distanced themselves from the idea of punishing omissions.[65]

Nowhere was this more apparent than in England. English common law initially refused to find liability for omissions.[66] This position was ardently defended, even late into the nineteenth century.[67] For example, James Fitzjames Stephen once proposed the following hypothetical: "[a] number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are, no doubt, shameful cowards, but they can hardly be said to have killed the child."[68]

It was not until the very end of the nineteenth century that English courts, reluctantly, began to recognize some exceptions to this baseline rule.[69] One of the first exceptions was finding a duty to act when one had voluntarily assumed the care of another.[70] Critically, that case was one of the first to articulate the oft-repeated assertion that "[i]t would not be correct to say that every moral

58. AGATHA CHRISTIE, AND THEN THERE WERE NONE 333 (1940).

59. F. SCOTT FITZGERALD, THE GREAT GATSBY 110 (1925).

60. *See* CHRISTIE, *supra* note 58, at 340 ("Vera Claythome was hanged."); FITZGERALD, *supra* note 59, at 125–26 ("I found myself on Gatsby's side . . . . I was surprised and confused . . . as he lay in his house and didn't move or breathe or speak . . . .").

61. *Psalms* 82:4.

62. *See Luke* 10:29–37.

63. *See* Gómez-Aller, *supra* note 42, at 421; Kirchheimer, *supra* note 54, at 616–17.

64. *See* Kirchheimer, *supra* note 54, at 616.

65. *See id.* at 617.

66. *See, e.g.*, R v. Smith (1869) 11 Cox CC 210 (recognizing that omissions may result in criminal liability but declining to impose liability here).

67. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 10 (London, MacMillan & Co. 1883).

68. *Id.*

69. *See, e.g.*, R v. Instan (1893) 1 QB 450.

70. *Id.*

obligation involves a legal duty; but every legal duty is founded on a moral obligation."[71] The Crown Court subsequently carved out more exceptions, creating a duty to act when one creates a harmful situation[72] or where there was a contractual duty to act.[73]

American jurisdictions, with their libertarian backgrounds, were more than willing to accept the idea that "there is no legal duty to rescue another in danger, even though a moral obligation might exist."[74] Most jurisdictions today only find there to be a duty to assist when there exists a special relationship between the victim and the bystander.[75] The most commonly recognized example of this is a parent's duty to protect their child.[76] Most jurisdictions also find there to be a duty to act when one has assumed care of another[77] or when one creates the harm inflicted on another.[78] It was not until the murder of Kitty Genovese—explained below—that American jurisdictions began to seriously consider creating a general duty to act in all situations and then only if the bystander witnessed the peril personally.[79]

These holdings, ancient and modern alike, are more than a little disturbing when framed in relation to the question of who it is that society seeks to protect. While crimes of commission are familiar and readily understood, the crime of omission raises significant concerns.[80] The failure to consistently incorporate crimes of omission in criminal codes ensures those who could have acted to protect the person in peril evade legal accountability.[81] Professor Arthur Leavens, in refuting the special relationship theory for omissions, argued causation should be the ultimate guidance when it comes to defining which omissions should be criminalized.[82]

As outlined below, serious questions need to be asked in rebuttal of Stephen's hypothetical about the drowning child.[83] While failing to save a drowning child may not seem like traditional murder, is it fair to say the bystanders in that situation are not complicit in the child's death? While the question has been posed hypothetically to generations of law students, we pose the query from the perspective of the individual whose perpetrator acts with confidence that, for enablers and bystanders, institutional loyalty significantly outweighs any duty to the person in peril.

71. *Id.* at 454.

72. R v. Miller [1982] UKHL 6.

73. R v. Pittwood [1902] TLR 37.

74. Peter M. Agulnick & Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT'L L. REV. 93, 95 (1998).

75. *Id.* at 98–99.

76. *Id.* at 99.

77. *Id.* at 103.

78. *Id.* at 102–03.

79. *See* Claire Elaine Radcliffe, *A Duty to Rescue: The Good, the Bad and the Indifferent—The Bystander's Dilemma*, 13 PEPP. L. REV. 387, 387–88 (1986).

80. *See* Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 551 (1988).

81. *See* Radcliffe, *supra* note 79, at 388.

82. *See* Leavens, *supra* note 80, at 590–91.

83. *See* discussion *infra* Section VII.B.3.

The historical failure of courts, people of letters, faith leaders, and scholars to perceive the dilemma from the perspective of the person in distress has unfortunate consequences for the one person most in need of assistance. The continuing—if not determined—efforts of institutional actors to turn their backs, for that is the essence of complicity, directly led to the crimes committed across U.S. college campuses, parish after parish, and where America's elite gymnasts trained and performed.[84]

As we turn our attention to the question of consequences, addressed in the following two sections, it is incumbent upon us to recall that we are examining the question before us exclusively through the lens of the person in peril. From their perspective, there is no question regarding the painful consequences of bystander-enabler complicity, reinforcing the requirement to aggressively prosecute the crime of omission.

V. BYSTANDERS AND ENABLERS

The proposed definitions for bystanders and enablers are formed by the ramifications of their decision not to act on behalf of the person in peril.[85] That decision facilitates the perpetrator's actions; omission must be understood as having direct impact on harm that befalls the person in peril. To that end, the two relevant terms are defined as follows:

> *Bystander: An individual who has direct and personal knowledge of harm faced by another person and has the ability to act to minimize that harm. There is no expectation the bystander will directly intervene to minimize the harm as the duty to act is limited to informing first responders-law enforcement as to the circumstances requiring their action or intervention.*
>
> *Enabler: An individual who knows, or should know, that another individual has been harmed and makes the decision to not act to either minimize harm to that individual and/or to other potential victims. The enabler, distinct from the bystander, is not present when the harm is caused but fails to act when information regarding harm is brought to their attention.*

While there are similarities between the two actors, there is one significant difference: the bystander had direct knowledge of harm as they were physically present when the harm occurred, whereas the enabler learned—albeit after the harm took place—of the harm or was in a position to learn of the harm but chose otherwise. The difference between being present when harm occurs as compared to learning of the harm is not significant to the person in peril. From the person in peril's perspective, both actors made the decision to ignore their plight and the attendant consequences.

84. *See* sources cited *supra* notes 3–10 and accompanying text.

85. *See, e.g* Amos N. Guiora & Jessie E. Dyer, *Bystander Legislation: He Ain't Heavy, He's My Brother*, 29 KAN. J. L. & PUB. POL'Y 291, 292 (2020).

While bystanders were critical to the murders of Sherrice Iverson[86] and Kitty Genovese[87]—briefly discussed below—they are distinct from institutional enablers. Neither murder reflects institutional complicity or institutional protection.[88] Nevertheless, to facilitate discussion of the relationship between bystanders, enablers, and institutional complicity, it is incumbent upon us to initially discuss the bystander dilemma in its most direct form. Only afterwards can we progress to the broader enabler-institutional complicity-omission discussion. We briefly address these two murders, the consequences of which resonate decades later, both because of their sheer horror and their impact on the bystander discussion.[89]

A. Bystanders

The question of imposing a duty to act came under scrutiny in the aftermath of Kitty Genovese's murder in New York City in 1964.[90] Perhaps no murder has galvanized the bystander discussion as much as Genovese's death.[91] While initial reports of the incident were later found to be misleading,[92] the fact remains Genovese could have been aided, and her death likely prevented, if those who heard her cries for help had done something as opposed to nothing.[93] The story goes as follows:

> Kitty Genovese was returning home from work at around 2:30 a.m. on March 13, 1964, when she was approached by a man with a knife. Genovese ran toward the front door of her apartment building, and the man grabbed her and stabbed her while she screamed. A neighbor, Robert Mozer, yelled out his window, "Let that girl alone!" causing the attacker to flee. Genovese, seriously injured, crawled to the rear of her apartment building, out of the view of any possible witnesses. Ten minutes later, her attacker returned, stabbed her, raped her, and stole her money. She was found by neighbor Sophia Farrar, who screamed for someone to call the police. Police arrived several minutes later. Genovese died in the ambulance on the way to the hospital.[94]

86. *See* Don Terry, *Mother Rages Against Indifference*, N.Y. TIMES (Aug. 24, 1998), https://www.nytimes.com/1998/08/24/us/mother-rages-against-indifference.html [https://perma.cc/UH7W-J4RJ].

87. *See A New Look at the Killing of Kitty Genovese: The Science of False Confessions*, ASS'N FOR PSYCH. SCI. (June 30, 2017), https://www.psychologicalscience.org/publications/observer/obsonline/a-new-look-at-the-killing-of-kitty-genovese-the-science-of-false-confessions.html [https://perma.cc/FC9L-8JK3].

88. *Compare* Sam Roberts, *Sophia Farrar Dies at 92; Belied Indifference to Kitty Genovese Attack*, N.Y. TIMES (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/nyregion/sophia-farrar-dead.html [https://perma.cc/9E49-7E8G] ("37 apathetic neighbors who witnessed the murder failed to call the police . . . ."), *with* Levenson, *supra* note 8 ("[S]everal accusers say were largely ignored by university officials.").

89. *See, e.g.*, Terry, *supra* note 86; Roberts, *supra* note 88.

90. *See*, *e.g.*, *A New Look at the Killing of Kitty Genovese: The Science of False Confessions*, *supra* note 87.

91. *Id.*

92. *Id.*

93. *See, e.g.*, Roberts, *supra* note 88.

94. *Id.*

The other case which garnered significant attention regarding the bystander is that of David Cash, who witnessed his friend, Jeremy Strohmeyer, assault seven-year-old girl Sherrice Iverrson in a bathroom stall.[95] Cash did not intervene and left the bathroom.[96] When his friend emerged, he candidly told Cash he had raped, strangled, and murdered the girl.[97] Cash took no action and did not contact the police.[98] He faced no charges for his failure to save Iverrson or hold his friend accountable.[99] What is most disturbing about Cash is the flippancy with which he denied any responsibility for Iverrson's death.[100] In his own words, "I'm not going to get upset over somebody else's life. I just worry about myself first."[101]

While it is true that many individuals will "do the right thing," the lack of bystander legislation allows individuals like David Cash to go unpunished.[102] Cash is a classic bystander, positioned to protect a defenseless seven-year-old child, yet choosing to protect his friend by remaining silent. While there are countless other examples of individuals in a position to intervene on behalf of an individual in peril, only these two cases are highlighted because our primary focus is on enablers in an institutional setting. To most effectively make that argument, however, it is necessary to temporarily digress and explain the individual bystander (rather than the institutional enabler) and bystander legislation that has been enacted in the past decades.

Ten states[103] and twenty-eight countries[104] have enacted bystander laws. Generally, these laws place a duty on the bystander to aid another individual in serious peril.[105] Assistance does not extend beyond calling the police/first responders, thereby not imposing a requirement to physically intervene.[106] The underlying rationale for bystander legislation is to impose a limited duty when the bystander has knowledge of the peril and has the capability to act; the knowledge is limited to situations where the bystander is physically present and sees the peril.[107] The legislation intends to criminalize the bystander who does not act,

95. Terry, *supra* note 86.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. These states include California, Florida, Hawaii, Massachusetts, Minnesota, Ohio, Rhode Island, Vermont, Washington, and Wisconsin. Guiora & Dyer, *supra* note 85, at 304. Utah will become the next state to enact bystander legislation with the passage of Utah H.B. 218 Reporting Requirement Amendments. 2021 Utah Laws Ch. 419.
104. These countries include Albania, Andorra, Argentina, Austria, Belgium, Brazil, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Israel, Italy, the Netherlands, Norway, Poland, Portugal, Russia, Serbia, Spain, Switzerland, and Tunisia. Guiora & Dyer, *supra* note 85, at 306.
105. *Id.* at 293; Zachary Kaufman & Stephanie Ashe, *Turning Bystanders into Upstanders Amid Sexual Crimes*, STAN. L. SCH. (Aug. 10, 2018), https://law.stanford.edu/2018/08/10/turning-bystanders-into-upstanders-amid-sexual-crimes/ [https://perma.cc/UXF7-D46V]; GUIORA, *supra* note 11, at 100–01.
106. Guiora & Dyer, *supra* note 85, at 292.
107. *Id.* at 292, 294.

but it does so in a limited context.[108] That limitation similarly applies to the act required of the bystander.[109]

In Utah, where bystander legislation has been introduced by State Representative Brian King, the crime is defined as a Class B misdemeanor, which imposes either six months imprisonment and/or a $1,500 fine.[110] Opposition to bystander legislation largely focuses on five distinct arguments: the measure would overwhelm the existing 911 operator systems; there would be a significant increase in civil suits; abuse of prosecutorial discretion, particularly regarding minority communities; the measure reflects undue government intervention; legislation is unnecessary as most people will just do the right thing.[111]

A caveat is in order: the duty to report to law enforcement exists in many jurisdictions regarding both children and the elderly; however, those same jurisdictions do not expand that duty to individuals who do not fall into those two specific categories.[112] That is, while some jurisdictions penalize the failure to report on behalf of children and the elderly, that same obligation is not extended to members of society not considered "vulnerable."[113] Legislators, jurists, libertarians, civil rights organizations, certain faith leaders, and members of the broader community express opposition to expanding that duty beyond those two categories.[114] This in large part reflects opposition to the crime of omission as criminalizing an individual who did not create the harm suffered by the victim.[115] From the perspective of the person in peril, however, the moment a bystander comes upon the person in distress, they become inexorably linked to the victim's fate, whether inadvertently or not.[116]

Professor Patricia Smith captured this point:

> It is not true that the bystander is not in control of the situation he witnesses. If it is correct to say that he let it happen, then he had control over preventing the outcome. It is not true that the bystander, who lets something happen, is not a sufficient condition for the outcome; at least, like the actor, he is a necessary element in a sufficient set.[117]

Professor Smith makes a compelling argument, suggesting the bystander not be viewed as a passive actor but rather someone positioned to act on behalf of the person in peril.[118] While the bystander did not cause the harm, they did not take steps to mitigate on the provision that acting would not cause them harm.[119] That rationale is at the basis of recommending criminalizing the

108. *Id.* at 293–94.
109. *See id.* at 294.
110. *Id.* at 293.
111. *Id.* at 310–15.
112. *Id.* at 310.
113. *Id.*
114. *Id.* at 315–23; *see* Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 432–33 (1998).
115. Stewart, *supra* note 114, at 432–33.
116. *See* Patricia Smith, *Legal Liability and Criminal Omissions*, 5 BUFF. CRIM. L. REV. 69, 98 (2001).
117. *Id.*
118. *Id.*
119. *See id.*

bystander who chose not to act; it would, without doubt, be applied to David Cash and those who heard—regardless of the factual dispute—Kitty Genevese's cries for help.[120] Careful examination of both cases, and others, compellingly suggests that the bystander's failure to intervene significantly contributed to further harm. That is the essence of the bystander; the individual who saw the peril and could have acted but chose not to. From the perspective of Kitty Genevese and Sherrice Iverson, their fate was sealed when their (the pronoun is deliberate) bystanders chose to, literally, turn and walk away.[121]

Criminalizing the bystander would serve two important purposes: it would impose a criminal sentence on people like David Cash and deter others from abandoning a person in peril. This is distinct from the institutional enabler to whom we now direct our attention. The two terms—bystander and enabler—have both differences and similarities: the most significant difference being the question of presence and knowledge.[122] In the Genevese and Iverson cases, bystanders—particularly Cash—had direct knowledge of the peril and had the ability to act without harm to themselves.[123]

The ability to act without harm to themselves is distinct from the enabler, as defined above, who was not present at the time of peril but knew or should have known and failed to act.[124] In the same manner that criminalizing bystanders is essential to protecting individuals in peril, that same jurisprudential-philosophical approach is applicable to the enablers. In other words, can guilt be attached to an actor who was not present when a harm occurred but who, nevertheless, should have acted when informed of the peril and chose not to provide assistance either to the specific individual or others who would be harmed, based on a predator's consistent pattern? The institutional enablers we discuss below made the conscious decision to protect the institution rather than the person in peril; their loyalty extended exclusively to the institution.[125]

B. Enablers

The enabler is distinct from the bystander in that the actor was not present at the time of peril but knew or should have known and failed to act.[126] The same jurisprudential-philosophical approach at that core of criminalizing bystanders is applicable to criminalizing enablers.[127] In other words, guilt can be attached to an actor not present when harm occurs but who, nevertheless, should have acted when informed of the peril, or should have known of the peril, yet chose not to

120. Terry, *supra* note 86; *A New Look at the Killing of Kitty Genovese: The Science of False Confessions*, *supra* note 87.

121. *A New Look at the Killing of Kitty Genovese: The Science of False Confessions*, *supra* note 87; Terry, *supra* note 86.

122. Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1187 (2021).

123. Terry, *supra* note 86. Discussion has also developed regarding bystanders who witness crimes online, or "Digital Samaritans." *See* Kaufman, *supra* note 122.

124. Kaufman, *supra* note 122, at 1160.

125. GUIORA, *supra* note 11, at 98.

126. *Id.* at 97.

127. *Cf.* Smith, *supra* note 116.

provide assistance to the person in peril. The institutional enablers we discuss in the next section made the conscious decision to protect the institution rather than the person in peril; their loyalty extended exclusively to the institution.[128] The relationship, as discussed below, between the enabler and the institution ensures complicity in the harm to the person most demanding protection from the perpetrator.

Numerous theories abound as to the motivation of the institutional enabler, including loyalty-identification to the institution; fear of economic repercussions; dislike of the person in peril; personal characteristics which impact or prevent acting forcefully; failure to recognize peril posed, whether based on a misunderstanding, misread, or deliberate obfuscation; perceived (actual or real) understanding regarding corporate-institutional loyalty demands; preference for conflict aversion; or a combination of the above and/or other considerations.[129] Regardless of which motivations apply, the consequence is the perpetrator acts knowing that those who could act to prevent the crime will not do so.[130] More egregiously, the person in peril comes to recognize that protection will not be offered by those positioned to do so.[131] Absent a case where the enabler would be in harm's way were they to act counter to the perceived institutional benefit, there is no justification that can withstand legislative, prosecutorial, or judicial scrutiny.

Those instances must be understood to be outliers;[132] in the overwhelming majority of cases, harm would not have befallen enablers had they chosen to protect the individual in peril rather than the institution.[133] In those cases, were they able to compellingly demonstrate their position of peril, criminal sanction would not be imposed.[134] Absent those unique circumstances, there is no justification—from the perspective of the person in peril—for tolerating enabler inaction. To fully appreciate the consequences of enabler action, the Catholic Church and MSU examples below must be understood from the perspective of the person injured by the enabler.[135] While the enabler did not directly cause harm to the survivor, their inaction indirectly caused harm;[136] for that reason, omission, like commission, must be criminalized.

128. *E.g.*, Gibbs, *supra* note 6.

129. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 15–20 (1993).

130. GUIORA, *supra* note 11, at 98.

131. *Id.* at 97.

132. *See* Levy, *supra* note 2 at 613.

133. GUIORA, *supra* note 11, at 98.

134. *Id.* at 135.

135. Gibbs, *supra* note 6; Emanuella Grinberg, *Cardinal Bernard Law, Symbol of Church Sex Abuse Scandal, Dead at 86*, CNN (Dec. 20, 2017, 6:58 PM), https://www.cnn.com/2017/12/20/world/former-boston-cardinal-bernard-law-dead/index.html [https://perma.cc/R57R-7NAY].

136. Fiona Woollard & Frances Howard-Snyder, *Doing vs. Allowing Harm*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 1, 2016), https://plato.stanford.edu/archives/win2016/entries/doing-allowing/ [https://perma.cc/4QKG-AHJ8].

VI. EXAMPLES OF HARM CAUSED BY INSTITUTIONAL COMPLICITY AND ENABLERS

We initially focus on Cardinal Bernard Law, archbishop of Boston from 1984 until his resignation in 2002.[137] For the crimes he enabled, the actions he tolerated, and the abuses he ignored, Cardinal Law has been referred to as the "godfather" of sexual crimes against children in the Catholic Church.[138] Had laws criminalizing enablers been in effect, it is all but certain that he would have been prosecuted.[139] But in fact, he never faced criminal charges.[140] Tragically, the same is true of the other enablers discussed here, including some of the biggest, most highly recognized names in college athletics.[141] This section will also analyze the systemic rape culture among football and basketball players at MSU, fostered by former Head Coach Mark Dantonio and Head Coach Tom Izzo, respectively.[142]

A. Cardinal Law

Cardinal Law starkly highlights the way enablers bob and weave in their conscious effort to protect their institution's reputation and finances.[143] Many enablers identify so powerfully with their institution they believe they are one and the same: a melding that allows no room for anyone, or anything, else.[144] It is inevitable, then, that survivors come in a distant second. This theme defines the enabler-survivor relationship and explains why even the most minimal of survivor expectations are not met.

In 1984, Law was ordained as archbishop of Boston. Law soon received reports of multiple boys suffering abuse from Father John Geoghan, who was under Law's authority.[145] This was just one of many letters alleging abuse against Geoghan.[146] Parents and guardians became very concerned, as they expected Geoghan to be defrocked.[147] Instead of removing Geoghan from his duties or contacting the police, Law simply had Geoghan transferred to different locations where the abuse repeated itself.[148]

137. Grinberg, *supra* note 135.

138. Michael Dowd, *Michael Dowd: Cardinal Should Have Faced Criminal Charges*, BOS. HERALD (Nov. 17, 2018, 12:00 AM), https://www.bostonherald.com/2017/12/21/michael-dowd-cardinal-should-have-faced-criminal-charges/ [https://perma.cc/FLC4-9XRJ].

139. *Id.*

140. *Id.*

141. *See* Gibbs, *supra* note 6; *see also* Jake New, *The 'Black Hole' of College Sports*, INSIDER HIGHER ED (Feb. 9, 2017), https://www.insidehighered.com/news/2017/02/09/baylor-not-alone-shielding-athletes-accused-misconduct-punishment [https://perma.cc/3JQ5-3DYZ].

142. Gibbs, *supra* note 6.

143. Grinberg, *supra* note 135.

144. *See id.*

145. GUIORA, *supra* note 11, at 138.

146. *Id.*

147. *Id.*

148. *Id.*

Geoghan was later allowed to study in Rome.[149] After he returned, Cardinal Law had him resume his duties as Geoghan, insisting he had rid himself of his pedophilia.[150] Geoghan's assertion would prove to be untruthful as he soon afterwards resumed his abuse of young boys.[151] Law's solution was again to move Geoghan from parish to parish, perhaps in the hope that eventually the reports would cease.[152] Despite Law advising Geoghan's new supervisors of his past, he was somehow continuously placed in positions where he had access to young boys.[153]

After years of reports like this, Cardinal Law had Geoghan sent to a program for priest sex offenders.[154] Geoghan was labeled as a "high-risk homosexual pedophile" and shortly thereafter as an "atypical pedophile in remission."[155] Geoghan was only in this program for a matter of months after which Law again assigned him a leadership role.[156] Predictably, he continued his abuse.[157] Law would not remove him from his position until years later.[158] Geoghan was placed on leave and asked to retire.[159] Law's actions were later investigated by the Massachusetts Attorney General, who wished to hold Law accountable for his actions.[160] But the lack of mandatory reporting requirement for priests ultimately led all inquiries for criminal liability to dead ends.[161]

Law was never punished for his decision to protect his abusive priest.[162] Law's decisions were not happenstance or coincidence. This was a deliberate decision to protect the Catholic Church despite ample evidence of Geoghan's abuse. For Law, it was far more convenient for the Church to shift Geoghan to another location, in the hope that Geoghan's actions would stop on their own.[163] This ensured that the Church's reputation was preserved in the eyes of both the court of law and the court of public opinion.

The possibility—and eventually the knowledge—that Geoghan would continue his abuse did not seem to have concerned Law greatly; the sole question was how to protect the institution.[164] Law's conduct is the textbook definition of an enabler that reflects a historical pattern that defines the Church's response to allegations of priest abuse.[165] Unfortunately, Law's misconduct does not exist in

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 139.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. Dowd, *supra* note 138; GUIORA, *supra* note 11, at 139.
162. GUIORA, *supra* note 11, at 139.
163. *See id.* at 140.
164. *Id.* at 152.
165. *Id.* at 140.

isolation.[166] A similar narrative was weaved by Cardinal Pell in Australia as made clear by a previously redacted report published by the Australia Royal Commission into Institutional Responses to Child Sexual Abuse.[167] This report found that, like Law, Pell was responsible for suspicious and erratic transfers from parish to parish of priests about whom allegations were made of sexual misconduct.[168] Among other things, these reports showed that Pell was aware Father Gerald Ridsdale—against whom multiple allegations had previously been made—was taking young boys on camping trips alone.[169]

Pell, like Law, made decisions reflecting an enabler whose actions protected the institution and harmed the vulnerable.[170] Both Pell and Law were in positions of power, both were esteemed in their respective communities, entrusted with the welfare of members of their faith, particularly vulnerable members.[171] Nevertheless, both made the same decision: protect the Church and shuffle priests from parish to parish, thereby exposing individuals, particularly children, to predictable future harm, which is precisely what occurred to those who had no reason to suspect Law and Pell preferred institutional reputation to personal safety.[172] Both Pell and Law meet the test of enablers; unfortunately, absent legislation, neither was prosecuted for the crime of enabling.[173] It is hard to imagine two men more fitting to be tagged with this criminal offense.

B. Sports Culture: Enablers at Michigan State University

While there is no doubt about the egregiousness of Law's and Pell's conduct, they are not outliers in the context of institutional enablers. As horrendous as Larry Nassar was—one cannot underestimate the evil he perpetrated over decades—an explanation of the culture at MSU solely through the lens of his actions misses important and disturbing issues that extend well beyond one individual.[174] The enabler culture is embedded deeply at MSU.[175] The sheer number of alleged assaults and the silence from coaches and administrators which followed are exemplary of textbook enabler culture.[176]

Rape and assault allegations have been leveled against Michigan State's basketball and football players for years. But for most of this time, there was more or less silence from the two head coaches: Tom Izzo (basketball) and Mark

166. ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, REPORT OF CASE STUDY NO. 35 13 (2017).

167. *See generally id.*

168. *Id.* at 20.

169. *Id.* at 108.

170. *Id.* at 117.

171. *Id.*; Grinberg, *supra* note 135.

172. *See* ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, *supra* note 166 at 117; Grinberg, *supra* note 135.

173. Grinberg, *supra* note 135.

174. GUIORA, *supra* note 11, at 153.

175. *Id.*

176. *Id.* at 153–54.

Dantonio (football).[177] Dantonio once said that MSU is a "safe campus," a claim which the following list will prove is untrue as it is absurd.[178] When he was confronted with rapes committed by three of his players in 2018, he claimed that this was "new territory."[179] The following list of allegations against MSU football and basketball players through the years show that nothing could be farther from the truth:

1. In 2007, four football players allegedly raped a woman named Ashley Dowser.[180] Ashley died by overdose in 2012.[181] Her diary revealed the details of the rape and her subsequent intent to harm herself.[182] The incident was reported to MSU police in 2014, and a subsequent police interview confirmed that the four players "ran a train" on Ashley.[183] Those interviewed suggested that this practice was not uncommon among MSU football players.[184] Scott Becker, associate director of the MSU Counseling Center, shockingly concluded that it was unlikely that Ashley was raped because of inconsistencies in her diary entries.[185] The Ingham County Prosecutor's Office (ICPO) subsequently declined to press charges, citing Becker's conclusion.[186]
2. In 2009 a gang rape was allegedly committed by MSU football players.[187] No charges were ever filed despite the survivor informing the police.[188] Later that year, two additional domestic assaults were alleged to have been committed by football players.[189] Again, charges were never filed.[190]
3. In 2010, a woman (Jane Doe) was allegedly raped by two basketball players.[191] The Athletic director Mark Hollis performed his own investigation, apparently without going to the police.[192] Hollis told the woman's parents that if something similar were to happen in the

177. *Id.* Dantonio unexpectedly announced his resignation on February 4, 2020. Stephen Douglas, *The Timing of Mark Dantonio's Resignation is Questionable at Best*, BIG LEAD (Feb. 4, 2020), https://www.thebiglead.com/posts/mark-dantonio-resignation-timing-lawsuit-bonus-recruits-01e08xahhvay [https://perma.cc/WV2H-4XC6].

178. GUIORA, *supra* note 11, at 154.

179. *Id.*

180. *Id.*

181. *Id.* Ashley Elizabeth Dowser-Obituary, A.J. DESMOND & SONS FUNERAL HOME, https://www.desmondfuneralhome.com/obituaries/Ashley-Elizabeth-Dowser?obId=12338556#/obituaryInfo [https://perma.cc/69DG-RBBG].

182. GUIORA, *supra* note 11, at 154.

183. *Id.*

184. *Id.* An unnamed football player discussed this when questioned by the police. *Spartan Silence*, ESPN+, https://www.espn.com/espnplus/player/_/id/686fee37-06a6-47aa-aa1d-e9ad6e4b783d (last visited Nov. 13, 2021) [https://perma.cc/F8FW-VHTH].

185. GUIORA, *supra* note 11, at 154.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 155.

190. *Id.* at 154–55.

191. *Id.* at 155.

192. *Id.*

future, action would be taken, but that no action would be taken in this woman's case.[193]

4. Shortly thereafter, Carolyn Schaner was allegedly raped by two members of the basketball team.[194] Carolyn reported the rape to the police that night.[195] The University removed the players from their dorm and changed the players' school schedules to keep them away from Carolyn.[196] These scheduling changes were not even communicated to Carolyn.[197] Prosecutors soon declined charges on the case.[198]
5. The University did not perform a Title IX investigation in the Schaner incident. Instead, they hired an outside law firm to investigate the incident.[199] The firm asked for Carolyn to meet to discuss their findings.[200] The group would not allow Carolyn to have a counselor with her in the meeting.[201] Carolyn was asked why she didn't leave the building when she was being raped.[202] She was then told there was insufficient evidence that the University's policy had been violated.[203]
6. In 2013 a rape allegedly committed by a MSU football player, and, again, no charges were ever filed.[204] Later that year, a woman was assaulted by another football player.[205] The victim only wanted an apology, which the player gave.[206] Once again, criminal charges were never filed against anyone.[207]
7. In 2015, an MSU football player named Keith Mumphery allegedly raped a woman.[208] Even though he was found guilty of violating the university's sexual misconduct policy, again, no criminal charges were filed.[209]
8. In 2015, Bailey Kowalski was allegedly raped by three MSU basketball players.[210] The MSU Counseling Center strongly discouraged Bailey from reporting, telling her that she was "swimming with big fish."[211] Bailey bravely defied this advice and filed a police report in 2019; the investigation is still ongoing.[212]

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 156.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*

9. In 2017, a woman was raped by MSU football players Josh King, Demetric Vance, and Donnie Corley.[213] The MSU Counseling Center again discouraged the survivor from filing a police report, telling her to "focus on healing."[214]

This list, as horrendously long as it is, is not even complete. There are doubtlessly many more survivors who chose not to approach law enforcement or the University.[215] What is all the more disturbing is the supreme silence which answered the pleas of those women with the courage to come forward. This silence seems only to have been broken with subtle, or sometimes overt, pleas that the victims keep quiet, lest they tarnish the precious reputation of a *sports team*.

It was Dantonio and Izzo who violated the trust of the MSU community by allowing students—who happen to be particularly skilled in sports—whose previous behavior was documented and known to go on and continue their athletic career.[216] Dantonio did the unimaginable: he attempted to make himself an additional victim of the very crimes which were perpetuated by those under his authority.[217] *That* is the definition of an enabler: one who denies and distances themselves from their responsibility to prevent wrong doing.

Tom Izzo is a successful men's college basketball coach.[218] He wins big.[219] He has received dozens of awards and has been entered into Naismith Memorial Basketball Hall of Fame.[220] By all accounts, Izzo is one of the most respected coaches in the University's history.[221] Many NBA teams have desired to hire him, but he has rebuffed them all and maintained his loyalty to the Michigan State community.[222] Izzo's players, however, have been implicated in a heinous number of sexual assaults.[223] To understand the actions of Dantonio and Izzo, it is important to understand sports culture.[224] Division I athletics, like all sports, is big business, and the expectations and demands on coaches are enormous.[225] The stakes, money, and pressure are so constant that maybe it should not be

213. *Id.*

214. *Id.*

215. *See* THE CRIMINAL JUSTICE SYSTEM: STATISTICS, *The Majority of Sexual Assaults Are Not Reported to the Police*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Nov. 13, 2021) [https://perma.cc/UX9W-SZS7].

216. GUIORA, *supra* note 11, at 157–58.

217. *Id.* at 158.

218. *Id.* at 159.

219. *See Tom Izzo Hall of Famers*, BASKETBALL HALL OF FAME, https://www.hoophall.com/hall-of-famers/tom-izzo/ (last visited Nov. 13, 2021) [https://perma.cc/UAV9-QARP].

220. *Id.*

221. *Id.*

222. Eamonn Brennan, *Tom Izzo, Spartan for 'Life,'* ESPN: MEN'S COLL. BASKETBALL BLOG (June 15, 2010), https://www.espn.com/blog/collegebasketballnation/post/_/id/12533/tom-izzo-spartan-for-life [https://perma.cc/2PRV-6TWA].

223. GUIORA, *supra* note 11, at 159.

224. Mark Schultz, *Coaches' Behavior in the NCAA is Becoming Unacceptable. Again.*, (Dec. 20, 2020), https://www.footballzebras.com/2020/12/coaches-behavior-in-the-ncaa-is-becoming-unacceptable-again/ [https://perma.cc/PTF7-TS6C].

225. Rich Exner, *Topped by Ohio State, Big Ten Sports Approaches $2 Billion a Year in Spending*, CLEVELAND.COM (Feb. 25, 2020, 6:06 PM), https://www.cleveland.com/osu/2020/02/topped-by-ohio-state-big-ten-sports-approaches-2-billion-a-year-in-spending.html [https://perma.cc/8FNN-TW2S].

surprising when coaches are willing to turn a blind eye to conduct which is more convenient to ignore.[226] Players are, after all, the currency of sports.[227] It is understandable—despite being unacceptable—why a coach will make allowances and assume risks with particular individuals who promise great potential on the field or in the court.[228]

Perhaps the coach assumes that a player's unwanted behavior will fade away in a new environment or hopes that the player will develop some newfound maturity.[229] Regardless, it is apparent that coaches like Izzo will take risks if it means gaining a player who could win the team a championship. From a cost-benefit perspective, this may seem acceptable, especially if a player's misconduct flies under the radar.[230]

Sports are, inherently, a business. Fans and viewers only really care about wins and losses.[231] The elusive goal of a win encourages tolerance of unacceptable behavior and even criminal action. A football coach keeping a close eye on teams of 100 or more may understandably be difficult, but that argument cannot be used on basketball teams whose members number between fifteen and twenty. Basketball coaches often keep a close eye on their players ensuring players keep up their GPA and otherwise stay out of trouble.[232]

Because of the number of assaults allegedly perpetuated by members of his team, we need to ask what accountability Izzo demanded from his players, if any. The number of cases detailed above suggest Izzo was willing to accept behavior that resulted in direct harm to MSU's students. His failure to aggressively and publicly address these acts over several years cannot be ignored. Izzo owed a responsibility to all members of MSU equally, no more to his players than to the women they assaulted.

The successes, which Dantonio and Izzo have brought to MSU should not, and indeed cannot, wave away the disturbing conduct of their athletes. The desire to win games is understandable, but at some point, a line is crossed. Mark Dantonio, Tom Izzo, innumerable administrators, coaches, presidents, cardinals, CEOs, and others in positions of power made the decision to enable the wrongdoer, thereby creating harm for others.[233] It is for that reason that criminalizing the enabler is vitally important, for otherwise not only will a specific enabler go unpunished, but there will be no deterrence for future enablers.

226. Jeremy Crabtree, *Playing the Bad Guy*, ESPN (Jan. 29, 2015), https://www.espn.com/college-sports/recruiting/football/story/_/id/12249013/coaches-go-art-negative-recruiting [https://perma.cc/KRS4-YRCU].

227. *Id.*

228. *See, e.g.*, *id.*

229. *See, e.g.*, *id.*

230. *See* Pat Forde & Pete Thamel, *Exclusive: Federal Documents Detail Sweeping Potential NCAA Violations Involving High-Profile Players, Schools*, YAHOO! SPORTS (Feb. 26, 2018), https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html [https://perma.cc/GL8V-K8H9].

231. *See, e.g.*, Garth Johnson, *NCAA Basketball: Why Fans Enjoy Rival's Losing as Much as Their Own Winning*, FANSIDED, https://bustingbrackets.com/2020/01/23/ncaa-basketball-fans-enjoy-rivals-loss-much-winning/ (last visited Nov. 13, 2021) [https://perma.cc/3R4V-AZQW].

232. GUIORA, *supra* note 11, at 160.

233. *Id.* at 162.

With that, we turn our attention to the mechanism for criminalizing the enabler. Failure to aggressively pursue this course ensures the existing lacuna goes unaddressed and that harms caused by predators enabled by Law, Pell, Izzo, and Dantonio will repeat themselves at similar institutions.

Before doing so, however, we need to pause and address the question of "carrot or stick?"[234] While this Article makes the argument that criminalizing the enabler is needed both to deter others and to punish the wrongdoer, others say this is a step too far, suggesting education efforts are sufficient in addressing the enabler.[235] That argument is premised on the argument that criminalizing is "over-kill" and imposing a criminal record on an enabler does not reflect the intent or spirit of the criminal law.[236] The argument reflects concern, perhaps justifiable, with unnecessarily "tagging" an individual as a criminal when, so goes the argument, the act is one of omission.[237]

The deterrence-punishment argument is at the core of criminal law jurisprudence and philosophy. The discourse regarding the effectiveness and intent of deterrence and punishment has been discussed widely.[238] The discussion of whether to criminalize the enabler depends on the perspective from which the question is posed. When viewed, as argued in this Article, from the perspective of the person in peril, the answer is obvious. That is the position advocated in these pages. When viewed, however, from the perspective of the enabler specifically and broader society in general, alarm bells are raised regarding over-reach.[239]

The over-reach argument suggests a more measured, perhaps moderate approach to the dilemma.[240] Advocates for this approach believe legislative over-reach can have unintended consequences running the gamut from prosecutorial over-reach to law enforcement targeting of minority communities to misallocation of government resources to exaggeration of the threat posed by enablers.[241] The suggestion, then, is that the problem is manageable and perhaps not as profound as suggested in these pages.[242]

234. *Carrot-and-Stick*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/carrot-and-stick (last visited Nov. 13, 2021) [https://perma.cc/MLN2-XRRA].

235. Sarah Taddeo, Tracy Schuhmacher, & Alex Biese, *Look the Other Way: The Reason for Persistent Sexual Harassment Is a Support System*, DEMOCRAT & CHRON. (May 17, 2021, 3:59 AM), https://www.democratandchronicle.com/story/news/2021/05/17/enablers-allow-sexual-harassment-persist-experts-say/5045666001/ [https://perma.cc/ENY3-5UHG] (quoting Professor Austin Drumwright from the University of Texas who encourages bystander training to remedy the situation).

236. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 401 (1958).

237. Stewart, *supra* note 114, at 435–36.

238. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 956–67 (2003).

239. Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U.L. REV. 77, 124–28 (2005); Dyson, *supra* note 26, at 216–22.

240. Guiora & Dyer, *supra* note 85, at 323–24.

241. *Id.* at 315–22.

242. *Id.* at 323–24.

The most appropriate response to the efforts to minimize the harm posed by the enabler was articulated by Tiffany Thomas-Lopez.[243] Ms. Thomas-Lopez was assaulted by Larry Nassar on numerous occasions while she was a student-athlete at Michigan State University.[244] When she physically demonstrated to Lianna Haden,[245] a MSU trainer, what Nassar was doing to her, Ms. Hadden expressed shock and dismay.[246] Rather than take decisive action intended to protect Ms. Thomas-Lopez, however, Ms. Hadden merely suggested Tiffany speak with Destiny Teachnor Hauk, the MSU Head Trainer.[247] Ms. Teachnor-Hauk, rather than take decisive actions intended to protect Ms. Thomas-Lopez chose the opposite course.[248] In conjunction with the Head Softball Coach, Ms. Jacquie Joseph,[249] Ms. Teachnor-Hauk strongly discouraged Ms. Thomas-Lopez from pursuing her allegations.[250] This effectively forced Ms. Thomas-Lopez to make an agonizing choice: continue to suffer from Nassar's abuse or quit the team; she chose the latter. The three—Hadden, Teachnor-Hauk, and Joseph—made the deliberate decision to ignore the peril of the survivor and thus enabled the crimes committed by Larry Nassar.[251]

Regardless of their motivations, the consequences from Ms. Thomas-Lopez's perspective reflected the double trauma survivors confront when abandoned by enablers. Not only was Ms. Thomas-Lopez violated on numerous occasions, but when she reported the crimes to those she trusted, those empowered to protect her, all three made the decision to protect Nassar and Michigan State.[252] From the perspective of the survivor, the refusal to criminalize the enabler ensures that what happened to Ms. Thomas-Lopez will invariably repeat itself. Rejection of the criminalization proposal, reverting to a "carrot-education" paradigm ultimately fails to do what is most essential: protect the vulnerable.

Nevertheless, we should not be dismissive of efforts to educate. Such efforts, however, were they to be implemented, must be undertaken in conjunction with implementation of the criminal process. It is "fool's gold" to assume educational efforts, regardless of their sincerity and desire, can compel enablers to act on behalf of the survivors.[253] As we have discussed throughout this Article,

243. Bill Hutchinson, *Former Michigan State University Softball Player Says She Gave Up the Sport She Loved in the Wake of Larry Nassar's Sexual Assaults*, ABC NEWS (Jan. 26, 2018, 3:54 PM), https://abcnews.go.com/Sports/michigan-state-university-softball-player-gave-sport-loved/story?id=52605169 [https://perma.cc/M7VN-V5G8].

244. Complaint at 2, Thomas Lopez v. Nassar, No. BC644417 (Cal. Super. Ct. Dec. 21, 2016).

245. *Lianna Hadden-Biography*, MSU SPARTANS, https://msuspartans.com/staff-directory/lianna-hadden/155 (last visited Nov. 13, 2021) [https://perma.cc/K2XV-AA43].

246. Hutchinson, *supra* note 243.

247. Kim Kozlowski, *State Accuses 2 MSU Trainers of Lying About Nassar*, DET. NEWS (Feb. 20, 2019, 3:03 PM), https://www.detroitnews.com/story/news/local/michigan/2019/02/20/state-accuses-2-msu-trainers-lying-nassar/2929458002/ [https://perma.cc/624A-WEPU].

248. *Id.*

249. *Jacquie Joseph—Biography*, MSU SPARTANS, https://msuspartans.com/sports/softball/roster/coaches/jacquie-joseph/1035 (last visited Nov. 4, 2021) [https://perma.cc/Y5D7-G2T6].

250. Hutchinson, *supra* note 243.

251. *See* Kozlowski, *supra* note 247.

252. *See id.*

253. Guiora & Dyer, *supra* note 85, at 323–24.

protection of the survivor is at the core of this undertaking. With that, we turn to the proposed methodologies to criminalize the enabler.

VII. CRIMINALIZING THE ENABLER

The phrase "talk is cheap" comes to mind for those who agree sexual assault enabling is reprehensible but do not agree with criminalizing the enabler. Because our primary motivation is to create a mechanism protecting the vulnerable from the perpetrator and enabler alike, we present in this Section a road map for criminalizing the enabler. In the previous section we examined the direct consequences of the historical hesitation to recognize omission as equating to commission.[254] That approach, while rooted in a particular jurisprudential philosophy, exacerbates the harm of the person in peril. To view harm through the narrow lens of commission, rather than through combination of omission and commission, benefits two actors: the perpetrator (directly) and the enabler (indirectly); the former because they are unencumbered in committing their crime, the latter because they will not be held responsible for their decision. The protection of the institution is the ultimate result.

Some may argue that existing legislation—particularly mandatory reporting laws—are sufficient.[255] There are many reasons why this is incorrect as explained in the following two Sections.

A. Inadequacy of Mandatory Reporting Legislation

Every state in the country has adopted some type of "duty to report" or mandatory reporting law.[256] These laws generally require an adult, who is in some special position, to report child abuse to law enforcement as soon as they suspect it is occurring.[257]

While mandatory reporting laws are undeniably a step in the right direction, all mandatory reporting laws lack the necessary elements to make them truly effective. Indeed, all states have pieces of the puzzle but lack every necessary element to effectively criminalize sexual assault enabling.[258] These elements are considered in turn:

254. *See supra* Part VI.

255. Guiora & Dyer, *supra* note 85, at 300–01; Christina Mancini, Justin T. Pickett, Corey Call & Sean Patrick Roche, *Mandatory Reporting (MR) in High Education: College Students' Perceptions of Laws Designed to Reduce Campus Sexual Assault*, 41 CRIM. J. REV. 219, 219 (2016).

256. Guiora & Dyer, *supra* note 85, at 305.

257. *Id.*

258. *See generally* U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE INFO. GATEWAY MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, https://www.childwelfare.gov/pubpdfs/manda.pdf (last visited Nov. 13, 2021) [https://perma.cc/VXH5-T3PU].

1. Who is required to report?

A few states extend liability for mandatory reporting to all individuals, regardless of position or status.[259] A majority of states, however, enumerate those who may be held liable to specific individuals in positions of authority.[260] The former is the preferrable approach.

Any state which enumerates specific positions to be held liable will obviously fall short of including a certain place where sexual assault occurs. If this Article has demonstrated anything, it is that sexual assault can occur anywhere and by anyone. It occurs at the most revered universities and the holiest of cathedrals.[261] Nowhere is exempt, and thus, no one should be exempt.[262] Failing to include all persons in a mandatory reporting statute ignores the—unfortunate—omnipresence of sexual assault.

2. Who is protected?

Almost every state restricts mandatory reporting protections to require reporting for the assault of children.[263] Only a handful of outliers require reporting for all victims when rape and/or abuse is suspected, and even then, only medical practitioners are required to make such a report.[264]

Here, again, such a restriction is shortsighted and ignores the reality that all members of society are susceptible to sexual assault and abuse. This also ignores the well-acknowledged effects that sexual assault can have on an individual's ability to protect themselves from sexual predators. While the desire to protect the most vulnerable first is understandable, such a restriction simply provides a window for enablers to reside in if a victim they prey on is a competent adult.[265] All states should extend reporting protections to all individuals.

259. *See, e.g.*, UTAH CODE ANN. § 62A-4a-403(1) (West 2020) (Utah's statute states "[when any individual] . . . has reason to believe that a child is, or has been, the subject of abuse or neglect . . . the individual shall immediately report the suspected abuse or neglect . . . ."); *see also* TEX. FAM. CODE ANN. § 261.101(a) (West 2019).

260. The Massachusetts statute lists forty-seven positions. MASS. GEN. LAWS ch. 119, § 21. The Washington statute lists nineteen positions. WASH. REV. CODE § 26.44.030(1)(a).

261. *See supra* Part VI.

262. *See supra* Part VI.

263. Texas's statute requires reporting when one has "cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . ." TEX. FAM. CODE ANN. § 261.101(a).

264. *See* MASS. GEN. LAWS ch. 112, § 12A ½; CAL. PENAL CODE § 11160(a)(2).

265. Levy, *supra* note 2 at 621.

3. When must a report be made?

Virtually every state requires immediate reporting to a law enforcement agency or abuse hotline.[266] A few states allow a buffer zone of several days before a report must be made.[267] Given the seriousness of abuse and the continuing danger to the victim, immediate reporting is ideal.

4. Who is exempt?

Nearly every state recognizes some necessary exceptions for certain types of privileges.[268] While such privileges may be desirable, the ideal duty-to-report statute will include as few exceptions as possible or rescind all privileges.[269]

5. What is the degree of criminality?

Most states punish a failure to report as a misdemeanor.[270] A minority of states assign only a fine, usually between $500 to $1,000, for violations.[271] All states should punish failure to report as a misdemeanor punishable by at least six months in prison or a fine of $1,000.[272]

Most state's mandatory reporting laws fail when it comes to who is required to report and who is protected. By analyzing all these factors, we can come up with a "perfect" mandatory reporting law as one that 1) requires all adults to report; 2) protects all individuals, regardless of age or disability; 3) requires immediate reporting; 4) has as few exceptions as possible; and 5) punishes failure to report as a misdemeanor requiring at least six months in prison or a fine of $1,000.

The phrase "we're all mandatory reporters" captures the spirit of these proposed changes.[273] It is no different from the oft-repeated sentiment in torts that we all have a duty to act reasonably toward each other, regardless of our differences or conflicts.[274] Survivors deserve no less from a modern, civilized society.

266. ALASKA STAT. ANN. § 47.17.020(a).

267. For example, the California mandatory reporting statutes require a report to be made within two days of learning about the abuse. CAL. PENAL CODE § 11166(b). Michigan's statute requires reporting within seventy-two hours. MICH. COMP. LAWS § 722.623(a) (2020).

268. Michigan's statute recognizes exceptions for the attorney-client privilege and the clergy-parishioner privilege for statements made in a confessional setting. MICH. COMP. LAWS § 722.631.

269. Wyoming's statute, for example, recognizes no exceptions for mandatory reporting, even within the attorney-client privilege. WYO. STAT. ANN. § 14-3-210(a). The costs and benefits of a statute such as this is an analysis that this Article cannot be fully addressed.

270. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 258.

271. Vermont's statute only requires a $500 fine. VT. STAT. ANN. tit. 33, § 4913(h).

272. California follows this approach. 2020 Cal. Legis. Serv. Ch. 243 (A.B. 1963).

273. *Cf.* Mark Moseley, *When it Comes to Child Sex Abuse We're All 'Mandatory Reporters*,*'* LENS (Oct. 30, 2012), https://thelensnola.org/2012/10/30/child-abuse-reporting-rules-change/ [https://perma.cc/WL4M-MVJ5] (discussing mandatory reporting in the context of the Louisiana law).

274. Hill v. Superior Prop. Mgmt. Servs., Inc., 321 P.3d 1054, 1056 (Utah 2013).

B. Inadequacy of Other Options

Aside from mandatory reporting, there are many other types of laws which come close to criminalizing enabling behavior yet fall short in one way or another. The purpose in reviewing these forms of legislation is twofold. First, it demonstrates how currently existing legislation, in a way, embraces the idea of criminalizing omission and holding individuals responsible for harms they did not instigate. Second, it demonstrates how criminalization of enablers may simply require a different interpretation of current legislation as opposed to a new law.

1. Criminal negligence

Criminal negligence, in its most basic terms, is described as "a material forsaking of expected concern, vital abandonment of required care, or real divergence of appropriate concern" as well as "aggravated, culpable, gross, or reckless conduct that is such a departure from that of the ordinarily prudent or careful person . . . as to be incompatible with a proper regard for human life."[275] It is important to note that "criminal negligence" may refer either to an independent crime or to the mens rea element of the Model Penal Code.[276]

On the surface, this seems to align perfectly with the arguments made in this Article: criminalize the enablers because their conduct—*their omissions*—represent a substantial and unjustifiable deviance from the ordinary standard of care each human being owes to each other.[277] Moreover, the crime of negligence is tied to the tort of negligence, which clearly enumerates a general duty of care all human beings owe each other.[278]

Despite this seemingly good fit, most states characterize their criminal negligence statutes in terms of commission, especially as related to homicide.[279] There are other states, however, whose criminal negligence statues are so broad and ambiguous they seem to embrace inclusion of omissions. For example, Louisiana's statute states, "[c]riminal negligence exists when . . . there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."[280] In practice, however, such statutes are enforced exclusively on crimes of commission.[281]

In jurisdictions where broad criminal negligence statutes exist, it may be more advisable to expand those statues to encompass enabling behavior rather than creating a separate statute.

275. 21 Am. Jur. 2d *Criminal Law* § 121 (2021).
276. MODEL PENAL CODE § 2.02(d) (AM. L. INST. 2020).
277. Am. Jur., *supra* note 275.
278. *Id.*
279. *See, e.g.*, ALA. CODE § 13A-6-4(a) (2021).
280. LA. STAT. ANN. § 14:12 (2021).
281. *See* Kirchheimer, *supra* note 54 at 619.

2. Reckless endangerment

An additional crime which bears some similarities—and important distinctions—with the proposed mandatory reporting law is reckless endangerment. In layman's terms, reckless endangerment entails causing another to be put in circumstances which may result in death or serious injury.[282] For example, the Utah reckless endangerment statute reads, "[a] person commits reckless endangerment if, under circumstances not amounting to a felony offense, the person recklessly engages in conduct that creates a substantial risk of death or serious bodily injury to another person."[283] There also exists child endangerment statutes which criminalizes such behavior more severely when harm results to a child, although many of these statutes restrict liability to the parent or guardian of said child.[284]

There is an argument that enabling behavior constitutes reckless endangerment.[285] According to the Model Penal Code, one acts recklessly when one "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."[286] For example, to subject a young girl to "treatments" by a physician—and one with a record for abuse—alone in a hotel room amounts to creating a substantial and unjustifiable risk that she will sustain serious bodily injury.[287]

And yet, courts have interpreted reckless endangerment in terms of commission, not omission.[288] As such, most reckless endangerment statutes envision more overtly malicious acts, for example, deliberately leaving someone alone in a desert and driving away.[289]

3. Accessory after the fact

Many jurisdictions criminalize accessories "after the fact."[290] In general terms, this means aiding or otherwise assisting one who has committed a crime, especially when helping them to avoid punishment.[291] For example, the U.S. code criminalizes an individual who "receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, [a]s an accessory after the fact."[292] On the surface, this seems to describe the enablers

282. *Reckless Endangerment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

283. UTAH CODE ANN. § 76-5-112 (West 2021).

284. IOWA CODE § 726.6 (2021).

285. *See* Daniel G. Moriarty, *Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers*, 34 S. ILL. U. L. J. 647, 671 (2010).

286. MODEL PENAL CODE § 2.02 (AM. L. INST. 2020).

287. This refers to Mattie Larson, an elite gymnast, who was ordered by USA Gymnastic officials to be treated by Larry Nassar alone in his hotel room; Ms. Larson uses the word "abandoned" to describe what she felt Nassar's enablers, USAG officials, did to her. GUIORA, *supra* note 11, at 57–58.

288. *See*, *e.g.*, State v. Moore, 77 S.W.3d 132, 136 (Tenn. 2002) (discussing commission of reckless endangerment crimes).

289. *See, e.g.*, UTAH CODE ANN. § 76-5-112 (WEST 2021); TENN. CODE ANN. § 39-13-103 (WEST 2021).

290. *See, e.g.*, 18 U.S.C. § 3.

291. *Accessory After the Fact*, BLACK'S LAW DICTIONARY (11th ed. 2019).

292. 18 U.S.C. § 3.

in Section V who could be said to have assisted those guilty of sexual abuse.[293] Yet again, in application courts have restricted interpretation to actions which involve more overt, physical actions, avoiding any application to crimes of omission.[294]

While Cardinal Law, Tom Izzo, and Mark Dantonio may have disapproved of sexual violence, their willingness to put the institution first, and their subsequent silence, allowed rapists and abusers to go unpunished.[295] That is the reality of the culture they tolerated, if not created, at the institutions they headed.[296] All three had knowledge of criminal actions committed "on their watch," yet all three made the conscious decision to enable such behavior which persisted over the course of years.[297]

Akin to Stephen's hypothetical: while individuals who watched the child drown are not as directly culpable as the one who pushed him in, their silence and inaction directly assisted the ultimate result, especially when preventable.[298] Arguably, this would legitimize application of the crime of accessory after the fact. Nevertheless, courts and prosecutors have refused to apply such an interpretation.[299]

While a different interpretation of these three laws may effectively criminalize sexual assault enabling, the recommendation is still the complete mandatory reporting law suggested in Section A.[300] Among other things, mandatory reporting laws are more well-known, and thus changes made to one would be more likely to be understood by—and effectively conveyed to—the public.[301] Moreover, the creation of a new law sends a powerful message that the government will refuse to tolerate such heinous behavior.

C. Best Practice for Responding to Sexual Assault Allegations

One of the primary intentions behind the previous recommendation to expand mandatory reporting is to break down any barriers between individuals who learn of sexual assault and the police.

To that end, we recommend the following two-part process: 1) the person with knowledge of sexual assault contacts the police; and 2) the reporter contacts institutional superiors when reasonable to do so.

It is imperative that these steps are taken in this order. If the victim or someone on their behalf initially approaches a senior institutional official, history repeatedly demonstrates they will hear these five words: "we will handle this

293. *See supra* Section V.B.

294. *See, e.g.*, State v. Rich, 184 Wash. 2d 897, 900 (2016) (involving an individual who was speeding with a child in her car).

295. *See supra* Sections VI.A, VI.B.

296. *See supra* Sections VI.A, VI.B.

297. *See supra* Sections VI.A, VI.B.

298. *See* Leavens, *supra* note 80.

299. *See id.* at 549.

300. *See supra* Section VII.A.

301. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 258.

internally" or "we'll look into this ourselves."[302] Those words are devastating for victims. Those words have been spoken too many times and have been the source of unending pain to an untold number of survivors.[303] While there is the possibility the institution's superiors will make a speedy report to law enforcement, example after painful example has shown that the financial and reputational allure of "keeping things quiet" is too irresistible for institutions everywhere.[304]

Hence the recommended mandatory reporting laws include a provision that reporters should contact the police before anyone else. Some may call such a requirement draconian, but countless examples have shown the risk of institutions choosing to protect themselves or brush off complaints as vindictive is far too great. The potential detriments of this approach will be examined below.

Ultimately, the end goal of modifying mandatory reporting laws is to create a world where all individuals feel an imperative to immediately report sexual assault to law enforcement. There is no assumption this will solve every problem. The police themselves may be complicit or otherwise corrupt. It may be that the police find there is insufficient evidence at that time to move forward with prosecution. The more people who know abuse may be occurring, however, the better. The police are bound at some point to be more suspicious than someone in the abuser's institution.

If Cardinal Law had went to the police after the first allegation against Geoghan, it is entirely possible Geoghan could have been prosecuted, tried, and sent to prison, thus sparing dozens of boys the lifelong scars of sexual abuse.[305] If the first prosecution failed, at the very least Geoghan would know for certain that the church would not protect him the next time an allegation was made.

It is critical to take steps toward creating a society where all individuals, in all institutions, feel an imperative to take all allegations seriously and take them to the police before anyone else. Such a mentality is simply what survivors deserve in a just and equitable society.

D. Arguments and Counterarguments

It is only appropriate to examine this proposed legislation with a critical eye. With that in mind, listed below are some of the most common arguments against criminalizing enablers and their counterarguments.

Some survivors argue this legislation is potentially harmful to those suffering from abuse.[306] For example, a secretary being abused by her boss may be less likely to report instances of her boss abusing others out of fear of retaliation

302. *See Spartan Silence*, *supra* note 184; Dowd, *supra* note 138; Douglas, *supra* note 177.

303. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 575–87 (2014), https://dynamic.uoregon.edu/jjf/articles/sf2014.pdf [https://perma.cc/X7G8-HHCB].

304. *See* Udowitch, *supra* note 29, at 103.

305. *See* GUIORA, *supra* note 11, at 138.

306. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 619 (1998).

in the form of more abuse.[307] There is a simple solution to this valid concern: provide immunity to those who are being abused or who are in reasonable fear of abuse by the same abuser. Such a provision would protect victims while continuing to punish individuals like Cardinal Law who were under no reasonable fear of abuse to themselves.

In that same vein, there are many, especially in employment situations, who may fear retaliation from the hands of the institution for their actions in preventing abuse.[308] Here, again, a relatively simple solution is to expand and/or reinforce whistleblower protections. While many such laws already exist, legislators ought to ensure they work effectively and ensure that the public knows they are in place.[309] Institutions themselves also ought to create internal policies to ensure their own protections for whistleblowers.[310]

Some argue such legislation will result in discriminatory prosecution practices against minorities.[311] This is indeed a valid concern which needs to be addressed on multiple fronts. Prosecution review boards, along with other efforts, can be effective at counteracting this concern.[312]

Many express concerns that enabler statues such as these will cause people to become paranoid.[313] It is easy to imagine someone in Dantonio's or Izzo's position making mountains out of molehills and attempting to micromanage their athlete's personal lives when they suspect abuse. The counterargument is that the mens rea requirement for knowledge of sexual assault can be defined in a sufficiently distinct way so as to restrict punishment to instances where abuse is reasonably likely to be occurring.

An additional concern is that this legislation will punish people who fail to report not out of a desire to protect their institution, but simply because they are timid.[314] This may be true, but, the question, as discussed in this Article, is how we most effectively protect the person in peril. From the survivor's perspective, there is no discomfort the enabler could possibly experience which could compare to the years of anxiety, fear, nightmares, stress, and often unending pain which can follow even one instance of sexual abuse, let alone hundreds.[315] Failing to enact legislation criminalizing the enabler ensures perpetrators continue to act with immunity and confidence. The continued insistence that criminalizing

307. *See id.*

308. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCH. 247, 260–61 (2003).

309. David Kwok, *The Public Wrong of Whistleblower Retaliation*, 96 HASTINGS L.J. 1225, 1258 (2018).

310. *See id.* at 1268.

311. Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, 139 PEDIATRICS PERSP. 1, 2 (2017), https://pediatrics.aappublications.org/content/pediatrics/139/4/e20163511.full.pdf [https://perma.cc/UX7K-7LL8].

312. *See, e.g.*, Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, TIME (July 7, 2020, 3:55 PM), https://time.com/5863783/prosecutors-criminal-justice-reform/ [https://perma.cc/8R5D-PJ2W].

313. *See* Raz, *supra* note 311, at 2.

314. *See* Stewart, *supra* note 114, at 434–36.

315. *Id.* at 386.

omission is "goes too far"[316] ensures abandonment of the survivor. Failing to criminalize omission reflects a willingness, intended or otherwise, to protect the enabler rather than to protect individuals from sexual abuse. Such a conclusion is unacceptable. When put on the proverbial scales of justice, the needs of the victim far outweigh concerns of the enabler.

The persistently repeated argument that such efforts are unnecessary since people will usually do the right thing is debunked in example after example.[317] While often held up as the primary reason to oppose criminalizing enabler omission,[318] it reflects abandonment of the person in peril. More than that, the failure to criminalize omission represents an unwillingness to recognize omission has consequences and must not be understood otherwise. To argue that omission is devoid of ramifications is to ignore the plight of the person directly harmed by a powerful combination of the perpetrator and enabler. The melding of commission and omission has one result: terrible harm to the person in peril who was attacked by the perpetrator and abandoned by the enabler.

VIII. A PATH FORWARD

We have, in the previous pages, proposed a way forward to leap over a wall constructed over centuries and reinforced on a regular basis. That wall protects institutions and perpetrators. It does not require Superman to leap over it. From the perspective of the person in peril, however, it must truly seem like the wall which protects those seeking to harm them, directly and indirectly, has become their Wailing Wall.[319] That is most unfortunate, reflecting a deeply ingrained opposition to recognizing that the crime of omission is as consequential as the crime of commission. The consistent voices of opposition to criminalizing the omission of bystanders and enablers reflect an unwillingness to examine the dilemma from the perspective of the person most in need of assistance. This instinctual resistance only serves to reinforce the entrenched power of abusers, their institutions, and their enablers.

The power dynamic between institutions, institution protectors, and the person in peril is illustrative of an overwhelming power imbalance. If there is something we should have learned these past months,[320] it is that power imbalances, which define much of American society, cause extraordinary harm—whether directly or indirectly. Power imbalances cut across many sectors; they cannot be claimed by one group. The mantle of imbalance is held, tragically, by many, and

316. *See* Stewart, *supra* note 114, at 415.

317. *See supra* Sections VI.A, VI.B.

318. Roni Rosenberg, *Two Models of "Absence of Movement" in Criminal Jurisprudence*, 12 OHIO ST. J. CRIM. L. 195, 198–99 (2014).

319. The Wailing Wall is the holiest place for Jews. It marks the destruction of the Temple. It is a place where Jews (today) go and pray and lament. To say a place is "like a Wailing Wall," can mean either a place akin to a shoulder to cry on to express one's sorrow meaning a place of grief. *Wailing Wall*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/wailing%20wall (last visited Nov. 13, 2021) [https://perma.cc/HE4D-3DBP].

320. Time of writing is January 2021.

transferred from generation to generation. This has been a disquieting historical reality at odds with John Winthrop's "Dreams of a City on a Hill."[321]

Winthrop penned his words in 1630, before he and his fellow settlers arrived on the shores of New England.[322] The hope was that the Massachusetts Bay Colony would shine like an example to the world.[323] Whether it met that lofty goal or not is a matter of historical perspective, beyond our purview and scope. Nevertheless, his words—and their powerful, aspirational message—are relevant when considering the duty owed to the person in peril in the context of omission:

> God Almighty in his most holy and wise providence hath so disposed of the condition of mankind, as in all times some must be rich some poor, some high and eminent in power and dignity; others mean and in subjection.
>
> The Reason hereof:
>
> . . . .
>
> *3rd Reason.*
>
> Thirdly, that every man might have need of others, and from hence they might be all knit more nearly together in the bonds of brotherly affection. From hence it appears plainly that no man is made more honorable than another or more wealthy etc., out of any particular and singular respect to himself, but for the glory of his Creator and the common good of the creature, Man.
>
> . . . .
>
> *Question: What rule must we observe and walk by in cause of community of peril?*
>
> *Answer:*
>
> The same as before, but with more enlargement towards others and less respect towards ourselves and our own right. Hence it was that in the primitive Church they sold all, had all things in common, neither did any man say that which he possessed was his own. . . . whereof we keep an honorable remembrance of them; and it is to be observed that both in Scriptures and latter stories of the churches that such as have been most bountiful to the poor saints, especially in those extraordinary times and occasions, God hath left them highly commended to posterity.[324]

We opened with Lazarus's majestic words, and we close with Winthrop's moving aspirational phrases. We can learn much from their respective pens. Lazarus references those in despair and what can be done for them;[325] Winthrop addresses the duty we owe each other.[326] Examined together in the context of institutional complicity and the consequences of bystander-enabler omission,

321. John Winthrop, *Dreams of a City on a Hill*, AM. YAWP READER (1630), https://www.american-yawp.com/reader/colliding-cultures/john-winthrop-dreams-of-a-city-on-a-hill-1630/ (last visited Nov. 13, 2021) [https://perma.cc/ZU8J-RHDW].

322. *Id.*

323. *Id.*

324. *Id*.

325. *See* Lazarus, *supra* note 1.

326. *See* Winthrop, *supra* note 321.

their words ring loud on behalf of the person whose voice is not heard. That person is the one standing outside the wall, knowing inside are the actors—commission and omission—who have teamed up to cause them harm.

Our failure to legislate the crime of omission ensures continuing harm to those who do not have a voice, impacted by a power imbalance that favors the institutions and ensures that society continues to turn its back on them. The time has come to take to heart Lazarus's and Winthrop's words from the perspective of the person in peril, harmed by perpetrator and bystander-enabler alike. In the proceeding pages, we have provided a road map for how to overcome this historical wrong; the time to act is now before what happened at Michigan State, Penn State, USA Gymnastics, University of Michigan, and the Catholic Church is perceived as normal.

Survivors deserve better from society.