

BYSTANDER INTERVENTIONS

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Bystander intervention strategies are emerging as a popular proposed solution to complex social problems like bullying in schools and online, sexual misconduct on college campuses, and harassment in the workplace. As the name suggests, bystander intervention initiatives encourage individuals who witness such harms to adopt an active, interventionist approach in stopping them. For example, a teenager who sees another student being bullied on a website, a college student who observes a heavily intoxicated female student being led into a bedroom by a male companion, and a work colleague who overhears a sexist or racist joke are encouraged to either intervene to prevent a situation from escalating or report an incident after it has occurred. The belief that bystander interventions can combat these harms is so strong that, in some instances, the implementation of bystander intervention initiatives is becoming legally required.

Ironically, at the same time as law is starting to require the implementation of bystander intervention initiatives, law also functions as an impediment to successful bystander intervention. First, while bystander intervention programs try to create a norm of intervention, most legal norms support non-intervention, giving rise to a “competing norms” problem most commonly resolved with inaction. Second, a lack of legal accountability for the surrounding institutions and organizations indirectly discourages bystander intervention. Finally, a perceived risk of liability associated with intervention immobilizes many bystanders. Unless these legal impediments are minimized, bystander intervention is unlikely to be a successful solution to social problems.

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INTRODUCTION

Social problems like bullying in schools, sexual misconduct on college campuses, and harassment in the workplace plague American society at alarmingly high rates. National surveys indicate that approximately seventy percent of students in middle and high school have been bullied.¹ In college, between twenty percent and twenty-five

1. Sandra Graham, *Bullying: A Module for Teachers*, AM. PSYCHOL. ASS'N, <http://www.apa.org/education/k12/bullying.aspx> (last visited Oct. 5, 2015).

percent of women are sexually assaulted.² In the workplace, despite increased diversity and sensitivity training, one in four women report having experienced some form of sexual harassment.³ These harms often have profound negative consequences for those who experience them, including psychological and physiological health problems; difficulties in personal and social relationships; and a reduced ability to focus, function, or perform academically or occupationally.⁴

To cure these social ills, many policymakers, advocates, and social activists are promoting bystander intervention initiatives. Bystander intervention has emerged as the most popular proposed prescription to address these wrongs, and bystander intervention programs are being championed by many high-profile and high-powered institutions and entities, including the White House, the Centers for Disease Control and Prevention, the American College Health Association, and the World Health Organization.⁵ Thousands of schools, college campuses, military bases, workplaces, and other institutions have already implemented bystander intervention training programs, and those numbers continue to grow at a voracious clip.⁶ The widespread adoption of these programs reflects the belief that bystander intervention can prevent the harms of bullying, campus sexual misconduct, and workplace harassment from occurring, facilitate the redress of harms once they have occurred, and ultimately result in a

2. Jennifer Katz & Jessica Moore, *Bystander Education Training for Campus Sexual Assault Prevention: An Initial Meta-Analysis*, 28 VIOLENCE & VICTIMS 1054, 1054 (2013).

3. Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS (Nov. 16, 2011), <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>; see also Theresa M. Glomb et al., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 309, 310 (1997).

4. Ellen M. Kraft & Jinchang Wang, *Effectiveness of Cyber Bullying Prevention Strategies: A Study on Students' Perspectives*, 3 INT'L J. CYBER CRIMINOLOGY 513, 514 (2009); Sarah McMahon et al., *A Statewide Exploration of Bystander and Gender-Role Attitudes in New Jersey*, 28 AFFILIA: J. WOMEN & SOC. WORK 296, 296 (2013).

5. Sarah McMahon et al., *Measuring Bystander Attitudes and Behavior to Prevent Sexual Violence*, 62 J. AM. C. HEALTH 58, 58 (2014); Lauren Chief Elk & Shaadi Devereaux, *The Failure of Bystander Intervention*, NEW INQUIRY (Dec. 23, 2014), <http://thenewinquiry.com/essays/failure-of-bystander-intervention/>.

6. For example, the Military Academy and the Air Force "have implemented one of the most comprehensive programs to address sexual assault in a large institution." Christopher J. Goewert & Andrew R. Norton, *Sexual Assault: Four Commonly Held Beliefs*, 40 REPORTER, no. 2, 2013, at 24, 30.

shifting of social norms such that these harms will decrease and become less prevalent in the future.⁷

The idea behind bystander intervention is simple: many of these harms or the precursors to them occur in the presence of other people, and these witnessing individuals thus have the ability to disrupt or mitigate these harms.⁸ It is estimated that nearly eighty-five percent of bullying incidents are witnessed by other students,⁹ that “third parties are present in nearly one third of reported sexual assaults,”¹⁰ and that almost seventy percent of working women have observed workplace harassment incidents.¹¹

Bystander intervention focuses on these witnesses and tries to teach them how to intervene or disrupt these harms in safe and effective ways.¹² For instance, in bystander intervention workshops, children and teens are urged to intervene when they see bullying occurring at school or online, through either direct action (such as making an Internet posting in support of the bullied student) or by telling a parent or teacher about the incident.¹³ College students who see someone trying to isolate a heavily intoxicated woman are urged to create a distraction, like spilling beer on the potential perpetrator or simply asking the woman if she is alright or needs help.¹⁴ Similarly, workplace colleagues are encouraged to speak up when they hear another colleague being harassed, offer support to that colleague, and report the occurrence.¹⁵

7. Victoria L. Banyard, *Who Will Help Prevent Sexual Violence: Creating an Ecological Model of Bystander Intervention*, 1 *PSYCHOL. VIOLENCE* 216, 216–17 (2011).

8. *Id.* at 216.

9. Ann M. Jones, Middle School Students’ Perceptions of Bullying and the Effects of an Anti-Bullying Policy 8 (Mar. 2013) (unpublished EdD thesis, Northeastern University), <https://repository.library.northeastern.edu/files/neu:1212>.

10. Banyard, *supra* note 7, at 216 (citing MIKE PLANTY, U.S. DEP’T OF JUSTICE, *THIRD-PARTY INVOLVEMENT IN VIOLENT CRIME 1993-99*, at 1 (2002)); Sarah McMahon & Victoria L. Banyard, *When Can I Help? A Conceptual Framework for the Prevention of Sexual Violence Through Bystander Intervention*, 13 *TRAUMA, VIOLENCE, & ABUSE* 3, 9 (2012).

11. Robert T. Hitlan et al., *Upsetting Behavior: Reactions to Personal and Bystander Sexual Harassment Experiences*, 55 *SEX ROLES* 187, 190 (2006); see also Glomb et al., *supra* note 3, at 310.

12. Lori E. Koelsch et al., *Bystander Perceptions: Implications for University Sexual Assault Prevention Programs*, 27 *VIOLENCE & VICTIMS* 563, 565 (2012).

13. McMahon & Banyard, *supra* note 10, at 3–4; Joshua R. Polanin et al., *A Meta-Analysis of School-Based Bullying Prevention Programs’ Effects on Bystander Intervention Behavior*, 41 *SCH. PSYCHOL. REV.* 47, 48–50 (2012).

14. Victoria L. Banyard et al., *Sexual Violence Prevention Through Bystander Education: An Experimental Evaluation*, 35 *J. COMMUNITY PSYCHOL.* 463, 466 (2007).

15. PAULA McDONALD & MICHAEL G. FLOOD, *AUSTRALIAN HUMAN RIGHTS COMM’N, ENCOURAGE. SUPPORT. ACT! BYSTANDER APPROACHES TO SEXUAL HARASSMENT IN THE WORKPLACE* 1 (2012).

Although formal evaluation of bystander intervention programs is still in the early stages, the belief in the potential power of bystander intervention to alleviate social problems has prompted some policymakers and legislatures to forge ahead and make implementation of bystander intervention initiatives a legal requirement for some institutions.¹⁶ The new Campus SaVE Act, for example, requires colleges to offer bystander intervention programs to new students and employees.¹⁷

This Article argues that at the same time as law is beginning to require the implementation of bystander intervention training, law and legal norms paradoxically function as impediments to its success. First, although bystander intervention initiatives try to foster a norm of intervention, many legal norms instead support nonintervention, creating a “competing norms” problem that bystanders are likely to resolve with inaction.¹⁸ Second, law has largely failed to hold institutions and organizations accountable for harms like bullying, campus sexual misconduct, and workplace harassment. This lack of legal accountability creates an environment in which bystanders feel that these harms are not taken seriously and institutions and organizations will not support them if they do intervene. Finally, fear of liability and other legal consequences prevents many bystanders from intervening. Unless these legal impediments shift, bystander intervention strategies are unlikely to achieve their potential as an effective antidote to these deeply entrenched social problems.

Part I of this Article explains how bystander intervention has become the preferred solution to a number of social problems. It sets out the reasons why bystander intervention has attracted such a devoted following, the theoretical basis of bystander intervention strategies, and the developing legal requirements regarding the implementation of bystander intervention programs.

Parts II and III focus on the conflict between existing legal norms and the norms that bystander intervention initiatives promote. Most importantly, the common law no-duty-to-rescue rule, which governs in the vast majority of states, is a norm of nonintervention. This norm is further reinforced by the state’s lack of a duty to protect against third-party harms. Also, additional legal ambiguities and competing norms, like confusion surrounding the applicability of the First Amendment in the bullying context; difficulties in understanding the relationship between consent, force, and sexual misconduct on campus;

16. See *infra* Part I.B.

17. See *infra* notes 85–86 and accompanying text.

18. See *infra* notes 101–106 and accompanying text.

and differing definitions of what constitutes a hostile work environment, discourage bystander intervention.

Part IV explores how a lack of institutional and organizational legal accountability impacts bystander intervention. While Titles VII and IX of the Civil Rights Act theoretically hold schools and workplaces accountable for serving as “silent bystanders” and failing to protect or properly respond to students and employees who experience harassment and sexual misconduct,¹⁹ in reality such actions are often unsuccessful and tend to capture only the most egregious failures. As a result, schools, colleges, and workplaces are often understood to be quite tolerant of the harms that bystanders are asked to prevent. The lax legal enforcement against institutions for permitting or even condoning these harms suggests to bystanders that these harms are not serious and institutional support for intervention may be lacking. Bystanders are unlikely to intervene in such circumstances.

Part V considers how a perceived risk of liability and other legal consequences immobilizes many bystanders. Especially in the campus sexual misconduct context, many students indicate that they often do not intervene for fear of attracting negative legal consequences. Specifically, since many incidents of campus sexual assault have their beginnings in parties involving underage drinking, bystanders who have themselves engaged in underage drinking are hesitant to reach out to campus authorities for fear that they may find themselves subject to a number of penalties and punishments.

The final part, Part VI, offers four proposed solutions for overcoming these challenges. First, in order to create a more robust norm of intervention generally, more jurisdictions should adopt the same duties to rescue or report in instances of emergencies or serious crimes that currently exist in a small minority of states. Second, Good Samaritan laws need to be expanded to reduce bystanders’ fear of liability. Third, bystander intervention training programs must acknowledge and account for the role of legal norms and the existing tensions between those norms and the ones that bystander intervention training seeks to create. Fourth, a resilient framework of community responsibility, in which accountability is enforced at the state, institutional, group, and individual level, should be adopted. Without these wide-scale changes, bystander intervention is unlikely to successfully address the social problems it targets.

Even with the legal impediments resolved, bystander intervention initiatives raise a number of additional concerns that will need to be

19. Nancy Chi Cantalupo, Jessica Lenahan (Gonzales) v. United States & Collective Entity Responsibility for Gender-Based Violence, 21 AM. U. J. GENDER SOC. POL’Y & L. 231, 234 (2012).

addressed as bystander intervention initiatives further develop. But, with the proper legal norms and supports in place and an acknowledgement and accounting of the outstanding concerns, bystander intervention may serve as a helpful tool in the effort to reduce and alleviate social harms.

I. BYSTANDER INTERVENTION PROGRAMS

A. Background to Bystander Intervention Programs

1. OVERVIEW OF THE PROGRAMS

Recently, thousands of schools, college campuses, military bases, workplaces, and other institutions have implemented bystander intervention training programs. These programs are meant to address and prevent social harms like bullying, sexual misconduct, and harassment.²⁰ They typically take the form of a workshop or series of workshops that teach participants techniques and strategies they can employ if they witness harms occurring, sense that harms are becoming at risk of occurring, or are later told about such harms.²¹ The

20. Maia Szalavitz, *What Bystanders Can Do to Stop Rape*, TIME (Jan. 11, 2013), <http://healthland.time.com/2013/01/11/what-bystanders-can-do-to-stop-rape/>; see also McMahon & Banyard, *supra* note 10, at 4 (“The bystander approach has been adopted by many college campuses, organizations including the National Collegiate Athletic Association (NCAA), and even as a statewide level prevention strategy in a handful of states, including Kentucky, Massachusetts, and New Jersey.”). To a lesser extent, bystander intervention strategies are also being promoted in the context of intimate partner violence and hazing. See, e.g., JANE STAPLETON & ELIZABETH ALLAN, STOP HAZING: LESSONS LEARNED FROM BYSTANDER INTERVENTION PREVENTION IN ENDING SEXUAL AND RELATIONSHIP VIOLENCE AND STALKING: TRANSLATIONS FOR HAZING PREVENTION (2014), http://www.gannett.cornell.edu/cms/pdf/hazing/upload/FINAL-lessons_learned-from_bystander-intervention_1_24_14-11.pdf.

21. For instance, *Bringing in the Bystander*, a popular bystander intervention program, is 4.5 hours long and delivered over one to three sessions. *Bringing in the Bystander*® *In-Person Prevention Program*, U.N.H.C. LIBERAL ARTS, <http://cola.unh.edu/prevention-innovations-research-center/bringing-bystander®-person-prevention-program> (last visited Oct. 26, 2015). Other popular bystander intervention programs include the University of New Hampshire *Bystander Intervention Program* (Banyard, Moynihan, and Plante), *Green Dot*, *Mentors in Violence Prevention* (MVP) (Katz), *Men of Strength* (Men Can Stop Rape), *Step UP!* (University of Arizona), *InterACT*, the *Red Flag* campaign, and the online program *Take Care*. Most bystander intervention programs are aimed at all genders, but some bystander intervention programs focus specifically on men as intervenors. It is unclear whether these programs are less, equally, or more effective. One study claims, “The most effective training programs in these environments are those administered by men to all male audiences,” Goewert & Norton, *supra* note 6, at 31, but also that “[o]ther studies looking at training for men that feature a female rape survivor have actually been shown to increase acceptance of rape myths and one program even increased men’s reported

workshops often incorporate realistic scenarios about moments that the target audience is likely to experience and suggest that because of their proximity to the harm, bystanders have the ability to potentially intervene, speak up, or do something to discourage, prevent, or interrupt a harm.²²

The programs often state their goals as three-fold. First, they try to prevent harms in “specific, on-the-ground situations.”²³ They “teach potential witnesses safe and positive ways that they can act to prevent or intervene when there is a risk” of harm.²⁴ For instance, bystander

likelihood of sexual aggression.” *Id.* (citing John D. Foubert et al., *First-Year Male Students’ Perceptions of a Rape Prevention Program 7 Months After Their Participation: Attitude and Behavior Changes*, 51 J. C. STUDENT DEV. 707, 708 (2010)).

One popular bystander intervention program for school-aged adolescents and teens is *Steps to Respect* (Olweus). *Program Profile: Steps to Respect*, CRIME SOLUTIONS, <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=279> (last visited Oct. 14, 2015).

The workshop/presentation form of training has its own challenges. Most obviously, presentations are generally not an effective means of effecting change. Few presentations are taken seriously or remembered. As one student said of anti-bullying presentations, usually they are viewed as simply “tickets out of class.” Taylor Kelly, *Bystanders Can Help by Intervening*, ASBURY PARK PRESS (Jan. 20, 2015, 5:44 PM), <http://www.app.com/story/opinion/contributors/student-voices/2015/01/20/jan-grade-winner-taylor-kelly/22064465/>.

22. Victoria L. Banyard et al., *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32 J. COMMUNITY PSYCHOL. 61, 61 (2004); see also JACKSON KATZ, PENN STATE: THE MOTHER OF ALL TEACHABLE MOMENTS FOR THE BYSTANDER APPROACH (2011), http://www.nsvrc.org/sites/default/files/NSVRC_News_Jackson-Katz-PSU-Part1_0.pdf. Bystanders are individuals who witness harms but do not actively participate in them. *Id.*; see also Banyard, *supra* note 7, at 216. As Anastasia Powell writes, “Simply put, a *bystander* is somebody who observes an action of violence, discrimination or other unacceptable or offensive behavior.” ANASTASIA POWELL, REVIEW OF BYSTANDER APPROACHES IN SUPPORT OF PREVENTING VIOLENCE AGAINST WOMEN 8 (2011), http://www.ncdsv.org/images/VicHealth_ReviewBystanderApproachesSupportPreventingVAW_5-2011.pdf.

Typically, bystander intervention programs focus on bystanders who are in some sort of social relation with the people directly involved in the targeted harms, like “friends, classmates, colleagues, or members of sports teams” or other social groups. KATZ, *supra* (“The dynamics of bystander behavior – and the impediments to action – are very different when people know the perpetrator or victim, versus when they are strangers.”).

23. Jesse Singal, *The Wrong Way to Look at Rape and Bystander Intervention*, N.Y. MAG. (Dec. 24, 2014, 1:55 PM), <http://nymag.com/scienceofus/2014/12/wrong-way-rape-and-bystander-intervention.html>.

24. NAT’L SEXUAL VIOLENCE RES. CTR., IT’S TIME . . . TO INCORPORATE THE BYSTANDER APPROACH INTO SEXUAL VIOLENCE PREVENTION (2011) [hereinafter IT’S TIME], http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_Bystander-SAAM-2011.pdf. Bystander intervention programs often emphasize that they are concerned that bystanders only intervene in safe ways, but there is, of course, a risk that bystanders could face violence as a result of their interventions. This raises at least

intervention programs suggest that a high-school student witnessing online bullying could intervene by posting something in support of the bullied teen, a college student witnessing a male student trying to isolate a heavily intoxicated female student could inform him that his car alarm is going off,²⁵ and an employee who witnesses a colleague telling a racist or sexist joke could ask that colleague to stop.²⁶

Second, they try to change social norms so that people are more likely not to look the other way when others are in danger.²⁷ The programs attempt to challenge the social norms that support, condone, or permit these harms,²⁸ by encouraging bystanders to identify, confront, and speak out against them. Critiquing the language and turns of phrases that reflect implicit support for these harms is an important part of this goal. Since language is a powerful tool for dehumanization and deindividuation²⁹ (processes often associated with bullying, sexual misconduct, and harassment), it is thought that teaching bystanders to not tolerate derogatory language can in turn cause speakers to rethink their manner of communication. For example, as the *Step UP!* bystander intervention program advises, “Don’t joke about sexual

two important questions. First, “[t]o what extent is it ethical to ask people to risk their own personal safety to intervene in situations that could become physically violent?” Banyard, *supra* note 7, at 219. And, second, if a situation does become physically violent, what is or should be the potential liability of the institution for encouraging bystander intervention?

25. Eliana Dockterman, *Rose Byrne on Frat Culture and How Bystanders Can Stop Sexual Assault*, TIME (Nov. 13, 2014), <http://time.com/3506709/rose-byrne-frats-campus-sexual-assault-prevention-psa/>. Other suggested interventions when “a drunk young man at a party is pawing a drunk young woman” include “suddenly turning on the lights at a party or turning off the music” or “forming a conga line and pulling him away from the woman he’s bothering and onto the dance floor.” Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES (Feb. 7, 2014), <http://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html>.

26. The following is an example of the kind of scenarios bystander intervention programs often use:

A close female friend calls you crying. You ask her what has happened and she says that something happened at a party at a friend’s house the night before. She reluctantly tells you that she woke up in the night to find a naked man on top of her. She is afraid to tell anyone because she had stayed at her friend’s house, being too drunk to make it home, and believes she is at fault.

POWELL, *supra* note 22, at 9 (quoting a scenario from *Bringing in the Bystander*).

27. *Id.* at 8.

28. *Id.* at 25.

29. Gentry Russell McCreary, *The Impact of Moral Judgment and Moral Disengagement on Hazing Attitudes and Bystander Behavior in College Males 41* (2012) (unpublished PhD thesis, University of Alabama), http://libcontent1.lib.ua.edu/content/u0015/0000001/0000929/u0015_0000001_0000929.pdf.

assault . . . jokes . . . can trivialize the severity of the behavior.”³⁰ Thus, a college student who overhears a classmate telling another, “I totally just raped that exam,” is encouraged to intervene and condemn that kind of language use.³¹

Third, bystander intervention programs try to give bystanders tools that enable them to serve as “effective and supportive” allies to those who have already suffered harm.³² In addition to offering physical and emotional support, bystander intervention programs teach that bystanders can assist others by informing them about resources available to them and the options that may exist for them in relation to redressing the harm.³³ And, perhaps most importantly, bystanders can also help alleviate the feelings of distress and alienation that bullying, sexual misconduct, and harassment often cause.³⁴

2. THE THEORETICAL FOUNDATION OF THE PROGRAMS

Bystander intervention training programs are based on a theory of bystander behavior first developed by social psychologists Bibb Latané and John Darley in the 1960s.³⁵ Their work was inspired by the highly-publicized murder of Kitty Genovese in New York City.³⁶ According to media reports at the time, thirty-eight witnesses saw and heard the young waitress Kitty Genovese being stabbed to death outside of her apartment, yet none called police or attempted to intervene.³⁷

30. *Sexual Assault*, STEP UP! PROGRAM, <http://stepupprogram.org/topics/sexual-assault/> (last visited Oct. 18, 2015). However, research “reveals that students are not able to make a clear connection between the ‘low risk’ or sexist behaviors with the larger issues of sexual violence and bystander intervention.” McMahon et al., *supra* note 5, at 65.

31. McMahon et al., *supra* note 5, at 65.

32. It’s TIME, *supra* note 24.

33. *Id.*

34. JOAN TABACHNICK, ENGAGING BYSTANDERS IN SEXUAL VIOLENCE PREVENTION 29–30 (2008), http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Booklets_Engaging-Bystanders-in-Sexual-Violence-Prevention.pdf.

35. Banyard, *supra* note 7, at 216; McMahon & Banyard, *supra* note 10, at 4. In Europe, “[m]uch of the earliest academic research theorising bystander action/inaction in response to acts of violence occurred after the Second World War and in the wake of the Holocaust.” POWELL, *supra* note 22, at 12.

36. Bibb Latané & John M. Darley, *Bystander “Apathy,”* 57 AM. SCIENTIST 244, 244 (1969).

37. This account was later shown to be more myth than fact. In actuality, none of the neighbors would have been able to see the location where the attack took place, and likely only three or four neighbors heard anything at all. Also, at least one neighbor did telephone the police. See Bertrand Cretetz & Regis Deloche, *On the Optimality of a Duty to Rescue Rule and the Cost of Wrongful Intervention*, 31 INT’L REV. L. & ECON. 263, 263 n.2 (2011); see also MARCIA M. GALLO, “NO ONE

Intrigued by this unfortunate phenomenon, Latané and Darley ran a series of experiments and identified a five-step process necessary for successful bystander intervention. In order to intervene, a bystander must “notice that something is happening,” interpret it as a problem, decide that the problem requires personal action, choose what form that action will take, and, finally, implement that action.³⁸

However, Latané and Darley’s research suggested that two phenomena could thwart this intervention process and contribute to the “bystander effect”—the term used to describe the concept that bystanders are less likely to intervene when other bystanders are also present.³⁹ First, bystanders are affected by “pluralistic ignorance.”⁴⁰ As bystanders try to process whether they are witnessing circumstances that require intervention, many attempt to appear unconcerned and nonchalant, so as not look like they are overreacting.⁴¹ The other bystanders who see this response are “led by the *apparent* lack of concern of the others to interpret the situation as being less serious” than they otherwise would believe, and thus become less likely to interpret a given situation as a problem.⁴² The bystanders believe that if

HELPED”: KITTY GENOVESE, NEW YORK CITY, AND THE MYTH OF URBAN APATHY (2015). The incident is also the basis for an upcoming film, 37. John Anderson, *Kitty Genovese Killing is Retold in the Film ‘37,’* N.Y. TIMES (July 26, 2015), <http://www.nytimes.com/2015/07/27/movies/kitty-genovese-killing-is-retold-in-the-film-37.html>.

Despite the fact that the Kitty Genovese incident did not actually evidence a problem of bystander inaction, that problem has since revealed itself in many different instances. For example, the New York State Bystander Intervention Tool Kit describes the Richmond High Gang Rape and its connection to bystander intervention programs:

In October 2009, nearly a dozen bystanders watched as a 15-year-old girl was gang-raped outside of Richmond High School in California. While many of these bystanders carried cell phones and recorded videos, no one intervened. Why did this happen? Why did none of her peers stand up against this act of sexual violence?

Bystander inaction amongst a victim’s peers can be attributed to a phenomenon known as the “bystander effect.”

N.Y. STATE DEP’T OF HEALTH, STOP SEXUAL VIOLENCE 6 (2013) (footnotes omitted), <http://www.health.ny.gov/publications/2040>. Other high profile examples include the rape of Cheryl Arajou (which formed the basis of the movie *The Accused*), the Glen Ridge high school boys, and the casino incident. One additional example is the “Steubenville Rape” in which bystanders failed to intervene in the sexual assault of a sixteen-year-old girl by a group of youths. See Szalavitz, *supra* note 20.

38. Latané & Darley, *supra* note 36, at 247.

39. Peter Fischer et al., *The Bystander-Effect: A Meta-Analytic Review on Bystander Intervention in Dangerous and Non-Dangerous Emergencies*, 137 PSYCHOL. BULL. 517, 517 (2011). Some studies, however, have found that the “bystander effect vanished when the emergency was a particularly dangerous one.” *Id.* at 518.

40. Latané & Darley, *supra* note 36, at 249.

41. *Id.* at 248–49.

42. *Id.* at 265.

something were indeed amiss, other people would be doing something, and since they are not, the situation must not be as dire as they originally perceived.

The second phenomenon that Latané and Darley identified is a “diffusion of responsibility.”⁴³ Diffusion of responsibility occurs during the third step, after someone has identified a situation as a problem and is deciding whether they themselves should assume personal responsibility for intervening. At this stage, the “presence of other people” is again important, for “[i]f a number of people witness the same event, the responsibility for action is diffused, and each may feel less necessity to help.”⁴⁴ Where only one bystander is present, that bystander will generally feel a much deeper sense of responsibility to aid, for “if help is to come[,] it must come from” them.⁴⁵ Where many bystanders are present, however, “the onus of responsibility is diffused, and the finger of blame [for nonintervention] points less directly at any one person.”⁴⁶ Each bystander understands their share of responsibility to be only equal to that of each of the other bystanders, and thus can choose nonintervention relatively free from the “guilt for not acting” that can motivate sole bystanders to intervene.⁴⁷

Bystander intervention initiatives seek to counteract the effects of pluralistic ignorance and the diffusion of responsibility and eliminate the bystander effect. They teach that the passivity of bystanders is part of what allows harms like bullying, campus sexual misconduct, and workplace harassment to flourish. Since people often give great weight to what they believe their peers think about a behavior when they are deciding to intervene,⁴⁸ passive bystanding often has a large impact on whether any intervention takes place. Passive bystanding sends a message of tacit approval, such that those “who are aware of the” wrongdoing, but fail to “report, intervene, or otherwise seek to stop it,” help perpetuate harassment and misconduct by participating in

43. *Id.*

44. *Id.*

45. *Id.* at 260.

46. BIBB LATANÉ & JOHN M. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? 90 (1970). For example, in one study where a person simulated having a seizure, eighty-five percent of people who believed they were alone helped, whereas only thirty-one percent of those who were present with others did the same. David N. Kelley, Comment, *A Psychological Approach to Understanding the Legal Basis of the No Duty to Rescue Rule*, 14 BYU J. PUB. L. 271, 289 (2000) (citing John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968)).

47. Latané & Darley, *supra* note 36, at 260.

48. Szalavitz, *supra* note 20. See generally Professor Dan Kahan's description of social influence and individual behavior in Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352–61 (1997).

“culture[s] of silence and . . . protection” that contribute to the view that these behaviors are acceptable and allow these harms to go unchecked.⁴⁹ Combined with the fact that victims of these forms of misconduct often are unwilling or unable to themselves report the wrong, passive bystanding ensures that “perpetrators are not deterred from perpetrating in the future,” and the cycle of harm continues.⁵⁰ Bystander intervention programs aim to disrupt the cycle and encourage bystanders to convey condemnation of these harms.

3. THE TARGETED SOCIAL HARMS

Bullying, sexual misconduct, and sexual harassment are pervasive social wrongs that can profoundly harm those who experience them. Bullying has had significant negative impacts on children and their ability to learn. According to the National Center for Education Statistics and the Bureau of Justice Statistics, between one in four and one in three children have experienced bullying, and according to the American Medical Association, 3.2 million children have been bullied at school.⁵¹ Further, rapidly expanding technologies have allowed bullying to extend beyond the school yard into homes and any space where one engages in online activities. This has led to an explosion of cyberbullying, which “43% of teens ages 13-17” report having experienced.⁵² Bullying and cyberbullying often result in negative psychological consequences, including depression, isolation, illness, sleep disruptions, and decreased academic achievement, and, in some extreme cases, victims have committed suicide.⁵³

Like bullying, campus sexual misconduct is also a pervasive problem with significant negative consequences. National research indicates that approximately twenty percent “of all women experience a completed or attempted rape during their 4- to 5-year college careers.”⁵⁴ These experiences can have devastating effects on victims,

49. Cantalupo, *supra* note 19, at 235 (quoting MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 59 (2008)).

50. *Id.* at 235–36.

51. *Facts About Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/news/media/facts/> (last updated Oct. 14, 2014); ALLAN L. BEANE, THE NEW BULLY FREE CLASSROOM: PROVEN PREVENTION AND INTERVENTION STRATEGIES FOR TEACHERS K-8, at 6 (2011).

52. Kraft & Wang, *supra* note 4, at 514 (citing Chris Moessner, *Cyberbullying*, TRENDS & TUDES, Apr. 2007, at 1, 1).

53. *Id.*; *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/effects/> (last visited Oct. 10, 2015).

54. McMahon & Banyard, *supra* note 10, at 3 (citation omitted). The “1 in 5” statistic has been much criticized, but a recent nationwide survey published by the *Washington Post*/Kaiser Family Foundation Survey Project, which encompassed a

including “negative outcomes on physical and mental health” in both the short- and long-term, difficulties with “academic performance,” and strained “interpersonal relationships.”⁵⁵

Workplace harassment is also a prevalent and insidious harm. A recent survey reports that one in three American working women between the ages of eighteen and thirty-four have experienced sexual harassment in the workplace.⁵⁶ The psychological, physical, and economic impacts are severe. It is estimated that “90 to 95% of sexually harassed women suffer from some debilitating stress reaction, including anxiety, depression, headaches, sleep disorders, weight loss or gain, nausea, lowered self-esteem and sexual dysfunction. In addition, victims of sexual harassment lose \$4.4 million dollars in wages and 973,000 hours in unpaid leave each year in the United States.”⁵⁷

These three social harms, moreover, have more in common than merely a high rate of occurrence and a potential to inflict significant harm. Another unifying feature is that they are all methods of creating and maintaining social hierarchies, including those of race and class,

much larger sample size than the original, often-questioned study, confirms that the number is indeed correct. For an account of the original study, the controversy surrounding the statistic, and the new survey, see Glenn Kessler, *One in Five Women in College Sexually Assaulted: An Update on This Statistic*, WASH. POST (Dec. 17, 2014), <https://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/>.

55. McMahon & Banyard, *supra* note 10, at 3; see also CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY*, viii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. The study states:

Of rape victims, 25% to 45% suffer from nongenital trauma; 19% to 22% suffer from genital trauma; up to 40% get sexually transmitted diseases (STDs); and 1% to 5% become pregnant Four out of five rape victims subsequently suffer from chronic physical or psychological conditions, . . . and rape victims are 13 times more likely to attempt suicide than noncrime victims

Id.

56. Alanna Vagianos, *1 in 3 Women Has Been Sexually Harassed at Work, According to Survey*, HUFFINGTON POST (Feb. 19, 2015, 4:34 PM), http://www.huffingtonpost.com/2015/02/19/1-in-3-women-sexually-harassed-work-cosmopolitan_n_6713814.html. Only a small number of those instances are reported to the Equal Employment Opportunity Commission and state fair employment practices agencies; each year, they receive approximately fourteen thousand claims of sexual harassment. Dianne Avery & Catherine Fisk, *Overview of the Law of Workplace Harassment*, in *LITIGATING THE WORKPLACE HARASSMENT CASE 1*, 5 (Marlene Heyser ed., 2010). This number, which includes the complaints made to state agencies with whom the EEOC has work-sharing agreements, has remained relatively constant from 1997 to 2009. *Id.*

57. Minn. Advocates for Humans Rights, *Sexual Harassment - Effects of Sexual Harassment*, STOP VIOLENCE AGAINST WOMEN, <http://www1.umn.edu/humanrts/svaw/harassment/explore/4effects.htm> (last visited Nov. 11, 2015) (citing data compiled by Equal Rights Advocates).

but in particular, those of gender.⁵⁸ Beginning with childhood bullying, these harms function to set the norms of gender and sexuality in society. Indeed, bullying “begins to be particularly problematic” at around twelve years of age, or grade six, just as the majority of children are entering puberty and maturing sexually.⁵⁹ As puberty begins, “bullying often becomes more sexual and gendered, taking the form of sexual harassment, or ‘sexual bullying.’”⁶⁰ At this stage, bullying and harassment help create hierarchies and socialize group members regarding the rules of sexuality and gender performance.⁶¹ It becomes a form of “rigid policing of the gender-norm line.”⁶²

58. Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC’Y 337, 345 (2014); Philip C. Rodkin & Karla Fischer, *Cyberbullying from Psychological and Legal Perspectives*, 77 MO. L. REV. 619, 633 (2012); see also McDONALD & FLOOD, *supra* note 15, at 12 (noting that “at the core” of sexual harassment in the workplace is “hierarchical power relations”); Adrienne Nishina, *A Theoretical Review of Bullying: Can It Be Eliminated?*, in BULLYING: IMPLICATIONS FOR THE CLASSROOM 36–62 (Cheryl E. Sanders & Gary D. Phye eds., 2004).

59. Holly R. Stevens, *Rules, Laws and Conceptions of Justice in Middle School: An Exploratory Study of Children’s Legal Consciousness* 6 (2013) (unpublished PhD thesis, George Mason University).

60. Amanda B. Nickerson et al., *Measurement of the Bystander Intervention Model for Bullying and Sexual Harassment*, 37 J. ADOLESCENCE 391, 391 (2014) (citations omitted).

61. In addition to signaling “the child’s entrance to adolescence, and a mid-point of sorts on the path to adulthood,” age twelve or grade six is also an important stage in moral and cognitive development. Stevens, *supra* note 59, at 38 (“This stage of development hones students’ ability to think about complex relationships, hypothetical situations, and situations with contradictory goals, all while interpreting these situations into their own sense of self and ideas of the world.” (citation omitted)).

62. John G. Culhane, *Bullying, Litigation, and Populations: The Limited Effect of Title IX*, 35 W. NEW ENG. L. REV. 323, 327 (2013). When queried as to the reasons students are bullied, students responded that “[t]wo of the top three reasons” were “actual or perceived sexual orientation and gender expression.” Daryl Presgraves, *11-Year-Old Hangs Himself After Enduring Daily Anti-Gay Bullying*, PRWEB (Apr. 10, 2009), http://www.prweb.com/releases/Bullying_Harassment/LGBT_Safe_Schools/prweb2315304.htm (citing HARRIS INTERACTIVE & GAY, LESBIAN & STRAIGHT EDUC. NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA (2005), <https://www.glsen.org/download/file/MzMzMg>). Physical appearance was the top reason. *Id.* In a survey of over fourteen hundred students in grade seven, forty-nine percent reported having “been sexually harassed either physically or verbally” in the past six months, and another survey of almost two thousand students in grades seven to twelve found that forty-eight percent of students “experienced some form of sexual harassment” over the course of a school year. Alan Mozes, *Dating Violence Common by 7th Grade*, HEALTHDAY (Mar. 29, 2012), <http://consumer.healthday.com/mental-health-information-25/behavior-health-news-56/dating-violence-common-by-7th-grade-survey-663250.html>; CATHERINE HILL & HOLLY KEARL, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOLS 2 (2011), <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>. Also, “[e]stimates from a 1993 study indicate that of the 1,600 public high school students polled, eighty-five percent

Disturbingly (and contrary to many of the high-profile bullying incidents which attract media attention), approximately half of bullying and sexual harassment instances involve “aggressive boys” harassing girls.⁶³

Campus sexual misconduct has a similar dynamic: while sexual harm can happen to anyone of any gender, by anyone of any gender, most often it is a harm targeting a female and perpetuated by a male.⁶⁴ And it, too, perpetuates gendered hierarchies of inequality, as the denigration of women “*through* harassment and violence generally establishes or maintains the perpetrators’ status at the top of the hierarchy.”⁶⁵ Sexual harassment in the workplace performs a similar function.⁶⁶

of the girls and seventy-six percent of the boys reported experiencing some sort of sexual harassment.” Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 55 (2005) (citing AM. ASS’N OF UNIV. WOMEN, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS 7 (1993)).

63. Dan Olweus, one of the pioneers of studying bullying, “first reported this overlooked finding, writing that ‘boys carried out a large part of the bullying to which girls were subjected’: 60% of fifth through seventh grade girls whom Olweus reported as being harassed said that they were bullied by boys.” Rodkin & Fischer, *supra* note 58, at 633 (quoting DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO 18–19 (1993)).

64. Madeline C. Whitcomb, *Reflections on Bystander Intervention: Barriers and Facilitators in Sexual Assault Helping* 3–5 (2013) (unpublished B.A. Honors thesis, University of New Hampshire), <http://scholars.unh.edu/cgi/viewcontent.cgi?article=1094&context=honors>. It is estimated that “one in ten men on college campuses will experience a sexual assault, and both men and women are capable of perpetuating intimate partner violence.” *Id.* (citations omitted); *see also* Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Sexual Assaults?*, 40 J.C. & U.L. 443, 445 (2014). Of particular concern in the college campus is the rising number of so-called party rapes. Jessica Ashley Carroll, *Impact of Moral Judgment and Moral Disengagement on Rape Supportive Attitudes in College Males* 2 (2009) (unpublished PhD dissertation, University of Alabama), http://libcontent1.lib.ua.edu/content/u0015/0000001/0000116/u0015_0000001_0000116.pdf. Party rapes typically happen at off-campus private houses or fraternity houses and involve a man “plying a woman with alcohol or targeting an intoxicated woman.” *Id.* Most of these men are in some sort of social relationship with the women harmed: contrary to the myth of the stranger rape, the vast majority of college sexual assaults are committed by friends and acquaintances. *Id.* at 2, 5.

65. Cantalupo, *supra* note 19, at 277.

66. Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 365 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (sexual harassment in the workplace polices “norms of masculinity and femininity” and enforces gender roles). The International Labor Organization recognizes sexual harassment as “a clear form of gender discrimination based on sex” and “a manifestation of unequal power relations between men and women.”

The lines between these three harms are blurry at best. Campus sexual misconduct and workplace harassment “share core similarities” with childhood bullying, and a “continuum of violence” exists between these harms.⁶⁷ Indeed, the terms *bullying* and *harassment* are often used interchangeably to describe the same set of phenomenon, and in the campus sexual misconduct context, sexual violence is specifically incorporated into the category of sexual harassment.⁶⁸

Given the similarities and overlaps between these harms, it is perhaps not surprising that they could share a common solution. Bystander intervention training is believed to be a promising means of targeting all of these harms and changing the similar social norms underlying them.

4. EARLY EVALUATIONS ARE PROMISING

Creating active bystanders is a difficult task. Nevertheless, the developing research suggests bystander intervention programs can achieve some success.⁶⁹ However, because bystander intervention training is quite new, research into its efficacy is just beginning.⁷⁰ Many promotional materials boldly declare that “programs based on the

SUB-COMM. ON WORKPLACE SEXUAL HARASSMENT, ASS’N OF WOMEN FOR ACTION AND RESEARCH, RESEARCH STUDY ON WORKPLACE SEXUAL HARASSMENT 4 (2008), http://www.aware.org.sg/wp-content/uploads/AWARE_Research_Study_on_Workplace_Sexual_Harassment.pdf.

67. STAN DAVIS & JULIA DAVIS, SCHOOLS WHERE EVERYONE BELONGS: PRACTICAL STRATEGIES FOR REDUCING BULLYING 24 (2005); NAN D. STEIN & KELLY A. MENNEMEIER, ADDRESSING THE GENDERED DIMENSIONS OF HARASSMENT AND BULLYING: WHAT DOMESTIC AND SEXUAL VIOLENCE ADVOCATES NEED TO KNOW 3 (2011), http://vawnet.org/Assoc_Files_VAWnet/CIB_HarassmentBullying.pdf. Also, the literature on workplace harassment draws extensively on the bullying literature and notes that both words are frequently used without distinction.

68. Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011) [hereinafter Dear Colleague Letter] (stating many times that sexual harassment includes sexual violence); see also Diane Rosenfeld, *Changing Social Norms? Title IX and Legal Activism*, 31 HARV. J.L. & GENDER 407, 411–12 (2008) (“Title IX prohibits sexual harassment of college and university students . . .”).

69. One study of bullying interventions, for example, found that when bystanders intervened, the bullying stopped immediately in 57% of incidents. Kraft & Wang, *supra* note 4, at 516. Similarly, “observational research” indicates that intervening bystanders “successfully abate victimization more than 50% of the time.” Polanin et al., *supra* note 13, at 48.

70. Victoria L. Banyard et al., *How Do We Know if It Works? Measuring Outcomes in Bystander-Focused Abuse Prevention on Campus*, 4 PSYCHOL. VIOLENCE 101, 114 (2014).

bystander intervention model have been shown to be effective,”⁷¹ but researchers in the field remain only cautiously optimistic about the current state of knowledge regarding their efficacy. While early evaluations are promising, “research on and implementation of bystander intervention training programs is still in its early stages,”⁷² and definitive conclusions cannot yet be drawn. As the authors of one 2014 study noted, “There is currently a paucity of developed and tested measures in the field for such evaluation research.”⁷³ Indeed, the research surrounding bystander intervention initiatives is still being developed, “and program details and evaluations are not systematically published and therefore rarely subject to analytical scrutiny.”⁷⁴ Further, the studies that are performed tend to have as their subjects white, heterosexual college students, and it is not clear how the studies that do exist translate to other, more diverse populations.⁷⁵

To date, most of the studies that do exist have focused on whether bystander intervention programming can change bystander attitudes. A number of studies have offered positive results in this regard,⁷⁶ but some have shown contradictory findings.⁷⁷

71. Anne Kleinsasser et al., *An Online Bystander Intervention Program for the Prevention of Sexual Violence*, 4 PSYCHOL. VIOLENCE 227, 227 (2015).

72. Koelsch et al., *supra* note 12, at 565.

73. Banyard et al., *supra* note 70, at 101; *see* Koelsch et al., *supra* note 12, at 565; McMahon & Banyard, *supra* note 10, at 4; *see also* Banyard et al., *supra* note 14, at 464–65.

74. POWELL, *supra* note 22, at 6.

75. For instance, a 2015 study found that LGBT students “reported significantly decreased bystander efficacy over time,” indicating the possibility that the bystander intervention program “did not resonate with the experience of LGBT students, and may have even left them feeling disempowered.” Kathleen M. Palm Reed et al., *Experimental Evaluation of a Bystander Prevention Program for Sexual Assault and Dating Violence*, 5 PSYCHOL. VIOLENCE 95, 101 (2015).

76. A study of *Bringing in the Bystander* found that, after participating in the program, women indicated a higher level of confidence in their self-perceived ability and capacity to intervene to prevent sexual misconduct, compared to that of a control group. M. Moynihan et al., *Sisterhood May Be Powerful for Reducing Sexual and Intimate Partner Violence: An Evaluation of the Bringing in the Bystander In-Person Program with Sorority Members*, 17 VIOLENCE AGAINST WOMEN 703, 712 (2011). Similarly, a study of the Green Dot program found that it “noticeably increased active bystander behaviors and was associated with a reduction in rape myth scores.” Ann L. Coker et al., *Evaluation of Green Dot: An Active Bystander Intervention to Reduce Sexual Violence on College Campuses*, 17 VIOLENCE AGAINST WOMEN 777, 791 (2011). Another study of Army members found that “soldiers who participated in the bystander training reported substantial impacts on their attitudes and beliefs about sexual assault and they reported a much higher perceived ability and willingness to intervene in risky situations.” Goewert & Norton, *supra* note 6, at 30 (citing John Foubert et al., *Effects of the Men’s Program on U.S. Army Soldiers’ Intentions to Commit and Willingness to Intervene to Prevent Rape: A Pretest Posttest Study*, 27 VIOLENCE & VICTIMS 911, 918 (2012)). Another study found that following a one-hour

Much more important than self-reported attitudes, though, is actual behavior. Measuring actual bystander behaviors is “essential to furthering the understanding of whether or not bystander intervention is an effective strategy in creating change.”⁷⁸ Unfortunately, given that bystander intervention is just emerging as a popular strategy, not many analytically rigorous studies of whether these programs impact actual behavior exist.⁷⁹ The few studies that have been conducted have shown an “increase [in active] bystander behaviors relative to comparison groups,”⁸⁰ but more research is needed before definitive conclusions

training session college students felt more “confident about their willingness and effectiveness of intervening” than did the members of a control group who experienced a different form of training. *Id.* (citing Jennifer Langhinrichsen-Rohling et al., *The Men’s Program: Does It Impact College Men’s Self-Reported Bystander Efficacy and Willingness to Intervene?*, 17 VIOLENCE AGAINST WOMEN 743, 753 (2011)).

77. Kleinsasser et al., *supra* note 71, at 233. A recent study in the context of college sexual violence had a contradictory finding: the researchers there noted that “[i]t was disappointing that men themselves did not indicate a greater tendency to intervene” after attending the program. Christine A. Gidycz et al., *Preventing Sexual Aggression Among College Men: An Evaluation of a Social Norms and Bystander Intervention Program*, 17 VIOLENCE AGAINST WOMEN 720, 735 (2011).

78. McMahon et al., *supra* note 5, at 59.

79. Interestingly, one study found that bystander intervention training may help deter actual perpetrators from committing sexual assault. “At Ohio University, a group of male students took bystander training sessions and were asked four months later if they’d perpetrated a sexual assault; 1.5 percent said they had, compared with 6.7 percent for a control group that had no training.” Winerip, *supra* note 25.

80. Kleinsasser et al., *supra* note 71, at 228. However, it should be noted this study evaluated the program its authors devised. *See id.*

A study at the University of New Hampshire found that several weeks after participating in bystander intervention training, “38 percent of the men reported having intervened in a sexual assault compared with 12 percent of the group that had not seen the campaign.” Winerip, *supra* note 25. Another study found that “[s]tudents trained in Green Dot SEEDS bystander intervention engaged in more pro-social (actions which benefit other people or society as a whole) bystander behavior as compared to those who only heard a Green Dot speech on campus.” N.Y. STATE DEP’T OF HEALTH, *supra* note 37, at 3. Finally, one recent meta-analysis of bystander intervention programs in the bullying context found that such programs “increased bystander intervention behavior 20% of one standard deviation more than individuals in the control group.” Polanin et al., *supra* note 13, at 56–57. (Further, the “treatment effects were greater for high school only samples,” which “may indicate that bystander intervention behavior is a developmental process and programs may not influence younger students as intended.” *Id.* at 60. The authors of the meta-analysis noted that “future research must continue to assess how bystanders implement these processes and the direct effects on active bullying.” *Id.* at 62.)

There is some evidence to suggest that the effects could be lasting, as well. One study that took place seven months after the initial bystander intervention training found that “two-thirds of the men reported their attitudes and behavior were changed over the previous year directly as a result of the bystander training.” Goewert & Norton, *supra* note 6, at 30 (citing Foubert et al., *supra* note 21). And in another study, conducted two years after training, 145 out of 184 college student reported that they had

can be drawn. While “best practice guidelines to promote effective bystander intervention behaviors remain undefined,”⁸¹ and more studies are needed to determine the efficacy of these strategies,⁸² many researchers and policy makers are nevertheless optimistic that bystander intervention programs are worthwhile and will be shown to be an effective means of reducing social harms like school bullying, campus sexual misconduct, and workplace harassment.⁸³

B. The Laws Requiring Bystander Intervention Programs

Given the prevalence and seriousness of these harms, policymakers, legislatures, and advocates have been eager to promote bystander intervention programs, despite the fact that evaluations of their actual efficacy are still in their infancy. Belief in the possibility of bystander intervention is so high that in some circumstances, policymakers and legislatures have made the implementation of bystander intervention initiatives a legal requirement.

The mandatory implementation of bystander intervention programs is most prevalent in the college campus context, though it is beginning to occur in the bullying context as well.⁸⁴ In the college context, the federal Campus Sexual Violence Elimination Act (part of the Violence Against Women Reauthorization Act of 2013) now requires colleges to offer bystander intervention programs.⁸⁵ According to its provisions, college students and employees must be offered sexual violence “primary prevention and awareness” training, including “‘safe and positive’ options for bystander intervention.”⁸⁶ At least three states have

experienced long term changes in bystander behaviors. *Id.* (citing John Foubert et al., *In Their Own Words: Sophomore College Men Describe Attitude and Behavior Changes Resulting from a Rape Prevention Program 2 Years After Their Participation*, 25 J. INTERPERSONAL VIOLENCE 2237 (2010)).

81. Polanin et al., *supra* note 13, at 50.

82. Palm Reed et al., *supra* note 75, at 100.

83. Evaluations of bystander intervention programs in workplace harassment contexts are even more limited. “While general theoretical models are beginning to emerge, these have yet to be tested to any significant extent,” and research into the ways bystander intervention can be successfully used in the workplace is still “formative.” MCDONALD & FLOOD, *supra* note 15, at 8.

84. For example, Illinois requires schools and districts to “create, maintain, and implement a policy on bullying” and conduct a policy review every two years that includes “a policy evaluation process to assess the outcomes and effectiveness of the policy that includes . . . bystander intervention or participation.” 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West Supp. 2015).

85. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (to be codified at 20 U.S.C. § 1092(f)).

86. AM. COUNCIL ON EDUC., NEW REQUIREMENTS IMPOSED BY THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT 3 (2014), <http://www.acenet.edu/>

legislation that echoes this federal requirement. New York's "Enough is Enough" law provides that all incoming students must receive sexual violence prevention training that includes bystander intervention strategies.⁸⁷ Connecticut Public Act Number 14-11 requires all colleges situated in that state to host bystander intervention training.⁸⁸ Accordingly, Yale University has recently implemented bystander training on campus, and each sophomore must participate in a seventy-five-minute bystander intervention program.⁸⁹ And in California, schools must have implemented sexual violence awareness programs that include bystander training if they wish to be eligible for state funding for student financial assistance.⁹⁰

Bystander intervention in the workplace harassment context will likely take a slightly different path, similar to that forged by anti-harassment policies in general. As Frank Dobbin describes, after the enactment of Title VII and the newly created category of "sexual harassment," it was largely left to human resources professionals to develop the contours and scope of what training, processes, and grievance procedures were necessary to comply with Title VII.⁹¹ As

news-room/Documents/VAWA-Summary.pdf (quoting Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(5), 127 Stat. 54, 90 (to be codified at 20 U.S.C. § 1092(f)(8)(B)(i)(I))); *see also Understanding the Campus SaVE Act*, KNOW YOUR IX, <http://knowyourix.org/understanding-the-campus-save-act/> (last visited Oct. 27, 2015). However, "the statute does not make clear whether these programs must be mandatory or just available." Duncan, *supra* note 64, at 452.

87. S. 5965, 2015-16 Reg. Sess. (N.Y. 2015); *Governor Cuomo Signs "Enough Is Enough" Legislation to Combat Sexual Assault on College and University Campuses*, N.Y. ST. (July 7, 2015), <http://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university>.

88. Emma Platoff & Vivian Wang, *Yale Incorporates New Laws in Sexual Misconduct Policy*, YALE DAILY NEWS (Oct. 17, 2014), <http://yaledailynews.com/blog/2014/10/17/yale-incorporates-new-laws-in-sexual-misconduct-policy/>.

89. Interestingly, "nine out of ten Yale students interviewed about the [bystander] training program did not think it would be effective." Goewert & Norton, *supra* note 6, at 30 (citing Cynthia Hua, *Mandatory Bystander Training Introduced for Sophomores*, YALE DAILY NEWS (Jan. 24, 2013), <http://yaledailynews.com/blog/2013/01/24/bystander-training-introduced/>).

90. CAL. EDUC. CODE § 67386 (2014).

91. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 217-18 (2009). Indeed, the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), "privileged the creation of anti-harassment policies," and future courts held that employers could satisfy the first part of an affirmative defense to a claim of sexual harassment "by distributing an adequate anti-harassment policy." Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 142 (2008) (citing *Ellerth*, 524 U.S. at 764; *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001); *Shaw v. AutoZone, Inc.*, 180 F.3d 806 (7th Cir. 1999)). Thus, "less than one year after the *Ellerth* and *Faragher* [*v. City of Boca Raton*, 524 U.S. 775 (1998)],

more and more human resources departments adopt bystander intervention training, it too could become a de facto legal requirement in the same way that other stalwarts of training and grievance procedures have become required parts of Title VII compliance.

Part of the reason why bystander intervention has been so quickly and warmly embraced by legislatures and policymakers is likely because it connects well to the new trend of third-party policing, “an increasingly important form of regulation and law enforcement that is now often deployed to address social problems.”⁹² In third-party policing, the state tries to deter unlawful conduct by persuading or coercing a third-party individual or organization to perform activities that may discourage a potential primary wrongdoer.⁹³ It is part of the neoliberal form of governance that David Garland has termed *responsibilization*.⁹⁴ Prior to the rise of responsibilization, the main target of the state’s efforts to prevent harms and wrongs was the individual wrongdoer.⁹⁵ Now, however, the state seeks to alter “the norms, the routines, and the consciousness of everyone,” so as to make crime and harm prevention a part of everyone’s quotidian culture and practice.⁹⁶ “Situational crime prevention” plays a large role in this process.⁹⁷ A “situational crime prevention” or “routine activity approach” focuses on crimes and wrongs as occurring when “potential offenders,” “suitable targets,” and a lack of “capable guardians” converge together at once.⁹⁸

Bystander intervention programs understand bystanders to be “capable guardians,” third parties whose behavior or mere presence may help deter wrongdoing.⁹⁹ Buoyed by the data that is currently

decisions, 97% of employers responding to the SHRM survey reported having written policies against sexual harassment.” *Id.* at 143.

92. Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 825 (2015).

93. LORRAINE MAZEROLLE & JANET RAMSEY, *THIRD PARTY POLICING* 2–3, 50–51 (2005).

94. David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 452 (1996).

95. *Id.* at 454.

96. *Id.*

97. Sharyn L. Roach Anleu, *The Role of Civil Sanctions in Social Control: A Socio-Legal Examination*, in 9 CRIME PREVENTION STUD. 21, 31 (Lorraine Green Mazerolle & Jan Roehl eds., 1998).

98. *Id.*; STAPLETON & ALLAN, *supra* note 20.

99. STAPLETON & ALLAN, *supra* note 20, at 15. Whistle blowers could also fall into the “capable guardians” category, and there is “significant overlap” between the concepts of bystander intervention and whistle blowing. In particular, some scholars have argued that “research addressing whistle blowing may provide useful insights for discussions of bystander interventions, especially around the challenges in encouraging blowing the whistle on wrongdoing and recommendations for overcoming these challenges.” MCDONALD & FLOOD, *supra* note 15, at 22–23.

available and the belief that bystanders can be relatively easily encouraged to take effective actions, legislatures and policy makers are making new laws to ensure that entities implement programs that encourage bystander intervention.

II. LEGAL NORMS OF NO DUTY TO RESCUE OR PROTECT

As legislatures and policy makers begin to require institutions and entities to implement bystander intervention programs, it is important to acknowledge the other ways in which law impacts bystander intervention. To be effective, attempts to alter individual behaviors must take into account how social context may support or subvert such changes, and law is a significant part of this broader social context.¹⁰⁰ One of the most important variables in whether a bystander will choose to intervene or not is the presence of “competing norms” or contradictory prescriptions.¹⁰¹ Generally, if one norm supports intervention but another does not, bystanders are unlikely to intervene.¹⁰² Bystander intervention programs try to create a norm of intervention, foster a social responsibility norm, and encourage others to “feel a shared responsibility towards helping others.”¹⁰³ But this encouraged social responsibility norm is subject to interactions with other competing norms, and norms of non-intervention will trump norms of intervention.¹⁰⁴ Generally, “when norms that prescribe opposite behaviors (action versus inaction) are simultaneously activated, individuals will be more likely to conform to the norm that liberates them from the more costly (or effortful) behavior with respect to their own self-interests.”¹⁰⁵ In other words, norms that allow bystanders to remain passive will almost always be preferred over norms that suggest bystanders should intervene.

Unfortunately for bystander intervention programs, legal norms of nonintervention provide an “out” from the burden that bystander intervention would otherwise impose. Strongly held and widely

100. STAPLETON & ALLAN, *supra* note 20, at 20.

101. Jones, *supra* note 9, at 28.

102. *Id.* at 27–28.

103. POWELL, *supra* note 22, at 15.

104. Lynn Bowes-Sperry & Anne M. O’Leary-Kelly, *To Act or Not To Act: The Dilemma Faced by Sexual Harassment Observers*, 30 ACAD. MGMT. REV. 288, 292 (2005).

105. Andrena Pierre, *Third Party Citizen Reactions to Interventions in a Genocide: The Influence of the Social Categorization of Victims and the Norm of a Responsibility to Protect* 67 (2013) (unpublished PhD thesis, Carleton University) (citing Shalom H. Schwartz, *Normative Influences on Altruism*, 10 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 222 (1977)).

understood legal norms conflict with many of the actions encouraged by bystander intervention. Bystanders, particularly those who are “confused or impassive,” are likely to be strongly influenced by legal norms of nonintervention, since “[l]aw serves to inform behavior on a large scale” and offers a powerful justification for their preferred course of inaction.¹⁰⁶

A. No Duty to Rescue or Report

One potent source of a non-intervention norm in American law is the no-duty-to-rescue rule. This refers to the principle that, generally, a person has no legal duty to rescue another in danger.¹⁰⁷ Law professors often illustrate this rule with the following hypothetical: “An Olympic swimmer out for a stroll walks by a swimming pool and sees an adorable toddler drowning in the shallow end. He could easily save her with no risk to himself, but instead he pulls up a chair and looks on as she perishes.”¹⁰⁸ Other popular examples given to law students include “hypothetical cases of babies who drowned in bathtubs and actual cases of people who drowned in ditches and lakes while bystanders did nothing.”¹⁰⁹ While most would agree that bystanders who are in a position to safely save small children from drowning and yet choose not to do so have committed a grave moral wrong, the general legal rule is clear: subject to a small number of exceptions, there is no duty to rescue, even if such a rescue would be very easy and catastrophic injury or death would almost certainly result from non-rescue.¹¹⁰

106. Kate E. Bloch, Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 945 (1986).

107. See *id.* at 945, 949. There are a number of common law exceptions to the no-duty-to-rescue rule. For example, duties to rescue can arise when a potential rescuer contributed to or created the danger, when there is a special relationship between either the victim and the potential rescuer or the potential rescuer and a third-party wrongdoer, or if the rescuer began effecting a rescue. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 37–44 (2012).

108. David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 682 n.64 (2006) (quoting MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 78 (2d ed. 1993)).

109. *Id.* at 655. Also, “*Buch v. Armory Manufacturing Co.* [, 44 A. 809 (N.H. 1898),] . . . has been memorialized for its depiction of a particularly gruesome hypothetical scene in which a bystander sees a young child on the railroad tracks” yet does nothing to rescue the child from the oncoming train. Amelia H. Ashton, Note, *Rescuing the Hero: The Ramifications of Expanding the Duty to Rescue on Society and the Law*, 59 DUKE L.J. 69, 75 (2009) (footnote omitted) (citing *Buch*, 44 A. at 810).

110. Hyman, *supra* note 108, at 665. David Hyman suggests that not only is there no duty to rescue, but that “by restricting the ability of rescuers to recover in tort

This legal norm of no duty to rescue reigns supreme in the vast majority of the fifty states.¹¹¹ Its resilience connects to deeply held American principles of autonomy, individualism, and privacy.¹¹² Individualism, or “the right to be left alone,” holds a very privileged position in American society and is prized above many other concerns and values.¹¹³ Individualism is often understood to dictate that a victim of an emergency or a crime should not be entitled to “impose duties that restrict the freedoms and rights of the people around him.”¹¹⁴ Numerous additional arguments are also advanced in favor of maintaining the no-duty rules.¹¹⁵

for injuries they might suffer, the common law actually creates affirmative disincentives to rescue.” *Id.*

111. *Id.*

112. Heather Benzmilller, Note, *The Cyber-Samaritans: Exploring Criminal Liability for the “Innocent” Bystanders of Cyberbullying*, 107 NW. U. L. REV. 927, 946 (2013).

113. *Id.*

114. *Id.*

115. Advocates of the no-duty rule argue that the rule is entirely consistent with dominant legal and philosophical principles. In particular, the rule maintains the misfeasance/nonfeasance distinction found in much of private law, supports the liberal notion of individualism and negative liberties upon which the entire American legal system is based, and respects the traditional bounds of the duty of care in negligence law. *See, e.g., Edwards v. Honeywell, Inc.*, 50 F.3d 484, 488 (7th Cir. 1995) (“Should a passerby be liable for failing to warn a person of a danger? The courts thought not, and therefore said there is no tort duty to rescue. . . . This limitation on the scope of the duty of care has stood but others have fallen by the wayside in most or all states.”); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908) (“There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.”); Philip W. Romohr, Note, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-to-Rescue Rule*, 55 DUKE L.J. 1025 (2006) (noting that “under a negative state, an individual is free to undertake any activity as long as it does not violate the rights of others”). Further, they argue that any alteration to the no-duty rule would wreak harmful consequences, including potential harm to victims (in part because the quality of rescue may be less than that of a rescue performed in circumstances free from coercion), potential harm to rescuers (because they might attempt risky rescues), and a myriad of practical difficulties with implementation and enforcement. Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1463–79 (2008). Two such concerns are that a duty to rescue could morph into a “general duty of self-sacrifice,” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 cmt. e (2012), and could make it difficult to assign blame when there is a group of bystanders. Finally, no-duty supporters argue that imposing a duty would skew the incentives of rescue, as it would discount the significance of a purely altruistic act, “generate only a small number of additional rescue efforts” because people often attempt rescue based purely on the

A small minority of states have, however, initiated some form of legally required duty to rescue or report.¹¹⁶ Slightly more than half a dozen states have duty-to-report laws (which require witnesses to inform law enforcement of crimes), and at least four states have duty-to-rescue laws.¹¹⁷ The duty-to-report laws fall into one of two categories: “those that require the reporting of certain, specifically enumerated crimes” (as found in Massachusetts, Rhode Island, Washington, and Florida) “and those that require reporting of all general criminal acts” (as found in Colorado, Hawaii, Nevada, and Ohio).¹¹⁸ The duty-to-rescue laws, which only require rescue in certain limited circumstances (such as where there is a risk of death or grievous bodily harm to the victim) and when it can be done without risk to the rescuer, tend to have relatively minor criminal penalties. For example, a failure to rescue in Vermont will attract a fine of \$100.¹¹⁹

Laws that require rescuing or reporting are usually triggered by horrendous high-profile events involving sexual assault.¹²⁰ For instance, following the horrifying murder of Sherrie Ivernice in Nevada, in which a friend of the assailant witnessed him beginning a sexual assault on a seven-year-old girl in a casino restroom, the Nevada and California legislatures passed legislation imposing a duty to report on

moral duty anyway, and act as a deterrent to cooperating with authorities or providing delayed aid after an initial failure to rescue. Scordato, *supra*, at 1464, 1479–80.

116. Alison M. Arcuri, Comment, *Sherrice Ivernice Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 482 (2000).

117. Minnesota, Rhode Island, Vermont, and Wisconsin have duty-to-rescue laws. *Id.* at 482 n.88. Wisconsin and Rhode Island have both duty-to-rescue and duty-to-report laws. *Id.* at 482 nn.88 & 92.

118. Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required To Call for Help*, 33 IND. L. REV. 571, 575–77 (2000).

119. Jay Logan Rogers, Note, *Testing the Waters for an Arizona Duty-to-Rescue Law*, 56 ARIZ. L. REV. 897, 902 (2014) (citing VT. STAT. ANN. tit. 12, § 519 (2002)).

120. Indeed, one of the first and most comprehensive bystander intervention programs, developed by the University of New Hampshire, was spurred by a “brutal” campus gang rape in 1987, in which there were many bystanders, but none who intervened. Winerip, *supra* note 25.

Many states have “mandatory reporter” laws as well, which require professionals like “educators, physicians, nurses, optometrists, physical therapists, psychotherapists,” clergy members and “sometimes attorneys” to “report their suspicions of child abuse” or “other types of criminal conduct, such as elder abuse, violent crimes including domestic violence, environmental offenses, and financial crimes.” Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 3 (2002).

those who witness crimes against children.¹²¹ At the federal level, Congress considered a similar bill.¹²² Three states, Massachusetts, Rhode Island, and Pennsylvania, already had such laws, which were passed in the 1980s “in response to a highly publicized gang rape of a woman in a barroom in which none of the on-lookers notified the police or came to her aid.”¹²³ Similarly, following the gang rape of a sixteen-year-old girl in Richmond, California in which an estimated twenty witnesses also watched and took cell phone recordings of the assault, State Senator Leland Yee proposed to broaden legislation that made it a crime to fail to report a sexual assault if the victim was under fourteen to include all individuals under the age of eighteen.¹²⁴

But despite the laws in these few jurisdictions, in general people who witness sexual assault face no legal duty to do anything. Typically, “[t]he law does not touch the group member who intentionally watches and enjoys the gang rape; indeed, even aiders and abettors who cheer on the rapists, who snap photos, or who otherwise facilitate the gang rape, are rarely held accountable.”¹²⁵ Instead, the no-duty-to-rescue principle remains firmly entrenched in American law.¹²⁶

The recent high-profile case of sexual assault at Vanderbilt University highlights the type of bystander acquiescence that is currently legally acceptable and part of the no-duty-to-rescue, but which bystander intervention programs hope to discourage. As described in one newspaper report:

Awakened in the middle of the night when the light was turned on in his dorm room, Vanderbilt football player Mack Prioleau glanced down from his top bunk and saw his roommate and three other male students—all football

121. Thompson, *supra* note 120, at 11. For a discussion of the Good Samaritan principle and the Sherry Iverson case, see Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053 (2000).

122. Thompson, *supra* note 120, at 11.

123. *Id.* at 11–12.

124. Heather Gilligan, *Yee Seeks Community Support for Bystander Law*, RICHMOND CONFIDENTIAL (Feb. 9, 2010, 9:39 AM), <http://richmondconfidential.org/2010/02/09/yee-seeks-community-support-for-bystander-law/>. The ACLU opposed the law on the basis that it penalizes people “for being at the wrong place at they [sic] wrong time” and “flies in the face of the criminal justice system’s purpose, which is to ‘penalize people where there is wrongdoing or wrongful intent.’” *Id.* Another example of non-intervention prompting a change in the duty to rescue is Vermont’s adoption of a duty to rescue in 1967, following the murder of Kitty Genovese. Jay Sterling Silver, *Can the Law Make Us Be Decent*, N.Y. TIMES (Nov. 6, 2012), <http://www.nytimes.com/2012/11/07/opinion/can-the-law-make-bad-samaritans-be-decent.html>.

125. Kimberley K. Allen, Note, *Guilty by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 GEO. L.J. 837, 839 (2011).

126. For arguments in support of the no-duty rule, see *supra* note 115.

players—with a partially nude, unconscious woman lying facedown on the tile floor.

What he did next:

“I rolled over and after that I didn’t see anything else,” said Prioleau, who was 18 at the time. “I was scared and uncomfortable and didn’t know what to do.”

During the next 30 minutes—while Prioleau’s back was turned and he tried to go back to sleep—the woman would be sexually violated multiple times in the small dorm room while three of the men took pictures and video with their cell phones¹²⁷

While Prioleau’s roommate and the three other members of the football team were all charged with numerous crimes, including sexual assault, Prioleau did not face any charges related to the incident. Generally, since there is no legal duty to rescue, one’s mere presence typically attracts no liability of any kind. Further, it should be acknowledged that this harm occurred even though a popular bystander intervention program, the Green Dot program, had been run on the Vanderbilt campus.¹²⁸ As one student noted, “Everyone on campus says publicly they’re dedicated to interfering when necessary, but I don’t know that’s happening yet, and I think that’s going to take a lot of training.”¹²⁹

To be sure, despite the lack of a legal duty to rescue, many people still do so.¹³⁰ But the lack of a legal duty to do so contributes to a strong

127. Anita Wadhvani et al., ‘Bro Code’ Inaction in Vandy Rape Case Sparks Anger, TENNESSEAN (Jan. 25, 2015), <http://www.tennessean.com/story/news/2015/01/25/bro-code-inaction-vandy-rape-case-sparks-anger/22318275/>.

128. *Id.*

129. *Id.* However, some campuses have seen successful interventions following implementation of bystander intervention programs. See, e.g., Katy Murphy, *Stanford Rape: Bystander Intervention, Too Late To Prevent Attack, Leads to Arrest*, SAN JOSE MERCURY-NEWS (Jan. 28, 2015), http://www.mercurynews.com/education/ci_27414801/stanford-rape-bystander-intervention-too-late-prevent-attack (detailing how two cyclists intervened to stop a student “who was allegedly raping a passed-out woman”).

130. See, for example, Eugene Volokh and David Hyman, who both argue that the imposition of a duty to rescue would have little actual impact on the number of rescues. Hyman, *supra* note 108 (arguing that there is no real problem of failure to rescue in the first place, and a far larger problem is harm befalling rescuers); Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105 (1999) (arguing that only a very small proportion of people would be swayed by such a law, and, conversely, people who once may have come forward belatedly will be deterred from doing so). Hyman writes, “Stated bluntly, the available data provides no indication that imposing a duty to rescue has any effect whatsoever.” Hyman, *supra* note 108, at 688.

norm of non-intervention. The no-duty-to-rescue rule advances the view that people can and should “stay out of other people’s business,” a view that runs counter to that advanced in bystander intervention programs and creates a competing norms problem.¹³¹

B. No State Duty to Protect

Another legal norm that weighs against bystander intervention is the lack of a state duty to protect. In broad terms, the government generally “has no duty to safeguard people and protect them from privately inflicted harms.”¹³² The governmental lack of duty towards citizens directly parallels the lack of duty that individuals have to each other.¹³³ Just as an individual has no duty to rescue another person from peril, the government also has no such duty. Generally speaking, the state has no enforceable duty to prevent private violence from occurring even when specifically and credibly requested to intervene and provide protection.

According to Supreme Court precedents, no such general duty exists, nor is one required under the Constitution. The Court has stated clearly that in its view, the Constitution offers “no . . . right to police protection from criminal acts by other private citizens,”¹³⁴ and “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”¹³⁵ Although some scholars have made persuasive arguments to the contrary, and international law would also support such a duty, under current constitutional law, no such duty exists.¹³⁶

Common law and statutory sources do not often impose a duty to protect either. Rather, “claimants face incredible hurdles” in asserting duty-to-protect actions against agencies or individual state actors.¹³⁷ A myriad of common law and legislative immunities may apply, including

131. Koelsch et al., *supra* note 12, at 572.

132. Erwin Chemerinsky, *Government Duty to Protect: Post-DeShaney Developments*, 19 *TOURO L. REV.* 679, 681 (2003).

133. Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 *WASHBURN L.J.* 463, 465 (2001).

134. Laura Rae Dove, *A Constitutional Right to Police Protection and Classical Liberal Theory: Complement, Not Conflict*, 4 *AKRON J. CONST. L. & POL'Y* 37, 40 (2013) (discussing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), and *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)).

135. *DeShaney*, 489 U.S. at 195.

136. See, e.g., *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

137. Helen Gugel, Note, *Remaking the Mold: Pursuing Failure-To-Protect Claims Under State Constitutions via Analogous Bivens Actions*, 110 *COLUM. L. REV.* 1294, 1310 (2010).

the public duty doctrine, which typically operates to preclude tort actions based on the failure to properly provide police or other protective services.¹³⁸ This lack of a duty supports the same norms as the individual no duty to rescue and places individualism above other more communitarian values. The fact that the State has no obligation to protect people from the crimes or wrongs of others may cause individuals to wonder why they, as mere private citizens, should be asked to shoulder this burden.

The case of mandatory reporters for child abuse provides insight into the problem of encouraging individuals to report wrongdoing when the state agencies that they report *to* may fail to act. Most states have legislated mandatory reporter duties requiring certain professionals such as therapists, psychologists, and teachers to report any suspected cases of child abuse to the authorities. Once they do so, however, the agency receiving the information has no enforceable duty to act upon that information. Requiring individuals to report wrongdoing to authorities who may simply ignore the information anyway undermines the entire process and makes it difficult to justify the requirement in reporting. Moreover, a lack of belief in the appropriateness of the response has been shown to result in less reporting overall. One study found that when asked whether “they had *ever* failed to notify government authorities of instances of suspected abuse or neglect,” forty-four percent of clinical psychologists, fifty-one percent of social workers, and fifty-eight percent of child psychiatrists acknowledged that they had.¹³⁹ The dominant reason for this lack of reporting was a lack of faith in how the state-run child protective services office would respond to this information.¹⁴⁰ Mental health professionals were “skeptical of the quality of state child protection staff services” and therefore preferred to try to address the matter privately, without involving what they perceived to be an ineffectual state apparatus.¹⁴¹

Moreover, the norms surrounding the no-duty-to-protect norm seem particularly relevant to bystander intervention when one considers the large number of cases that involve a police failure to protect women and girls from third-party wrongs. Much of the case law involves women who are killed or seriously injured following pleas to police to intervene and protect them from specific individuals. For instance, in

138. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. g (2009).

139. Janet A. Gilboy, *Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Noncompliance*, 20 LAW & POL’Y 135, 147 (1998).

140. *Id.* at 148.

141. *Id.* at 149.

Barillari v. City of Milwaukee,¹⁴² the City was not liable when “police detectives failed to protect” a woman murdered by her ex-boyfriend, despite having made “concrete assurances of protection to her upon which she relied.”¹⁴³ In *Kircher v. City of Jamestown*,¹⁴⁴ a policeman who did nothing after he was told by witnesses that a woman had just been kidnapped and driven away in a vehicle was found to have “had no duty to victim to report incident and seek assistance.”¹⁴⁵ In the infamous case of *Riss v. City of New York*,¹⁴⁶ it was held that the “police owed no specific duty” to a woman who was burned in an acid-attack arranged by her ex-boyfriend “who stalked her and from whom she had repeatedly and unsuccessfully sought police protection.”¹⁴⁷ And finally, in a defining case from the Supreme Court, *Town of Castle Rock v. Gonzales*,¹⁴⁸ it was held that the police owed no duty to a woman for failing to enforce the restraining order she had against her ex-husband, even though the failure to enforce it led to the deaths of her three daughters.¹⁴⁹

The case of *Jones v. City of Philadelphia*¹⁵⁰ offers another example of a state failure to protect, this time in a college sexual misconduct context.¹⁵¹ In *Jones*, the plaintiff, a young female college student, alleged that during “Greek Week,” “a number of male individuals pulled her from the car, tore off her clothes, sexually assaulted her, and stole her money” and that two police officers observed the assault but “failed or refused to come to plaintiff’s aid.”¹⁵² The court held that the police could not be held liable, as the “State’s failure to protect an

142. 533 N.W.2d 759 (Wis. 1995).

143. Gugel, *supra* note 137.

144. 543 N.E.2d 443 (N.Y. 1989).

145. Gugel, *supra* note 137, at 1313 n.103.

146. 240 N.E.2d 860 (N.Y. 1968).

147. Gugel, *supra* note 137, at 1313 n.103.

148. 545 U.S. 748 (2005).

149. *Id.* at 768; *see also Bukowski v. City of Akron*, 326 F.3d 702, 713 (6th Cir. 2003) (deciding police officers were not liable for delivering mentally impaired woman back to man who had repeatedly raped her); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992) (holding school not liable for ongoing and frequent sexual assault of two female students by other students in classroom supervised by teacher trainee); *Archie v. City of Racine*, 847 F.2d 1211, 1233 (7th Cir. 1988) (finding fire department not liable for death of woman after it failed to respond to calls for assistance). Other reoccurring fact patterns involve police allowing an intoxicated person to drive and state agencies failing to prevent obvious ongoing child abuse. Gugel, *supra* note 137, at 1314–15.

150. 185 F. Supp. 2d 413 (E.D. Pa. 2001).

151. *Id.* at 414.

152. *Id.*

individual against private violence simply does not constitute a violation of the Due Process Clause.”¹⁵³

These kinds of alleged failures on the part of police bystanders undermine intervention efforts and make it less likely that the average bystander will attempt to intervene. These laws, and the legal norms of non-intervention that they represent, pose a challenge for bystander intervention initiatives and their hope of instilling norms of active involvement and engagement in protecting and caring for others.

III. LEGAL AMBIGUITIES AND ADDITIONAL COMPETING NORMS

Like other “ordinary people,” bystanders “make sense of their experiences by relying on legal categories and concepts.”¹⁵⁴ Even though they may not know the exact contours of specific legal concepts, people rely on their general sense of the law to inform their notions of appropriate and inappropriate behavior. In addition to the overarching legal norm of no duty to rescue, legal norms that relate to each of the targeted harms also function as competing norms that work against bystander intervention. In the bullying context, norms of free speech and ambiguities about when and where speech is protected can confuse potential bystanders. In the context of sexual misconduct on campus, bystanders are often unsure about what constitutes sexual assault. Similarly, in the workplace harassment context, conflicting standards regarding what constitutes a hostile environment make it difficult for bystanders to understand if intervention is warranted. Ambiguous standards such as these make it difficult for people to know how to shape their behavior and are likely to result in non-intervention.¹⁵⁵

A. Bullying and the First Amendment

An important factor in a bullying bystander’s decision to intervene is whether competing norms exist.¹⁵⁶ Competing prescriptions, in the

153. *Id.* at 417 (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989)).

154. Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 *LAW & SOC’Y REV.* 83, 88 (2005).

155. See Bowes-Sperry & O’Leary-Kelly, *supra* note 104, at 292–93.

156. A bullying bystander’s decision to intervene “is determined by a complex array of factors,” and bystanders may be reluctant to intervene for a number of reasons. Sharita Forrest, *Study Examines Role of School Culture in Promoting Bullying, Bystander Intervention*, ILL. NEWS BUREAU (Aug. 11, 2014, 9:00 AM), <https://news.illinois.edu/blog/view/6367/204545>. For example, students may fail to recognize bullying as such, fear getting bullied themselves, fear later retaliation, or feel social pressure to not intervene. *Id.*

form of conflicting legal norms, may impede the potential of bystander intervention strategies in the bullying context, as “children may not come to a victim’s defense because of confusion over competing norms in their environment.”¹⁵⁷ The way that a child defines a situation greatly influences whether a child will choose to intervene, and a key reason deterring them from such intervention is “compliance with competitive norms . . . that overrule . . . helping.”¹⁵⁸ One common source of these competitive norms is law.

Youths in the age range most impacted by bullying (middle school) have a perhaps surprisingly in-depth range of legal knowledge and are especially influenced by legal norms.¹⁵⁹ Just as individuals use law and legal norms to make sense of the events in life and to inform their own choice of behaviors, adolescents and teens use law in a similar way.¹⁶⁰ Children and youths use legal-like structures and concepts, rules, and ideas of justice to interpret their “everyday troubles, including instances of bullying.”¹⁶¹ Then, they pull from the law a “‘tool kit’ of responses, skills and habits” from which they choose a course of action.¹⁶² Moreover, young people are particularly sensitive and receptive to legal ideas because they are in the “conventional stage of moral development,” a stage in which they “seek to ‘align [their] behavior in accordance to social expectations and norms’—expectations that are informed, in part, by the law.”¹⁶³ For adolescents and teens, then, legal norms are a particularly important part of the decision to intervene in a bullying incident.

First Amendment norms are particularly important and salient to adolescents.¹⁶⁴ As one scholar wrote, “[I]f one were to draw a ‘map’ of

157. Jones, *supra* note 9, at 28.

158. *Id.* at 27–28.

159. For instance, in one study of eighth graders, one student noted that teachers may be “contractually obligated” to inform others of bullying incidents. *Id.* at 111. Another noted that students accused of bullying “could take the fifth amendment,” and perhaps should “get a lawyer.” *Id.* Others knew that victims of bullying “could file a lawsuit, or even get some kind of compensation” for the harm they suffer. *Id.* at 112.

160. Stevens, *supra* note 59, at 10.

161. *Id.*

162. Susan S. Silbey, *Child’s Play: The Origins of Hegemony, Acquiescence, and Obligation in Adolescents’ Study of Law 6* (June 7, 1989) (unpublished manuscript) (on file with Wisconsin Law Review).

163. Allen, *supra* note 125, at 862 & n.179, 863 (quoting Thomas Lateano et al., *Does the Law Encourage or Hinder Bystander Intervention? An Analysis of Good Samaritan Laws*, 44 CRIM. L. BULL. 708, 720–21 (2008)).

164. See Stevens, *supra* note 59, at 28–29; see also KENNETH DAUTRICH ET AL., *THE FUTURE OF THE FIRST AMENDMENT: THE DIGITAL MEDIA, CIVIC EDUCATION, AND FREE EXPRESSION RIGHTS IN AMERICA’S HIGH SCHOOLS* 16 (2008) (noting that “high schools across the nation take seriously their important mission to promote citizenship through social studies classes on democracy, voting, and the values

the children's views of the Constitution . . . it would consist almost entirely of the first and fourteenth amendments."¹⁶⁵ However, while most adolescents understand that they and others have the right to freedom of speech, they are often confused about what that right means for bullying. Some students incorrectly believe that "all speech is protected," leading not only to "bad decisions" about their own speech on and offline, but also to "bad decisions" about the speech of others as well.¹⁶⁶ They become

incapable of using their freedom of speech effectively, let alone understanding the rationale and purpose of protected speech and the need for self-constraint and civility. Such crass disregard for "the ways in which our speech affects the basic interests of others in living a decent life" means that, in the short term, bullying behaviors will not abate, either through enlightened self-control or the intervention of peers.¹⁶⁷

Students' confusion about the First Amendment and bullying is echoed and reinforced by schools. Much online harassment is created off campus and is thus subject to greater First Amendment protections than on-campus speech.¹⁶⁸ In order to be subject to school discipline, off-campus speech must create a "material and substantial interference" at school.¹⁶⁹ However, what constitutes such a disruption is far from clear, with some courts saying that the standard is met if it makes it harder for only one student to learn, and others holding that the standard is much higher.¹⁷⁰

When confronted with allegations of bullying, "[m]any adolescents argue that cyberbullying is an exercise of their First Amendment right

underlying the American political system, which include the First Amendment's free expression rights"); Silbey, *supra* note 162. Also, "the passage of legislation in 2004 creating a national Constitution Day, which mandates that all schools receiving federal funding designate a day to focus on important constitutional issues, including the First Amendment," helps to ensure students' familiarity with First Amendment speech rights. DAUTRICH ET AL., *supra*, at 21–22.

165. Silbey, *supra* note 162, at 11.

166. Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 199 (2009).

167. *Id.* at 199–200 (quoting Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 522 (1997)).

168. Emily Bazelon, *Could Anyone Have Saved Phoebe Prince?*, SLATE (Feb. 8, 2010, 3:53 PM), http://www.slate.com/articles/life/bulle/2010/02/could_anyone_have_saved_phoebe_prince.html.

169. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

170. Bazelon, *supra* note 168.

to free speech.”¹⁷¹ When these actions are successful, they give rise to the belief that “consequences for cyber bullying may not be upheld in a court of law” and perpetrators may even be “rewarded with a monetary settlement if the school is found guilty of violating a students [sic] First Amendment free speech rights for taking disciplinary action for Internet postings.”¹⁷²

Even students on the receiving end of bullying may perceive the First Amendment as protecting the offending speech. One student explained her experience of the First Amendment as enabling other students to engage in religiously based bullying:

Their right to free speech allows my classmates to tell me to go to church with them, to find Jesus, because the path I follow—my religion of Hinduism—is wrong. The school administration punishes my peers for saying the n-word or for calling someone a faggot. But they’re at a loss when my classmate tells me that I pray to clay pots and am going to hell, or when another student asks me if I’ll come back from India kowtowing to cows.¹⁷³

Within this landscape, adolescents are unlikely to carefully weigh the competing norms and decide whether another student’s online commentary is bullying and unprotected speech. Rather, competing prescriptions will be resolved as they normally are, in favor of nonintervention.

B. Consent, Force, and Sexual Misconduct on Campus

Cultural, social, and legal norms greatly influence the behavior of students in relation to campus sexual misconduct.¹⁷⁴ Many prevailing cultural and social norms are informed by law and legal norms,¹⁷⁵ particularly for sexual assault, law and culture “reciprocally influence

171. Courtney Stoel, *Cyber Bullying and the Classroom*, 6 *COLLEAGUES* 1, 2 (2011).

172. Kraft & Wang, *supra* note 4, at 516 (citations omitted).

173. Shreekari Tadepalli, *Love Thy Neighbor, Except for Some*, in *BULLYING UNDER ATTACK: TRUE STORIES WRITTEN BY TEEN VICTIMS, BULLIES, AND BYSTANDERS* 96, 97 (Stephanie H. Meyer et al. eds., 2013).

174. Joetta L. Carr, *Preventing Sexual Violence Through Empowering Campus Bystanders*, in *AM. COLL. HEALTH ASS’N, SHIFTING THE PARADIGM: PRIMARY PREVENTION OF SEXUAL VIOLENCE* 16, 16 (2008), http://www.acha.org/documents/resources/ACHA_PSV_toolkit.pdf.

175. Allen, *supra* note 125, at 862.

understandings of what is and is not the crime of rape.”¹⁷⁶ Currently, stories of sexual assault in the media are often premised on the idea that interpreting what another person wants during a sexual encounter is nearly impossible and confusion is inevitable in such arenas.¹⁷⁷ New initiatives are trying to remove this alleged ambiguity by advocating a standard of affirmative consent, but the prevailing cultural portrayal is that it is extremely difficult to tell what is consensual and what is not. For bystanders, the idea that sexual encounters are highly ambiguous situations—and thus that the line between consent and non-consent, or volition and force, is often just innocently missed—creates a lack of confidence in their own ability to judge whether a situation is untoward or not.

For example, one of the bystanders to the Steubenville sexual assault, in which an unconscious teenage girl was sexually assaulted by two football players from her high school, voiced his own confusion about sexual assault, violence, and consent when asked about why he did not intervene. He replied, “It wasn’t violent. I didn’t know what rape was. I pictured it as forcing yourself on someone.”¹⁷⁸

Given the variations in the law on sexual assault and rape, his confusion is understandable. Despite the public service announcements that suggest otherwise, in a majority of states, rape does still require force.¹⁷⁹ A gap thus exists between the definition of rape in a majority of states and the new “culture of consent” being promoted on campuses and in PSAs.¹⁸⁰ The result is that for some behaviors, “on campus, this is rape; off campus, it often is not.”¹⁸¹ These variations in the law, such that rape in one place is not rape in another, create ambiguity that in turn reduces the likelihood of helping behaviors.¹⁸² For bystanders like the teen in the Steubenville assault, expectations about what sexual assaults look like (a vision informed greatly by law) make it less likely

176. Lynne Hederson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 132 (1992).

177. *Id.* at 172.

178. William Cummings, *Teens Give Graphic Testimony at Ohio Rape Trial*, USA TODAY (Dec. 3, 2013, 1:06 AM), <http://www.usatoday.com/story/news/nation/2013/03/15/football-ohio-rape-trial/1991311/>.

179. Emily Bazelon, *The St. Paul’s Rape Case Shows Why Sexual-Assault Laws Must Change*, N.Y. TIMES MAG. (Aug. 26, 2015), <http://www.nytimes.com/2015/08/26/magazine/the-st-pauls-rape-case-shows-why-sexual-assault-laws-must-change.html>.

180. *Id.*

181. *Id.*

182. Peter Fischer et al., *The Bystander-Effect: A Meta-Analytic Review on Bystander Intervention in Dangerous and Non-Dangerous Emergencies*, 137 PSYCHOL. BULL. 517, 519 (2011) (citing Bibb Latané & Steve Nida, *Ten Years of Research on Group Size and Helping*, 89 PSYCHOL. BULL. 308 (1981)).

that intervention will take place when the incident differs from that image.

C. Workplace Harassment

Legal norms and ambiguities also weigh in favor of non-intervention in the workplace harassment context. An important factor in a bystander's decision to intervene when he or she witnesses workplace harassment is the legal norms available. Witnesses to harassment, particularly sexual harassment, have few concrete prescriptions available, as there are not many "commonly held" expectations of behavior in such scenarios.¹⁸³ Organizations may have made clear their own expectations regarding responses, but "there are no legal requirements . . . that hold general bystanders accountable for their actions" when they witness harassment, nor are there "general societal expectations that observers should intervene."¹⁸⁴ These conflicting norms offer little help to conflicted bystanders.

In particular, the ambiguous standard of what constitutes a hostile work environment undermines the possibility of bystander intervention. Although many wrongs are easy to identify (like defacing company property, for example), sexual harassment often appears ambiguous.¹⁸⁵ The public generally has "a strong abstract comprehension of the concept," but difficulty in identifying whether a particular behavior or set of behaviors meets the legal standard.¹⁸⁶ The "significant ambiguity around people's understandings and definitions" of sexual harassment means that observers may have more difficulty making sense of what they witness than they do when observing other kinds of negative conduct.¹⁸⁷

Sexual harassment law is a large contributor to this ambiguity.¹⁸⁸ The legal definitions and standards surrounding hostile environment harassment "are open to subjective interpretation, with varied perspectives on such questions as what constitutes 'severe or pervasive' harassment, when conduct is 'unwelcome,' and what a 'reasonable woman' or 'reasonable victim' would do."¹⁸⁹ "[G]iven the differential

183. Anne M. O'Leary-Kelly et al., *Answering Accountability Questions in Sexual Harassment: Insights Regarding Harassers, Targets, and Observers*, 14 HUM. RESOURCE MGMT. REV. 85, 100 (2004).

184. *Id.*

185. *Id.* at 89.

186. Amy Blackstone et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 LAW & SOC'Y REV. 631, 634 (2009).

187. Bowes-Sperry & O'Leary-Kelly, *supra* note 104, at 292.

188. *Id.* at 293.

189. *Id.* (citation omitted).

interpretations” surrounding sexual harassment and the difficulty in ascertaining whether a particular set of circumstances rises to the level of a hostile environment, bystanders may lack confidence in “their own definition of the situation.”¹⁹⁰ This “lack of confidence” works “against general bystander intervention,” as individuals are less likely to intervene if a situation is ambiguous and the bystander feels unsure regarding the severity of the wrong.¹⁹¹

This legal ambiguity is compounded by the reality that men are less likely than women to view “ambiguous social sexual behavior as harassing.”¹⁹² Men may err on the side of believing ambiguous behavior is not harassment because of the influence of social categorization theory: sexual harassment most often involves male aggressors and female targets, and male bystanders may be

motivated to interpret the situation in ways that facilitate positive attitudes about their ingroup member (i.e., the male harasser). In other words, [the desire to perpetuate positive associations with the gender group they belong to can cause male bystanders] to interpret ambiguous social sexual behavior as something other than [sexual harassment], which, in turn, influences their decision regarding intervention.¹⁹³

In addition to the problems created by ambiguous standards, a bystander’s decision to intervene or not is also partly premised on the work-related “role requirements” of the bystander, a factor heavily influenced by law.¹⁹⁴ Many organizations formally assign certain individuals the task of preventing sexual harassment. For example, supervisors and human resources professionals are, “through role expectations,” often required to specifically oversee harassment issues.¹⁹⁵ Similarly, law ascribes special role expectations to an organization’s agents (individuals “with supervisory authority or who exercise significant control over hiring, firing, or conditions of employment”).¹⁹⁶ The role expectations for these agents make them the most likely kind of bystander to intervene. Both “legal and organizational expectations” mean that nonintervention has greater consequences for the agents of an organization, rendering them subject

190. *Id.*

191. *Id.*; see also Banyard, *supra* note 7, at 217.

192. Bowes-Sperry & O’Leary-Kelly, *supra* note 104, at 293.

193. *Id.* at 293–94.

194. *Id.* at 296.

195. *Id.*

196. *Id.*

to “potential legal liability” and to “potential disciplinary action by the employer” if they fail to act.¹⁹⁷

Unfortunately, the fact that certain individuals have heightened responsibilities may mean that those without such responsibilities are even less likely to intervene. If harassment is witnessed by a group and that group includes a supervisor, human resources professional, or other individual whose organizational or legal role expectations involve sexual harassment prevention, “other observers are less likely to intervene.”¹⁹⁸ This is because the presence of an agent or supervisory figure “both enhances the audience inhibition effect (in which the embarrassment associated with inappropriate intervention is heightened) and minimizes felt responsibility (given the formal role expectations attached to the other observer).”¹⁹⁹ By associating responsibility for sexual harassment prevention with a certain type of agent or actor, legal norms may inadvertently result in other individuals being much less likely to intervene.

IV. A LACK OF LEGAL ACCOUNTABILITY FOR THE HARMS

In addition to the problem of competing legal norms, law also impedes bystander intervention through the lack of legal accountability that attaches to institutional and organizational contributions to the harms of bullying, campus sexual misconduct, and workplace harassment. Schools, colleges, and workplaces are not just the settings where these harms occur.²⁰⁰ Instead, these institutions and entities can, through their own actions, policies, and procedures, help to influence whether they happen at all. A lack of legal accountability has helped create environments where these harms flourish, and entities do not establish appropriate procedures and policies to redress them. This lack of institutional response signals to perpetrators, victims, and bystanders alike that these harms are not serious and do not deserve redress. Further, institutional acquiescence to these wrongs makes it less likely that bystanders will intervene: bystanders often avoid intervening unless they feel that the institutions and communities they are a part of take the relevant harms seriously and support the intervention.²⁰¹

197. *Id.*

198. *Id.* at 297.

199. *Id.*

200. POWELL, *supra* note 22, at 48 (noting that “workplaces, schools, and community organisations have a greater role to play than just as *settings* for targeting bystander programs towards individuals”). Also, they may have an obligation to respond to conduct that occurs outside of their specific physical environments. *See* Dear Colleague Letter, *supra* note 68.

201. POWELL, *supra* note 22, at 48.

A. The Legal Frameworks

1. WORKPLACE HARASSMENT

The main legal tool to combat sexual harassment is Title VII. However, although Title VII was meant to serve as a means to remedy harassment and is by far the most popular avenue for redress, various burdens and legal holdings have meant that few plaintiff claims are successful. In fact, employment discrimination cases are one of the least successful causes of action.²⁰² Plaintiffs in employment discrimination cases “fare worse than in almost any other category of civil case” and “constitute one of the least successful categories [of plaintiffs] at the district court level.”²⁰³ In other civil cases, the normal win rate for plaintiffs is fifty-one percent; in the employment-discrimination context, the rate is fifteen percent.²⁰⁴

A number of hurdles face potential plaintiffs. First, Title VII jurisprudence has limited the scope of employer vicarious liability and applied Title VII in a manner “quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers whose supervisory employees have been accused of sexual harassment.”²⁰⁵ Employer vicarious liability is now only available in cases of abuse of formal supervisory power.²⁰⁶ Unfortunately for plaintiffs, the bulk of Title VII cases do not involve formal abuses but instead are characterized by *informal* abuses of power.²⁰⁷ Also, who counts as a supervisor has been narrowed to include only those who are empowered to perform tangible employment actions,²⁰⁸ and lower courts have further limited this definition.²⁰⁹

Second, strict procedural rules block some plaintiffs. Even though individuals who experience harassment are unlikely to formally report it, and if they do report it, often choose to wait to see if the harassment ends on its own first, procedural rules require would-be plaintiffs to complain immediately through the employer’s own complaint process.

202. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 113 (2009).

203. *Id.*

204. *Id.* at 127.

205. L. Camille Hebert, *Why Don’t “Reasonable Women” Complain about Sexual Harassment?*, 82 IND. L.J. 711, 715 (2007).

206. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 176–77 (2013).

207. *Id.*

208. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2454 (2013).

209. Hebert, *supra* note 205, at 715–16.

Both of these requirements contradict real-world behaviors and incentives and act as bars to many potential claims.²¹⁰

Finally, despite the fact that targets of harassment rarely report or bring claims and “approaches which rely exclusively on individual complaints made by targets of harassment are [therefore] unlikely to be successful,”²¹¹ courts have been reluctant to allow second-hand harassment suits to proceed.²¹² Because they are often affected negatively by witnessing harassment, many bystanders or witnesses to sexual harassment have attempted to bring their own claims against employers.²¹³ They have achieved only limited success.²¹⁴ Falling under a variety of different names, including “‘bystander,’ ‘ambient,’ or ‘secondhand’ harassment,” courts have adopted a number of different approaches to their resolution.²¹⁵ When the plaintiff is not part of the “same protected class as the target of the harassment,” as, for instance, when a white male brings a claim for harassment targeted at African-American female co-workers, courts have sometimes addressed the issue as one of standing.²¹⁶ When the plaintiff is part of the same protected class, some courts have considered whether the observed harassment has contributed to a hostile work environment (a position supported by the Equal Employment Opportunity Commission), but

210. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 860–66 (2008).

211. MCDONALD & FLOOD, *supra* note 15, at 4.

212. Other scholars have also demonstrated numerous other impediments to successful claims. These include the problematic “unwelcomeness” element. *See, e.g.*, Ho, *supra* note 91, at 138.

213. One study found that second-hand or ambient harassment caused those who witnessed harassment to experience “negative job, health, and psychological outcomes similar to those suffered by direct targets of abuse.” Kristen H. Berger Parker, Comment, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945, 949 (2008) (quoting Roberts, *supra* note 66, at 367); *see also* Megan Paull et al., *When Is a Bystander Not a Bystander? A Typology of the Roles of Bystanders in Workplace Bullying*, 50 ASIA PAC. J. HUM. RESOURCES 351, 356–59 (2012); Polanin et al., *supra* note 13, at 49.

214. Avery & Fisk, *supra* note 56, at 18–19. The first successful reported case “where an employee not the target of sexual harassment has successfully sued under the hostile environment cause of action” was *Leibovitz v. New York Transit Authority*, 4 F. Supp. 2d 144 (E.D.N.Y. 1998). Christopher M. O’Connor, Note, *Stop Harassing Her or We’ll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 502 (1999). “The EEOC [also] recognizes the theory of bystander injury under Title VII.” *Id.* at 508.

215. Avery & Fisk, *supra* note 56, at 18–19. For an example of an unsuccessful case, *see Medrano v. Genco Supply Chain Solutions*, No. 1:10-cv-01555-LJO-SKO, 2011 WL 92016 (E.D. Cal. Jan. 11, 2011).

216. Avery & Fisk, *supra* note 56, at 18–19.

others have found that plaintiffs can only bring actions if they themselves are the target of harassment.²¹⁷

Despite the negative impact on both targets of harassment and witnesses to that harassment, Title VII has not been the effective remedy many had originally hoped for. After nearly forty years of Title VII “doctrinal development,” “sexual harassment remains disturbingly common and unaddressed.”²¹⁸ Moreover, “the law has done little to change the cultural understanding of sexual misconduct and the ways in which it impedes workplace equality.”²¹⁹ Instead, Title VII “rewards the proliferation of policies and procedures, but never inquires whether they have had the desired effect.”²²⁰ Harassment remains a frequent occurrence, and workplaces are only rarely legally held to account for it.

2. BULLYING

An important factor in a bullying bystander’s decision to intervene is a school’s culture and tolerance for bullying.²²¹ A school’s culture, in turn, is impacted by the potential of liability for such toleration. Students seeking to hold their schools liable for the bullying they experience generally try to do so through Title IX. However, like Title VII, Title IX has high legal standards that favor defendants, and Title IX victories thus generally “occur only in the most egregious circumstances.”²²² Also, additional avenues of potential redress, like complaints to the Office for Civil Rights (OCR), anti-bullying statutes, and tort claims, offer little hope of successful claims. As a result,

217. *Id.* at 19.

218. Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1047 (2015).

219. *Id.*

220. *Id.*

221. Forrest, *supra* note 156.

222. Kosse & Wright, *supra* note 62, at 60; *see also* ADELE KIMMEL & ADRIAN ALVAREZ, PUB. JUSTICE, LITIGATING BULLYING CASES: HOLDING SCHOOL DISTRICTS AND OFFICIALS ACCOUNTABLE 5 (2013), http://publicjustice.net/sites/default/files/downloads/Bullying-Litigation-Primer-April-2013_1.pdf (“It is fair to say that the standard of liability for sex-based peer harassment under Title IX is high and difficult to satisfy. In general, the successful Title IX bullying cases involve egregious fact patterns, both in terms of the nature of the bullying and schools’ failure to respond appropriately.”). When these egregious fact patterns are present, damage and settlement amounts can be high. *See, e.g.*, Zachary Schurin, *Deliberate Indifference to Bullying Can Amount to Massive Liability – Lessons from the Pine Bush Settlement*, JD SUPRA (July 20, 2015), <http://www.jdsupra.com/legalnews/deliberate-indifference-to-bullying-can-13003/> (describing a settlement of \$4.48 million in circumstances where Jewish students were “subjected to a systemic pattern of abuse over a period of many years”).

schools are not often held legally accountable for their role in perpetuating bullying.

a. Title IX

In the bullying context, plaintiffs who bring claims against schools for not doing more to prevent or address the bullying must prove that the conduct they suffered was “severe, pervasive, and objectively offensive,” the school had “actual notice” of the conduct, and the school was “deliberate[ly] indifferen[t]” to it.²²³ As a result, although some plaintiffs have brought successful peer-on-peer harassment claims under Title IX, such victories arise only in the most extreme circumstances.²²⁴ Given the high legal standard, “courts have been reluctant to rule in favor of students,” leaving Title IX unable to curtail school bullying and instead transforming it into “the glue that has held the . . . status quo of general indifference in place.”²²⁵ In practice, the legal threshold is so difficult to meet that students are left with only “scant protection,” and schools are able “to ignore many instances of sexual harassment without fear of legal repercussions.”²²⁶ Many scholars have concluded that the Court has essentially “gutted” Title IX and created “an almost insurmountable hurdle for a victim hoping to prove the school liable.”²²⁷

A longitudinal, empirical study of bullying litigation confirms this view. After examining thousands of bullying cases, the study found that

the overall outcomes of the claim rulings clearly favored the [school] district defendants. For example, 62% of the claim rulings were conclusively in their favor in comparison to 2% conclusively in favor of the plaintiffs. Moreover, this pattern was relatively consistent on a longitudinal basis during th[e]

223. Kosse & Wright, *supra* note 62, at 60.

224. *Id.*

225. *Id.* (alteration in original) (quoting Gigi Rollini, Comment, *Davis v. Monroe County Board of Education: A Hollow Victory for Student Victims of Peer Sexual Harassment*, 30 FLA. ST. U. L. REV. 987, 995 (2003)).

226. Misa Scharfen, Note, *Peer Sexual Harassment in School: Why Title IX Doctrine Leaves Children Unprotected*, 24 S. CAL. REV. L. & SOC. JUST. 81, 83 (2014).

227. Anne D. Byrne, Note, *School Liability Under Title IX for Sexual Abuse of a Student by a Teacher: Why Has the Supreme Court Allowed Schools to Put Their Heads in the Sand?* Gebser v. Lago Vista Independent School District, 188 S. Ct. 1989 (1998), 22 HAMLINE L. REV. 587, 614 (1999), *quoted in* Justin Paget, Comment, *Did Gebser Cause the Mestastaziation of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1280 (2008).

twenty-year period [of the study], with no particular abatement in the plaintiff's direction.²²⁸

b. Alternative avenues of redress

Three alternative avenues of legal accountability for bullying exist: direct complaints to the OCR, antibullying statutes, and tort claims. Although the OCR is empowered to investigate bullying and withhold federal funds where appropriate, it has not yet exercised this prerogative and has not actually withheld funding from any school.²²⁹ Antibullying statutes are also unlikely to be effective, since they do not generally offer a private right of action, and it is unclear to what extent any entity can or will offer enforcement.²³⁰ Tort claims, too, face at least two major obstacles. First, school officials are generally covered by qualified immunity for decisions made in the course of employment.²³¹ Second, the requirement that, to be actionable in negligence, a harm must be foreseeable has defeated many claims.²³² Accordingly, "it is only in rare cases that a court has found liability under a tort theory."²³³

3. CAMPUS SEXUAL MISCONDUCT

Colleges and universities have long ignored the problem of sexual assault on campus and, up until very recently, generally faced little to no legal consequences for doing so.²³⁴ Students who sought redress for

228. Diane Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299, 324 (2014) (footnotes omitted). This study considered all claims for bullying, not just Title IX claims.

229. Paget, *supra* note 227, at 1281 (citing Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 41).

230. KIMMEL & ALVAREZ, *supra* note 222, at 11, 18, 22; Kosse & Wright, *supra* note 62, at 71.

231. Culhane, *supra* note 62, at 329.

232. *Id.* at 329–30.

233. *Id.* at 330.

234. Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359 (2015). The OCR has not historically held colleges to account for their Title IX failings, and schools therefore "rarely face real penalties for not meeting their responsibilities" under Title IX. Lauren P. Schroeder, Comment, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1234 (2014). For example, in 2004 the OCR "found that many schools failed to comply with Title IX requirements" but responded by merely sending out "reminder letters to those institutions not in compliance." Lexie Kuznick & Megan Ryan, Comment, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 367, 376

sexual misconduct on campus and tried to do so under Title IX faced high threshold burdens, often rendering that line of relief ineffective. The same problems that prevent Title IX from being an effective means of institutional accountability in the grade school context also apply to colleges and universities. In particular, the requirement that a student must “prove that the school had ‘actual notice’ and acted with ‘deliberate indifference’” allows schools to effectively “enjoy practical immunity from liability.”²³⁵ Although some courts have construed the requirements in ways that are more generous to plaintiffs, most lower courts have interpreted them narrowly, causing scholars to lament that these requirements create a “‘disturbingly high’ [bar] for students,”²³⁶ put “a heavy burden on plaintiffs,”²³⁷ and render “the protections of Title IX inaccessible to many.”²³⁸

Indeed, the “actual notice” requirement may not only create a high bar for claimants, it may also “create perverse incentives for schools not to have effective reporting mechanisms” in place.²³⁹ For, if “ignorance is bliss, and a defense to legal judgments, why should schools establish effective complaint strategies?”²⁴⁰ They may instead prefer to avoid liability by trying to “insulate themselves from knowledge” rather than risk adverse judgments by setting up student-friendly procedures that encourage reporting.²⁴¹ This may account for the reported experience of many students who pursued internal procedures, in which they often perceived them to be biased in favor of defendants.

However, recent changes in the laws governing colleges and universities and in the federal government’s willingness to confront these issues may help improve institutional accountability in this

(2008). Also, in 2012, the OCR acknowledged “that Yale University had been violating Title IX for years, but” instead of issuing “an official federal finding of non-compliance, denying federal funding, or referring the case to the Department of Justice,” the OCR entered into a much-criticized settlement with the school. Schroeder, *supra*, at 1234. Indeed, as of 2008, no school had ever had federal funds withdrawn as a result of Title IX violations. Kuznick & Ryan, *supra*, at 376.

235. Kuznick & Ryan, *supra* note 234, at 375.

236. Rosenfeld, *supra* note 68, at 412 (quoting Linda Wharton, in *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 386, 387 (2008) (Megan Ryan ed.)).

237. *Id.* at 408.

238. *Id.*

239. *Id.* at 412.

240. *Id.* at 412–13 (quoting Deborah L. Rhode, *Sex in Schools: Who’s Minding the Adults?*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 66, at 290, 297).

241. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 300–01 (1998) (Stevens, J., dissenting).

context.²⁴² Although law has heretofore largely allowed colleges to ignore the problem of campus sexual assault, new laws purport to change this status quo. The legal regulation in this area is expanding to become “increasingly protective of victims’ rights and supportive of victim-centered institutional responses to campus peer sexual violence.”²⁴³ Colleges and universities are now subject to a number of

242. However, in 2011, the OCR demonstrated a growing initiative to ensuring institutional accountability for colleges and universities. First, it issued an “unprecedented” “Dear Colleague Letter,” a “significant guidance document” that demanded schools adopt “immediate and effective steps to respond to sexual violence.” Cynthia L. Cooper, *Women Lawyers Spur a Call to Action on Campus Sexual Assault*, 22 PERSP. 8, 9 (2014). The Dear Colleague Letter suggested that the federal government would not tolerate colleges ignoring the problem of sexual assault on campus any longer, and the OCR then took a number of tangible actions consistent with this new stance. *Id.* First, by 2013, the OCR was investigating twenty-six schools for Title IX violations, whereas in the 1990s and 2000s, there were only three or four such investigations a year. *Id.* Moreover, in 2013, the government fined schools \$1.45 million for Clery Act violations, which approximately equaled the amount of such fines in the preceding twenty-two years combined. *Id.*

In 2014, “sexual assault in higher education . . . received increased national attention.” Zenen Jaimes Perez & Manuel Gallardo, *A Shared Responsibility: Why Colleges and Universities Must Respond to Campus Sexual Assault*, GENERATION PROGRESS (Sept. 19, 2014, 6:00 AM), <http://genprogress.org/ideas/2014/09/19/31031/a-shared-responsibility-why-colleges-and-universities-must-respond-to-campus-sexual-assault/>. The Centers for Disease Control and Prevention issued a report, CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES 3 (2014), <https://www.notalone.gov/assets/preventing-sexual-violence-on-college-campuses-lessons-from-research-and-practice.pdf>, that suggested steps colleges could take to reduce campus sexual assault. *Fact Sheet: Not Alone – Protecting Students from Sexual Assault*, WHITE HOUSE (Apr. 29, 2014), <https://www.whitehouse.gov/the-press-office/2014/04/29/fact-sheet-not-alone-protecting-students-sexual-assault>. In May 2014, the Department of Education released, for the first time, the names of “schools under investigation for Title IX violations.” Penny Ray, *Princeton University Among 55 Schools Under Investigation for Title IX Violations*, TRENTONIAN (May 1, 2014, 2:56 PM), <http://www.trentonian.com/article/TT/20140501/NEWS/140509997>; see also *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP’T EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>. Then, in July 2014, a “report from the Office of Sen. Claire McCaskill (D-MO) shed light on how too many higher-education institutions fail to protect students from sexual assault.” Zenen Jaimes Pérez & Hannah Hussey, *A Hidden Crisis: Including the LGBT Community When Addressing Sexual Violence on College Campuses*, CENTER FOR AM. PROGRESS (Sept. 19, 2014), <https://www.americanprogress.org/issues/lgbt/report/2014/09/19/97504/a-hidden-crisis/> (citing SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS (2014), <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>). “[T]hese milestones . . . spurred new bipartisan legislation in the Senate to address the issue.” *Id.*

243. Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 NASPA J. ABOUT WOMEN HIGHER EDUC. 49, 55 (2010).

federal laws meant to address the problem of sexual misconduct on campus. Whether these new initiatives will actually result in increased accountability remains to be seen.²⁴⁴ There are suggestions that accountability may be more aspirational than actual. For example, despite all the media coverage and national attention currently being focused on campus sexual misconduct, when polled about whether sexual misconduct was a problem on their campus, only five percent of university presidents agreed that it was.²⁴⁵ One-third agreed sexual misconduct was “prevalent on American college campuses in general,” but adopted a “not on my campus” mentality when questioned about their own institutions.²⁴⁶

B. Institutional Responsibility and Burdening Bystanders

Even the best workshops and presentations “have limited opportunities to support young people to adopt positive behaviors,” unless they are supported by prevention and accountability strategies more broadly as well.²⁴⁷ Ultimately, “the effectiveness of doing primary prevention will be limited if the broader legal system and other social institutions” fail to also take these harms seriously.²⁴⁸ Right now, there is widespread “institutionalized acquiescence” to the harms of school bullying, campus sexual misconduct, and workplace harassment, and law has done little to elicit more responsive behaviors.²⁴⁹

The lack of institutional accountability allows institutions to continue their patterns of ignoring or downplaying the harms. This

244. This is not the first historical moment in which campus sexual misconduct has received significant media attention and sexual misconduct policies have been created. Following a survey in the 1980s indicating a high rate of sexual assault on campus, “[i]n the 1990s, media then became interested in colleges’ disciplinary responses to sexual assault on campus.” Michelle Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 988 (2004). As a result of media pressure, campuses “implemented a variety of sexual assault codes.” *Id.* Unfortunately, as evidenced by the current need for accountability, little meaningful change resulted from these efforts.

245. Maya Dusenbery, *Chart of the Day: College Presidents Think Rape is Only a Problem at Other Schools*, FEMINISTING (Mar. 17, 2015), <http://feministing.com/2015/03/16/chart-of-the-day-college-presidents-think-rape-is-only-a-problem-at-other-schools/> (citing GALLUP & INSIDE HIGHER ED, THE 2015 INSIDE HIGHER ED SURVEY OF COLLEGE & UNIVERSITY PRESIDENTS 19 (2015)).

246. *Id.*

247. David Lee et al., *Sexual Violence Prevention*, 14 PREVENTION RESEARCHER 15, 15 (2007).

248. POWELL, *supra* note 22, at 11.

249. Alafair Burke, *When Family Matters*, 119 YALE L.J. 1210, 1216–17 (2010).

impacts victims, perpetrators, and bystanders: institutional acquiescence perpetuates individual acquiescence. For victims, a belief that institutions will be hostile to their claims leads to less reporting.²⁵⁰ In one study of sexual harassment and bullying in schools, young women reported feeling that “they were expected to protect themselves from everyday violence with little help from others, including those in authority positions.”²⁵¹ They automatically assumed a “lack of institutional support,” an issue that the study’s authors noted “should be deeply concerning for educators and policy makers. As Stein has argued, lack of adult interruption or response to sexual harassment and abuse permits and encourages it.”²⁵² For example, one woman who experienced a campus sexual assault discontinued her education there “because she felt that their inaction following her complaint ‘signaled’ to her, ‘as well as to the student body as a whole, that the school either did not believe her or did not view [the assaulter’s] conduct as improper.’”²⁵³ Like many others, she interpreted the school’s response of “doing nothing” as being “‘functionally equivalent’ to condoning [the] behavior.”²⁵⁴

For perpetrators, the failure of institutions to take these wrongs seriously may encourage them “to continue perpetrating.”²⁵⁵ Indeed, institutions and entities like schools, workplaces, and colleges themselves are collective bystanders to these harms. The entities function as “silent bystanders,” and their bystander behavior interacts with that of other, individual bystanders.²⁵⁶ When they fail to address peer bullying, harassment, and violence, they contribute to the “lack of ‘proper guardianship’” that “is a key and necessary element of creating the problem in the first place.”²⁵⁷ When perpetrators of these harms “receive either encouragement or no punishment from peers,

250. Cantalupo, *supra* note 243, at 52.

251. Hlavka, *supra* note 58, at 354 (citing Nan Stein, *Sexual Harassment in School: The Public Performance of Gendered Violence*, 65 HARV. EDUC. REV. 145 (1995)).

252. *Id.* (citation omitted) (citing Stein, *supra* note 251).

253. Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 437 (2013) (quoting Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 624–25 (2009)).

254. Rahim Manji, *Passivity: Looking at Bystanders Through the Lens of Criminological Theory* 23 (May 2011) (unpublished Master’s thesis, University of Tennessee), http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1970&context=utk_gradthes.

255. Cantalupo, *supra* note 243, at 50.

256. POWELL, *supra* note 22, at 28 (noting that “the workplace or organization itself—through its own policies, procedures and leadership examples—can become either a *passive* or *prosocial* bystander to violence against women”).

257. Cantalupo, *supra* note 243, at 53.

administrators, faculty, and law enforcement officials, then effective guardianship is lacking.”²⁵⁸

Finally, for bystanders, institutional complacency signals that interventions will not be supported. The ways that entities and institutions respond (or do not respond) to sexual harassment and misconduct send important messages about the acceptability of those harms.²⁵⁹ Students are keenly aware of “how seriously their schools take sexual assault,” and students who witness sexual assault will “conform their behavior accordingly.”²⁶⁰ A large factor in a bystander’s decision whether to assist a person experiencing a harm “is the nature of preventative and remedial organisational systems, that is, the extent to which the organisational environment supports advocacy for targets and the way the organisation responds once a complaint is made.”²⁶¹ In circumstances where the law condones organizations doing nothing at worst or implementing ineffective policies and procedures at best, it is difficult to convince individual bystanders that they should intervene.²⁶²

V. LEGAL DISINCENTIVES

Law also impedes bystander intervention in another way: through a perceived risk of liability. In the popular imagination, rescue is often associated with potential liability. Accordingly, those who are in a position to intervene are often concerned about any legal consequences that could flow from such action, and Good Samaritan Acts have generally not alleviated this worry. The issue is particularly salient in the campus misconduct context, where student concerns about themselves being found in violation of school policy, most often for under-age drinking, may deter students from intervening to help others.

A. Risk of Liability

There is a generally perceived risk of liability associated with rescue. Indeed, even the Good Samaritan statutes meant to protect those who do engage in rescue from civil liability have conjured up negative associations. Despite the fact that every state now has a “Good Samaritan” statute ensuring that rescuers will not face civil litigation for their actions, there still “appears to be a perception that potential

258. *Id.* at 54.

259. Swan, *supra* note 253, at 403.

260. Rosenfeld, *supra* note 234, at 362.

261. MCDONALD & FLOOD, *supra* note 15, at 21.

262. Cantalupo, *supra* note 243, at 50–51.

rescuers may face significant legal risks.”²⁶³ Part of the problem is that the Good Samaritan statutes are

so confusing and ambiguous that the people whom they are meant to protect either do not know that they are covered under a particular statute or cannot understand the extent of their protection. Consequently, the fear of an impending lawsuit still deters bystanders from offering help to an accident victim.²⁶⁴

Indeed, in one study, sixty-seven percent of survey respondents indicated that they “would be less willing to render aid if they believed they would be sued by the victim at a later date.”²⁶⁵

As one newspaper editorial wrote, the parable of the Good Samaritan has ceded to the maxim that “no good deed goes unpunished.”²⁶⁶ More vivid in the public imagination are the figures of

the Sued Samaritan and the Jailed Samaritan. Reports across the country tell sad tales of bystanders who want to help the lost child or stranded commuter, but are paralyzed by fear. What if they mistake me for a kidnapper and I end up behind bars? What if I scratch the car and end up in court?²⁶⁷

These fears are exacerbated by real examples of litigation against bystanders. For instance, in one well-publicized California case, *Van Horn v. Watson*,²⁶⁸ a woman who witnessed her friend have a car accident and removed her from the car because she was concerned that the car was going to catch fire was sued on the basis that removing her friend “caus[ed] permanent damage to her spinal cord and render[ed] her a paraplegic.”²⁶⁹

263. Hyman, *supra* note 108, at 680.

264. Eric A. Brandt, *Good Samaritan Laws — The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303, 304 (1983).

265. Lateano et al., *supra* note 163, at 720.

266. Hyman, *supra* note 108, at 680 n.56 (citing *A Sad Twist on the Tale of the Good Samaritan*, SEATTLE TIMES (Nov. 25, 1998), <http://community.seattletimes.nwsourc.com/archive/?date=19981125&slug=2785400>).

267. *Id.* (quoting *A Sad Twist on the Tale of the Good Samaritan*, *supra* note 266).

268. 197 P.3d 164 (Cal. 2008).

269. *Id.* at 166; *see also* *Workplace Law - California's Good Samaritan Law*, FENTON & KELLER (Jan. 2009), http://www.fentonkeller.com/resources/workplace_law/2009/jan_2009_californias_good_samaritan_law.htm. The court found that the Good Samaritan law in place only protected individuals giving emergency medical aid, not to non-medical aid like removal from a perceived zone of danger. *Horn*, 197 P.3d at 167-71. In another example, a Reddit user claims to have been wrongfully sued for

Concerns over potential liability for intervening to provide aid in an emergency continue to trouble bystanders. In one case, a “staffer with CPR training at an elderly living facility refused to perform [CPR] on a resident who had stopped breathing,” and who subsequently died.²⁷⁰ Despite the 911 operator’s pleas to the staffer to either reconsider or find someone who was willing to perform CPR, the staff member said that her boss and company policy dictated that staff not offer emergency aid. While the company later claimed that the incident was due to a “complete misunderstanding” of the corporate policies on emergency aid, experts referred to the belief in America’s overly litigious culture as a deterrent to aid provision, noting, “In America where there’s a lawyer behind every defibrillator, there’s worry that some people have ‘Am I going to get sued?’”²⁷¹

This worry is not entirely unfounded, and accounts of Good Samaritans who face lawsuits or other legal consequences for assisting another circulate widely in the media and Internet. For instance, three men who thought they were assisting a police officer who needed help subduing a man in a parking lot were later sued by that man’s family after he “died beneath a pile of civilians and police officers.”²⁷² It turned out that the man, a schizophrenic, had done nothing wrong, and “all of these people who came to [the police officer’s] aid had it wrong.”²⁷³ Also, in 2014, in Tulsa, Oklahoma, a man who came to the aid of a woman after a stranger “grabbed her rear end” at the Tulsa Professional Bull Riders event was sued by the assaulter.²⁷⁴ The bystander, who yelled at the assaulter and “grabbed the man’s cigars and cowboy hat and threw them into the arena,” was sued by the assaulter (who was criminally charged and “admitted to groping” the woman) on the basis that his actions “suggested an imminent physical attack and were designed to embarrass” the perpetrator.²⁷⁵ While the

sexual assault following his attempt to assist a female teenager who had been choking. terran_immortal, Comment to *I’m Starting to Think the Whole “Good Samaritan” Is All Wrong*, REDDIT (Sept. 15, 2013), https://www.reddit.com/r/AdviceAnimals/comments/1mghra/im_starting_to_think_the_whole_good_samaritan_is/.

270. Ashley Fantz, *To Perform CPR or Not? Woman’s Death Raises Questions*, CNN (Mar. 6, 2013), <http://www.cnn.com/2013/03/04/health/california-cpr-death/>.

271. *Id.* (quoting Arthur Caplan, a medical ethicist at New York University).

272. Jason Nark, *Lawsuit Asks: When Is it Bad to Be a ‘Good Samaritan’?*, PHILLY.COM (Feb. 10, 2011), http://articles.philly.com/2011-02-10/news/27740169_1_keith-briscoe-police-officers-samaritans.

273. *Id.*

274. *Go Fund Me Account Set Up for Good Samaritan Sued by Alleged Tulsa Groper*, NEWSON6.COM (Dec. 16, 2014, 12:05 PM), <http://www.newson6.com/story/27641723/go-fund-me-account-set-up-for-good-samaritan-sued-by-alleged-tulsa-groper>.

275. *Id.*

lawsuit was later dropped,²⁷⁶ incidents like this can create a fear of liability in potential bystanders.

Good Samaritans have also lost their jobs for effecting rescues. One Good Samaritan was fired after leaving “his designated area during a shift” in order to assist with extinguishing “a car fire in the parking lot.”²⁷⁷ Similarly, a Wal-Mart employee was terminated for assisting an eighteen-year-old female assault victim screaming for help in the parking lot.²⁷⁸ Such negative consequences discourage rescue in general and work against the possibility of bystander intervention.

B. Risk and Campus Infractions

Fears of legal consequences are a major factor on campus, as well. One study found that “legal risk, specifically concerns with underage drinking and getting arrested, [is] a major concern and barrier in bystander behavior” on college campuses.²⁷⁹ Indeed, the study found that twenty-five percent of individuals failed to intervene in situations involving risk for sexual assault because they feared facing legal ramifications.²⁸⁰

Further, the fact that victims of assault are sometimes held liable for their own minor violations of campus alcohol or other policies may have a chilling effect on bystander behavior as well. In one incidence, a student who reported a sexual assault was fined \$250 for “violating the

276. Amanda Bland, *Sexual Battery Defendant Drops Lawsuit Against Man Who Intervened at Bull-Riding Event*, CLAREMOREWORLD.COM (Mar. 21, 2015, 12:00 AM), http://www.tulsaworld.com/communities/claremore/sexual-battery-defendant-drops-lawsuit-against-man-who-intervened-at/article_cf3f64db-16dc-5fd6-a08b-6d600bfb95fd.html.

277. Brett Snider, *Yes, You Can Get Fired for Being a Good Samaritan*, FINDLAW (Dec. 17, 2013, 7:32 AM), http://blogs.findlaw.com/law_and_life/2013/12/yes-you-can-get-fired-for-being-a-good-samaritan.html.

278. Lisa Roose-Church, *Good Samaritan Fired by Wal-Mart Says He Won't Go Back*, USA TODAY (Oct. 25, 2013, 10:58 AM), <http://www.usatoday.com/story/news/nation/2013/10/25/walmart-worker-fired-helped-assault-victim/3187049/>.

279. Whitcomb, *supra* note 64, at 37.

280. *Id.* at 43. One limitation of the study, though, is that only twenty students' interviews were coded. *Id.* at 17. The fear of being sanctioned is heightened or lessened depending on the relationship between a given community and its local law enforcement. In particular, whether “police in a given community support and implement Good Samaritan laws that protect helpful bystanders” may impact whether or not intervention takes place. Banyard, *supra* note 7, at 222. Also, the level of trust in law enforcement is likely important as well. In the small study discussed above, the author noted, “There seems to be a general sense of distrust for law enforcement within the University. Another student said, ‘The police aren't looking out for us. They are instead only looking out for who they can get in trouble.’” Whitcomb, *supra* note 64, at 30.

school's alcohol policy."²⁸¹ Another student who "was reportedly raped after smoking marijuana with her attacker" was "charged with drug possession, placed on probation, and fined \$250."²⁸² Indeed, "a 2000 study on campus sexual assault adjudication . . . found that the majority of colleges and universities did not provide rape victims protection from charges of alcohol or drug use when they reported their victimization."²⁸³ One director of a non-profit addressing sexual assault on campus stated, "We've seen victims outright discouraged from reporting rape because they've been told that they could be found guilty of drinking or having sex in the dorm."²⁸⁴ Not surprisingly, many campus victims are therefore "afraid of even going through the campus judicial system for fear of being sanctioned."²⁸⁵

Schools, too, often fear liability when they do intervene and discipline individuals who violate campus sexual misconduct codes. In particular, schools are vulnerable to such liability when they "are found to have deviated from the procedures outlined in their own disciplinary policies."²⁸⁶ One student, dissatisfied with the institutional response to a sexual misconduct incident, noted that she did not think their ineffectiveness was a result of ill-will, but rather a fear that "if they make the wrong decision . . . they're going to get all this legal action."²⁸⁷ The creator of a documentary film about campus sexual assault agreed with this assessment and also "point[ed] to fear of legal action as a potential reason why universities in general are hesitant to punish perpetrators."²⁸⁸ Legal actions related to campus sexual assault, she noted, tend to come from "the perpetrators and the perpetrators' family," rather than the victim.²⁸⁹ Thus, a fear of liability may contribute not only to individual bystanders failing to intervene, it may

281. Anderson, *supra* note 244, at 1005 (citing Tom Farmer, *Alleged Rape Victim: BU Hiding Sex Crimes*, BOSTON HERALD, Nov. 28, 2001, at 1).

282. *Id.* (citing Tom Farmer, *Alleged BU Rape Victim Cleared of Pot Charges*, BOSTON HERALD, Oct. 16, 2002, at 3). This was later overturned. *Id.* (citing Farmer, *supra*).

283. *Id.* at 1006.

284. *Id.* at 1006–07 (alteration in original) (quoting Gretchen Cook, *Campuses May Be Developing Tactics to Hide Rapes*, WOMEN'S ENEWS (May 25, 2003), <http://womensenews.org/story/the-nation/030525/campuses-may-be-developing-tactics-hide-rapes>).

285. *Id.* at 1007 (quoting Cook, *supra* note 284).

286. *Id.* at 1013.

287. Reina A.E. Gattuso & Jessica C. Salley, *Sexual Assault at Harvard*, HARV. CRIMSON (Mar. 7, 2013), <http://www.thecrimson.com/article/2013/3/7/sexual-assault-at-harvard/> (omission in original).

288. *Id.*

289. *Id.*

also be a factor in schools functioning as silent, rather than active, bystanders, as well.

VI. OVERCOMING THE LEGAL IMPEDIMENTS

The no-duty-to-rescue rule, the legal norms that support non-intervention, the lack of institutional accountability, and the fear of liability all act as legal impediments that limit the potential of bystander intervention to address harms like school bullying, campus sexual misconduct, and workplace harassment. The proposed changes set out below would counteract these impediments and instead allow the law to support bystander intervention. In order to change the culture that “gives rise to, promotes, creates the conditions for, condones, or ignores” the harms discussed, and instead “create a culture of caring where we do not allow humiliating, insulting, and harmful sexual attitudes and behaviors to flourish,” four alterations to both bystander intervention training programs and the legal norms that surround them should be implemented.²⁹⁰

First, more states should adopt the same duties to rescue and report currently found in a minority of states. Doing so would create a general legal norm of intervention, which would encourage bystanders to intervene in the three targeted contexts discussed here. Second, colleges should enact and publicize Good Samaritan protections for intervening bystanders, thereby minimizing bystanders’ fears of personal liability or legal consequences. Third, bystander intervention training programs must acknowledge the role of legal norms in shaping behavior and educate workshop attendees about ways to overcome the difficulties and ambiguities that law creates. Finally, a more robust community responsibility model, in which the state, institutions, smaller organizations, and individuals are all held accountable for their roles in perpetuating harms, must be implemented. This “vision requires a cultural shift that moves beyond the mere prevention of violence towards a community that adopts healthy and caring sexual attitudes and practices.”²⁹¹

290. Carr, *supra* note 174, at 18.

291. Am. Coll. Health Ass’n, *Position Statement on Preventing Sexual Violence on College and University Campuses*, in *SHIFTING THE PARADIGM*, *supra* note 174, at 5, 5.

A. Proposed Solutions

1. MORE STATES SHOULD ADOPT DUTIES TO RESCUE OR REPORT

If law is to support bystander intervention, the same legal duty to rescue or report in situations of emergency or serious crime that currently exists in a minority of states needs to be geographically expanded to more states.²⁹² This will help create a strong social norm of intervention that will make bystander intervention in all circumstances more likely.²⁹³ Law can be an important resource in setting norms and “encouraging altruistic behavior.”²⁹⁴ In general, altruistic or helping behaviors are “dictated by societal norms,” and “much of the research done to date indicates that the law can be used effectively” to promote intervention and Good Samaritan type of behaviors.²⁹⁵

Currently, there exist only weak norms suggesting that people should help each other. In fact, many argue that the social norm currently in place is to *not* help others.²⁹⁶ Individual behavior is shaped by social norms, and one reason people do not render assistance is that they perceive no societal expectation to do so. “Bystanders are acting in accordance with the social norm of no intervention”²⁹⁷ when they “tend not to intervene in rescue situations.”²⁹⁸ This is obvious in the numerous examples of people failing to intervene to help each other, particularly in circumstances involving sexual assault but in broader circumstances as well. If more states followed the path of a minority of jurisdictions and adopted similar duty-to-rescue or -report laws, that would send a “message . . . that we’re all in this together, that society seriously encourages . . . life-affirming values,” like “community

292. Also, where possible, these laws should be more vigorously enforced, as unenforced laws tend to actually strengthen the norm that the law was intended to change. See Dan M. Kahan, *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 610–11 (2000).

293. “Older research on bystander interventions in emergency situations highlights the importance of making social responsibility norms salient in order to encourage helping behaviours.” MCDONALD & FLOOD, *supra* note 15, at 38.

294. Claire Elaine Radcliffe, Comment, *A Duty to Rescue: The Good, the Bad and the Indifferent—the Bystander’s Dilemma*, 13 PEPP. L. REV. 387, 404 (1986).

295. *Id.* at 400–01 (quoting Viola C. Brady, Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551, 556 (1980)).

296. Eugene Volokh writes, “Those who don’t respond to the social norm of helping people in distress—at least by calling 911—probably aren’t likely to be swayed by the normative effect of a new duty-to-rescue/report law.” Volokh, *supra* note 130, at 106. However, this ignores the reality that the “social norm of helping people in distress” is rather weak and often superseded by the norm of minding one’s own business and not getting involved. *Id.*

297. Bagby, *supra* note 118, at 583.

298. Levit, *supra* note 133, at 473.

togetherness, and recognition and appreciation of our common humanity.”²⁹⁹ “One fringe benefit of these messages is that they are likely to have a ripple effect”: beyond just ensuring that people do not leave others in situations of peril when they could easily help, duty-to-rescue laws could also reduce the “widespread alienation, indifference, and polarization” that is often thought to define modern society and has been thought to contribute to the bystander effect.³⁰⁰

Such legislation can be justified on the grounds of “[m]oral obligation, civic duty, harm prevention, and public interest.”³⁰¹ Indeed, “Criminal legislation exists to protect societal interests, including the protection of public harm. Antisocial behavior can appropriately be made the subject of a criminal statute because it constitutes a public wrong. Witnessing a crime and ignoring the plight of the victim is antisocial behavior and therefore a public wrong.”³⁰²

And, in addition to the fact that a minority of states already have duty-to-rescue or -report laws, there are a few other laws that evidence the same spirit and point to the possibility of increasing the norm of intervention. Although they often escape notice, “laws sometimes do require helpfulness and compel good behavior.”³⁰³ Indeed, “at times, state legislatures find property interests important enough to require finders to act responsibly toward strangers’ property even where they refuse to require rescuers to save strangers themselves.”³⁰⁴ In Missouri, for example, a “statute requires a finder of lost property (e.g., jewels, a wallet) worth ten dollars or more to take it to a state agent to aid the true owner in recovering the property.”³⁰⁵ This statute exists even though Missouri does not have a duty-to-rescue law, leading to the

299. Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 628 (2010). As with current forms of the law, interventions should only be required if they can be performed safely and in prescribed circumstances.

300. *Id.* at 628–29. For instance, in response to an instance of bystander inaction in 2008, when pedestrians and drivers failed to stop or alert anyone to the presence of a seventy-eight-year-old man who had just been hit by a car and was lying on a road in Hartford, Connecticut, police chief Daryl Roberts stated,

It’s a clear indication of what we have become when you see a man laying [sic] in the street, hit by a car and people just drive around him, walk by him At the end of the day, we’ve got to look at ourselves and understand that our moral values have now changed. We have no regard for each other.

Id. at 622–23.

301. Bagby, *supra* note 118, at 579.

302. *Id.* at 583 (footnotes omitted).

303. Levit, *supra* note 133, at 472.

304. *Id.*

305. *Id.* (citing MO. ANN. STAT. § 447.010 (West 2000)).

“stark irony” that “[i]f a woman falls into Brush Creek and is swept away screaming in the current, bystanders can watch the event and have no obligation to report or help.”³⁰⁶ But “[i]f those same bystanders pick up her purse on a bridge after the unfortunate drowning, they do have a legal duty to report the loss—of the property, that is.”³⁰⁷

As the Missouri statute shows, Good Samaritan norms are becoming more common in law. Particularly in civil contexts, there has been a growing trend “of encouraging people to help one another.”³⁰⁸ Laws like “Good Samaritan statutes, state statutes requiring motorists involved in traffic accidents to render assistance to injured parties, and the efforts of some states to compensate citizens for aid rendered in emergencies are cases in point.”³⁰⁹ Also, these laws have been increasing in the criminal context as well. There has been a gradual increase in the number of laws “creating duties to assist the police (or, one might say, to assist the victim or society at large) by *reporting* situations in which a crime is being committed.”³¹⁰ Such laws suggest the possibility of a further expansion of duties to rescue or report.

An expanded duty to rescue, by entrenching altruistic behavior as a legal norm, would likely influence individual decision-making.³¹¹ For instance, when “the attitudes of students in Germany, Austria, and the United States toward affirmative duties” were surveyed, “[i]n

306. *Id.*

307. *Id.*

308. Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 *YALE L.J.* 1797, 1801 (1985).

309. *Id.* (footnotes omitted).

310. Thompson, *supra* note 120, at 5. Thompson asserts, “Appreciating the extent to which we require people to intervene in criminal matters by imposing legal duties to report their suspicions of criminal acts is an important change in our understanding of American criminal law theory.” *Id.*

311. David Hyman’s work reveals that imposing a legal duty to rescue has had virtually no effect in the jurisdictions that have done so. He writes, “States that have adopted a duty to rescue rule have not seen an increase or decrease in the number of non-risky rescues or the number of accidental deaths.” Hyman, *supra* note 108, at 657. He goes on to conclude,

Finally, if the no-duty rule that prevails in forty-seven of the fifty states is “sending the wrong message” about the desirability of undertaking a rescue, it is doing a singularly poor job of it. Indeed, even in the absence of a statutory duty, Americans turn out to be *too* willing to undertake rescue . . . judg[ing] by the number of injuries and deaths among rescuers. Indeed, proven rescuer deaths outnumber proven deaths from non-rescue by approximately 70:1.

Id. However, this is because, as he details, rescues were already occurring. *Id.* at 712. In the context of gender and sexual violence and harassment, interventions are not occurring. Thus, changing the law and legal norms could have the impact of influencing behavior in this context.

Germany, the only one of the three countries to have an affirmative duty law, 86% of the students knew that rescue was a legal duty.”³¹² These students were also the most likely to condemn “inaction in an easy rescue situation.”³¹³ This demonstrates that duty-to-rescue or -report laws can “create a societal expectation of intervention” that is well known and internalized by citizens of the jurisdictions where they exist.³¹⁴

Further, if a duty-to-rescue or -report norm is established, it could alleviate some of the backlash that those who engage in bystander intervention, and thus act against societal norms of non-helping, currently experience. Currently, bystanders who do intervene, particularly in circumstances involving sexual assault, can experience negative legal and social consequences, like having their telephone bills subpoenaed, being put on house arrest, or being monitored, followed, threatened, and generally harassed.³¹⁵

The experience of the three men who testified in the Cheryl Araujo rape case illustrates this problem. Cheryl Araujo was gang-raped in a bar while an unknown number of additional men watched,³¹⁶ a crime that formed the basis for the 1988 film, *The Accused*.³¹⁷ After fleeing the bar, Cheryl, “wearing just a brown coat and a single sock,” ran into three men (two brothers and a friend), who telephoned the police and provided testimony against the men they saw emerging from the bar to come after her.³¹⁸ They faced difficult social consequences for doing so: they “were often ridiculed for their testimony, suffering numerous death threats, and even today [some twenty-five years later] find people sometimes hearing rumblings about their involvement in the case.”³¹⁹ If the duty to rescue or report were expanded, then such

312. Bloch, *supra* note 106, at 950.

313. *Id.*

314. Bagby, *supra* note 118, at 583.

315. Elk & Devereaux, *supra* note 5.

316. Jonathan Friendly, *The New Bedford Rape Case: Confusion Over Accounts of Cheering at Bar*, N.Y. TIMES (Apr. 11, 1984), <http://www.nytimes.com/1984/04/11/us/the-new-bedford-rape-case-confusion-over-accounts-of-cheering-at-bar.html>.

317. THE ACCUSED (Paramount Pictures 1988).

318. Jay Pateakos, *Brothers Break Silence in Big Dan's Rape Case*, HERALD NEWS (Oct. 26, 2009, 4:42 AM), <http://www.heraldnews.com/article/20091026/News/310269264/>.

319. *Id.* Similarly,

the two girls who intervened and rescued a drunk young woman who was being publicly raped at a De Anza College baseball players' party were heroines, but some on the campus seemed not to agree. The young women suffered harassment; they were threatened by people who came up to them saying, “Stop your lying. Shut your f—king mouth.” They considered the intimidation serious enough to report it to law enforcement.

helping behavior would be more normalized and less likely to attract animosity when it occurs.³²⁰

Rather than promoting the kind of individualism that discourages helping behaviors and can actually make them seem aberrant, a more common duty to rescue would “promote the notion of communal responsibility over individual self-interest.”³²¹ A geographical expansion of the existing duty-to-rescue or -report laws

would make the law better reflect the moral norms of a communitarian society by giving people an affirmative obligation to help individuals in serious danger when doing so is safe and reasonable. This change would legally codify the notion that people have a civic responsibility to look out for one another.³²²

If the legal norm were to move towards the view that “each citizen assumes the duty to render a minimal degree of assistance to a person in grave distress,”³²³ intervention would become more normalized and bystander intervention in relation to the harms of bullying, campus sexual misconduct, and workplace harassment more possible. Even such a small shift in the law as “a *minimal* duty to inform the authorities in an emergency” punishable only by a minor penalty would strengthen the perceived responsibilities people in society owe to one another.³²⁴

JODY RAPHAEL, *RAPE IS RAPE* 154 (2013). Victims who report often face harassment as well. Friends of perpetrators have called victims derogatory names and threatened them with physical harm. Cantalupo, *supra* note 19, at 260–61; *see also* Dear Colleague Letter, *supra* note 68 (noting that “schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting”). Bystanders may also be punished for participating in the wrong initially, despite later intervening or “whistle-blowing.” For instance, a dental student at Dalhousie University who reported his group’s inappropriate and misogynistic use of Facebook was suspended along with the other group members. Denise Balkissoon, *When We Talk About Consent, Appreciate the Rare Bravery of the Bystander*, *GLOBE & MAIL* (Jan. 23, 2015, 7:24 AM), <http://www.theglobeandmail.com/globe-debate/when-bad-things-happen-appreciate-the-bravery-of-the-bystander/article22600324/>.

320. This is not to argue that outside the prescribed instances established in current duty-to-rescue or -report laws (i.e., when there is a risk of death or serious bodily harm), bystander intervention should itself be legally required.

321. Radcliffe, *supra* note 294, at 402.

322. Rogers, *supra* note 119, at 903 (footnote omitted). For an application of game theory to the duty to rescue, see Crettez & Deloche, *supra* note 37.

323. Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Analysis*, 11 *ROGER WILLIAMS U. L. REV.* 77, 134 (2005).

324. *Id.* at 141.

2. CAMPUSES SHOULD ENACT AND PUBLICIZE GOOD
SAMARITAN PROTECTIONS

To account for the research indications that bystanders sometimes fear the potential legal consequences of intervening, in the college campus sexual misconduct context “it would be helpful for future prevention programming, or freshman orientation programs, to emphasize a Good Samaritan law within the University.”³²⁵ A Good Samaritan law ensuring that bystanders would not be penalized for under-aged drinking or for other forms of minor misconduct “would encourage students to get their peers help from police, residential assistants, and other authority figures” when appropriate, without forcing students to risk facing penalties for choosing to help others.³²⁶

Cognizant of the impact that the fear of liability can have on bystander intervention and reporting sexual misconduct, the 2011 OCR Dear Colleague Letter suggests that “schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved” and should therefore “consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses.”³²⁷ The OCR goes on to recommend “that schools inform students that the schools’ primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.”³²⁸ Good Samaritan laws would enhance these recommendations and encourage bystander intervention.³²⁹

Good Samaritan laws should also provide some form of protection for bystanders who may participate in a wrong initially, but later intervene or act as whistle-blowers. For instance, a dental student at Dalhousie University who reported his group’s inappropriate and misogynistic use of Facebook was suspended along with the other group members.³³⁰ Applying punishment equally to those who come forward and those who do not can have a chilling effect on such behaviors.

325. Whitcomb, *supra* note 64, at 43.

326. *Id.*

327. Dear Colleague Letter, *supra* note 68.

328. *Id.*

329. California and New York, for example, have followed this recommendation. *See* CAL. EDUC. CODE § 67386 (2014); S. 5965, 2015–16 Reg. Sess. (N.Y. 2015).

330. Balkissoon, *supra* note 319.

3. PROGRAMS MUST ACCOUNT FOR LEGAL NORMS

Bystander intervention training programs need to take more explicit account of legal norms. In the bullying context in particular, programs should be sure to acknowledge the conflict that First Amendment norms may create and offer ways that adolescents can resolve these conflicts. In the campus sexual misconduct context, bystander intervention programs often explicitly include legal explanations and definitions of harms like sexual assault but need to also acknowledge the disconnect between many campus definitions of sexual assault and what is prominently portrayed in the media as sexual assault.³³¹ Similarly, in the workplace harassment context, bystander intervention training programs should emphasize techniques that bystanders could employ in ambiguous situations. Rather than having to definitively conclude whether whatever is occurring meets the legal definition of harassment, these techniques would allow for intervention uncoupled from legal definitions.

4. BYSTANDER INTERVENTION MUST BE SUPPORTED WITH INCREASED INSTITUTIONAL AND COMMUNITY RESPONSIBILITY

In order to be most effective, bystander intervention training must be embedded “within a comprehensive framework of prevention.”³³² Training should be part of an ecological approach, which “engages all members of the community and includes strategies aimed at policy and organizational practices, as well as cultural change at the individual level.”³³³ Otherwise, a bystander intervention approach that fails to adopt a community responsibility model of accountability risks “[m]inimizing the difficult work of challenging the institutions that support violence” and shifting “the responsibility of ending violence to those most vulnerable to it.”³³⁴ Without an enhanced sense of community responsibility, bystander intervention is akin to treating harms “as primarily a question of isolated incidents and one-off acts of heroism” and becomes, “in the end, just another way to ignore how violence is normalized and minimized in our everyday interactions.”³³⁵

331. A research report submitted to the U.S. Department of Justice and funded by a grant from the National Institute of Justice also recommends that they do so. HEATHER M. KARIJANE ET AL., *CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND* 32 (2002).

332. MCDONALD & FLOOD, *supra* note 15, at 6.

333. STAPLETON & ALLAN, *supra* note 20, at 12.

334. Elk & Devereaux, *supra* note 5.

335. *Id.*

One of the psychological phenomena that bystander intervention training seeks to counteract is that of diffusion of responsibility. The principle of diffusion of responsibility tells us that, as responsibility is perceived to be allocated amongst multiple individuals, each individual feels that the fact that they are only responsible for a small piece of the pie means that they need not do anything. Ironically, though, by framing bullying, sexual misconduct on campus, and harassment in the workplace as “community harms,”³³⁶ bystander intervention programs also assign small amounts of responsibility to multiple actors. The end result may be that each actor feels uncompelled to fulfill their role in the process.

In order to avoid this, the importance of each individual and collective actor in contributing to the harm must be emphasized. The State has an especially large role to play in the prevention of harms like bullying, campus sexual misconduct, and workplace harassment. In many ways, “the State represents society,” and, accordingly, “its actions and inactions are often assumed to express a society’s normative views about a particular issue.”³³⁷ The State’s response to harms expresses to “society as a whole” the “‘rightness’ or ‘wrongness’ of the actions or inactions of individual members of society.”³³⁸ Because the State has such a powerful expressive and normative role in regulating individual behavior, it is particularly important that the State be seen as denouncing harms through the existence and enforcement of laws and through explicit messaging as well.³³⁹ Recently, the State has been taking steps to assert its condemnation of harms like bullying, campus sexual misconduct, and workplace harassment.³⁴⁰ It should continue to do so and to encourage others to do so as well.

336. Banyard et al., *supra* note 14, at 464 (noting that bystander intervention is “[r]ooted in theories of community responsibility”).

337. Cantalupo, *supra* note 19, at 233.

338. *Id.*

339. *Id.* at 234 (noting that if those who commit harms are not appropriately sanctioned, “neither normative nor practical deterrence” of future similar harms results).

340. The White House has initiated the “It’s On Us” campaign, including a number of public service announcements featuring celebrities speaking out about sexual assault and the importance of bystander intervention. Press Release, The White House, Fact Sheet: Launch of the “It’s On Us” Public Awareness Campaign to Help Prevent Campus Sexual Assault (Sept. 19, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus->. In relation to bullying, the White House hosted a conference on antibullying, and the President participated in delivering a message for the anti-bullying campaign “It Gets Better.” Valerie Jarrett, *Ending Bullying in Our Schools & Communities*, WHITE HOUSE (Apr. 20, 2012, 5:42 PM), <https://www.whitehouse.gov/blog/2012/04/20/ending-bullying-our-schools-communities>. As well, they launched the website StopBullying.gov. In relation to workplace harassment, the White House has stated its

Institutions like schools, colleges, and workplaces also play an important role in preventing the harms of bullying, campus sexual misconduct, and workplace harassment. All of these institutions have significant power and control over their environments and cultures and the behavior of students and employees. Indeed, schools often play a “‘State-like’ role in their students’ lives,” just like “most employers in their employees’ lives.”³⁴¹ All of these entities “have disciplinary authority” over the behavior of students and employees, and “[i]n some cases, such as boarding schools or colleges and universities, schools can also function as their students’ place of residence, further increasing the school’s pervasiveness in, and impact on, a student’s life.”³⁴² Indeed, the importance of schools in their students’ lives is so profound that many students report what one researcher has called “‘institutional betrayal trauma’ to describe frequently reported [negative] effects experienced by victims who report sexual assault to their schools.”³⁴³

In addition to having the power “to coerce certain types of behavior from individual members of the collective,” institutions like schools, colleges, and workplaces are also able to give voice to the views of the collective community regarding what “is wrong or right about that behavior.”³⁴⁴ As one example, institutional enactment of specific policies that clearly enumerate prohibited grounds and protected classes have been shown to reduce bullying behaviors.³⁴⁵

commitment to equal opportunity and non-discrimination in the workplace. *See, e.g., Strengthening Protection Against Discrimination*, WHITE HOUSE, <https://www.whitehouse.gov/issues/civil-rights/discrimination> (last visited Nov. 11, 2015).

341. Cantalupo, *supra* note 19, at 250.

342. *Id.*

343. Rosenfeld, *supra* note 234, at 368 (citing Jennifer J. Freyd, *Institutional Betrayal and Betrayal Blindness*, FREYD DYNAMICS LAB, <http://dynamic.uoregon.edu/jjf/institutionalbetrayal> (last updated Aug. 30, 2015)). One student describes feelings of institutional betrayal in her open letter, *Dear Harvard: You Win*, published in the *Harvard Crimson*. *Dear Harvard: You Win*, HARV. CRIMSON (Mar. 31, 2014), <http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/>. She attributes the development of her mental illness to the institutional inaction she experienced, rather than to the impact of the assault itself. *Id.* Indeed, the very fact that the letter is addressed to Harvard, rather than to her assailant, indicates the degree to which she feels institutionally, rather than personally, betrayed. *Id.*

344. Cantalupo, *supra* note 19, at 266–67.

345. “[T]he Gay, Lesbian, and Straight Education Network (GLSEN) found that better outcomes were consistently correlated with the type of anti-bullying policy the school had.” Culhane, *supra* note 62, at 345 (citing JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY 68–71 (2012)). Schools with comprehensive policies enumerating that bullying on sexual orientation grounds would not be tolerated had victimization rates of 21.7% versus 36% where there was no policy. KOSCIW ET AL., *supra*, at 70. The study’s authors thus concluded that “comprehensive policies are more effective than other types

In addition to setting policies, schools, colleges, and workplaces each have important investigatory functions. These investigatory functions have often not been taken seriously. For instance,

40% of colleges and universities reported not investigating a single sexual assault in the previous five years. 30% of colleges and universities offered no training on sexual assault to students nor law enforcement officers. 70% of colleges and universities did not have a protocol for working with local law enforcement.³⁴⁶

And “[a]pproximately 20% of the nation’s largest public institutions and 15% of the largest private institutions allow their athletic departments to oversee cases involving student athletes.”³⁴⁷ New laws, however, may put increased pressure on schools to perform more fulsome investigations.

The Campus SaVE Act now requires colleges to offer sexual violence prevention programs that include bystander intervention.³⁴⁸ Colleges are responding quickly to this new requirement, as are the corporations and other entities interested in selling new sexual violence prevention products to them.³⁴⁹ The requirement has been a catalyst for a new industry of prevention programs, some of which, like the University of New Hampshire’s *Bringing in the Bystander*, are relatively well established, others of which are entirely new to the marketplace.³⁵⁰ There is some fear that these new online programs may

of policies in promoting a safe school environment for LGBT students. They may be most effective in messaging to teachers and other school staff that responding to LGBT-based harassment is expected and vital.” *Id.* at 69.

346. NAT’L SEXUAL VIOLENCE RES. CTR., *CAMPUS SEXUAL ASSAULT 1* (2015), http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_campus-sexual-assault.pdf (citing *SEXUAL VIOLENCE ON CAMPUS*, *supra* note 242).

347. *SEXUAL VIOLENCE ON CAMPUS*, *supra* note 242, at 11.

348. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (to be codified at 20 U.S.C. § 1092(f)) (mandating “primary prevention and awareness programs for all incoming students and new employees, which shall include . . . safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual” for “[e]ach institution of higher education participating in any program under [20 U.S.C. subch. IV] and title IV of the Economic Opportunity Act of 1964”).

349. Tovia Smith, *Curbing Sexual Assault Becomes Big Business on Campus*, NPR (Aug. 12, 2015, 4:42 PM), <http://www.npr.org/2015/08/12/430378518/curbing-sexual-assault-becomes-big-business-on-campus>.

350. *Id.* *Bringing in the Bystander* is available to colleges for \$1600, plus an additional \$350 for training. *Id.* *Haven*, a “45-minute online program” and “second

be more about providing schools with a means of indicating that they have met the prevention program requirement rather than actually facilitating any meaningful change.³⁵¹ As one professor noted, while “[t]hese quick-and-dirty programs online are really good at marketing their product,” it remains to be seen whether “they’re effective at doing much of anything except documenting that policy has been met” and the requirement of offering prevention programs including bystander intervention training has been fulfilled.³⁵² In this sense, offering bystander intervention training programs may become the new form of creating workplace sexual harassment policies—both can technically fulfill the letter of the law but may not create the hoped-for change which led to the law in the first place.

Also, institutions like schools should incorporate other, non-peer bystanders into the bystander intervention project. For instance, “[o]nly a few states actually require a school employee who witnesses an act of bullying to report it to a principal or other designated school official” (and a few more, in the spirit of Good Samaritan laws, offer immunity to employees for any good faith reporting efforts they do make).³⁵³ However, employees can be fairly easily compelled to engage in such reporting and face few of the same considerations that burden peer bystanders. Research demonstrates that

in school cultures where teachers and other school staff model active bystander roles by intervening in bullying (whether physical or verbal/emotional abuse and teasing), students themselves are more likely to intervene when witnessing bullying. By contrast, in school cultures where teachers show a poor understanding of bullying and fail to intervene (particularly in verbal/emotional bullying), students are more likely to facilitate bullying through non-intervention.³⁵⁴

Although the State and institutions like schools, colleges, and workplaces must assume responsibility for their roles in the perpetuation of harms like bullying, campus sexual misconduct, and workplace harassment, their role should not eclipse that of other smaller, community organizations.³⁵⁵ Community responsibility also

15-minute follow up” costs “between \$10,000 and \$20,000 a year” (depending on the size of the school). *Id.* 600 campuses currently offer *Haven*. *Id.*

351. *Id.*

352. *Id.*

353. Kosse & Wright, *supra* note 62, at 65–66.

354. POWELL, *supra* note 22, at 25–26 (citation omitted).

355. Dana Bolger, *Why Do We Love Bystander Intervention and Fear Community Consequences for Rape?*, FEMINISTING (Jan. 14, 2015), <http://feministing.com>.

means that the role of smaller organizations and communities in preventing and redressing harms must be acknowledged. Some progressive college organizations, like the Columbia University Marching Band, for instance, have produced their own “sexual assault policy and response plan.”³⁵⁶ Others, like fraternities, may need to experience more legal accountability to motivate them to take action as well.³⁵⁷

The final layer of community responsibility involves individual perpetrators. While bystander intervention appears to be a promising method of harm prevention, there must also be “a focus on the ultimate responsibility of perpetrators.”³⁵⁸ It is important to not erase the role of the bully, the perpetrator of a sexual assault, or a workplace harasser. Individual accountability is an important component of a multi-prong systemic attempt to prevent and redress these harms. Unfortunately, bystander intervention programs currently have little focus on individual offenders. Many of the programs are based on the underlying belief that you simply cannot change a perpetrator’s behavior. For instance, the White House Advisor on Violence Against Women, Lynn Rosenthal, addressed the concern that the “It’s On Us” Campaign minimizes the role of the actual perpetrator by saying, “One of the questions we’ve gotten is why doesn’t this campaign say directly to men, ‘Stop raping’? And the reason for that is that the campaign is research-based.”³⁵⁹ Changing the behavior of perpetrators is difficult, she continued, but “[a]ccording to research, campaigns can change the behavior of those surrounding a person committing sexual assault: teach college kids bystander intervention, and they will be more cognizant of what a dangerous situation looks like and how to stop it.”³⁶⁰ Advocates of the *Step Up!* program express a similar reluctance, stating, “There’s no credible research that we can rehabilitate rapists.”³⁶¹

Contrary to these expressions of futility, a comprehensive framework of responsibility requires acknowledging the role of all actors and creatively exploring the ways in which each can be

com/2015/01/14/why-do-we-love-bystander-intervention-and-fear-community-consequences-for-rape/.

356. *Id.*

357. Legal accountability for fraternities appears to be increasing, particularly in the form of civil suits. See Caitlin Flanagan, *The Dark Power of Fraternities*, ATLANTIC, Mar. 2014, at 72, 75.

358. Banyard, *supra* note 7, at 219.

359. Dockterman, *supra* note 25.

360. *Id.*

361. Joe Milholland, *CCSC Learns About Step Up Bystander Intervention*, BWOG (Jan. 26, 2015, 11:27 AM), <http://bwog.com/2015/01/26/ccsc-learns-about-step-up-bystander-intervention/>.

encouraged to alter behaviors in order to achieve the goal of reducing the serious social harms of bullying, campus sexual misconduct, and workplace harassment.

B. Additional Concerns

Even if the legal impediments to bystander intervention are resolved, bystander intervention still raises a number of concerns.³⁶² First, there is a risk that the current approach of encouraging bystanders to intervene will devolve into imposing sanctions on inactive bystanders. Second, bystander intervention initiatives may reify the very gender norms they purport to challenge. Finally, bystanders may implement intervention in ways inflected by racial biases.

1. PUNISHING NON-INTERVENTION

One concern that will need to be addressed as bystander intervention initiatives develop further is that encouragement of bystander intervention could devolve into sanctioning non-intervention.³⁶³ For the most part, bystander intervention initiatives currently rely on a “carrot” approach, encouraging individuals to intervene because it is the “right thing to do” and will make them feel like they are helping others. However, some jurisdictions have gone even further and have been using the threat of sanctions to require actual bystanders to intervene. For instance, one township in Illinois,

362. Assuming that bystander intervention does overcome these concerns and entrenches itself as a new social norm, there is one additional important risk that could result from bystander intervention and must be acknowledged. In the sexual misconduct context, there is a risk that a bystander’s observations could become a *de facto* corroboration requirement rule. If, as bystander intervention initiatives suggest, precursors to sexual assault are often readily observable to others, then a failure to have those precursors noted could factor against someone establishing a claim of sexual assault. Banyard, *supra* note 7, at 217. There is a long history of requiring corroboration in rape accusations, and it does not seem far-fetched to suggest that an “if that were true, someone would have seen something” idea may be inadvertently advanced through a rise in bystander intervention.

363. As Lauren Chief Elk notes, “[T]here is a new and prevalent conversation ab[ou]t arresting bystanders . . . arresting them if they’ve done nothing, not done exactly what cops deemed acceptable, did too much & are then charged with assault.” Lauren Chief Elk (@ChiefElk), TWITTER (Nov. 20, 2013, 12:14 PM), <https://twitter.com/ChiefElk/status/403255130629230592>; Lauren Chief Elk (@ChiefElk), TWITTER (Nov. 20, 2013, 12:15 PM), <https://twitter.com/chiefelk/status/403255323277807617>. Thus, “much like the increasing tendency to prosecute survivors who are unwilling to participate in prosecutions, bystander intervention initiatives are headed in a ‘criminalize bystanders who fail to intervene’ direction.” Melissa McEwan, *Not Alone*, SHAKESVILLE (Apr. 29, 2014), www.shakesville.com/2014/04/not-alone.html.

Rantoul, provides in its high school district anti-bullying policy that bystanders who fail “to make any action to discourage the bullying behavior . . . may be subject to appropriate discipline.”³⁶⁴ This approach has also been adopted in a Canadian province, where a student bystander in either primary or secondary school is required to report any bullying witnessed, and the failure to do so may result in disciplinary action from the school.³⁶⁵

There are also a number of scholarly proposals to increase bystander liability. For example, one student note “proposes that criminal liability should . . . attach to the witnesses of cyberbullying who fail to report the behavior.”³⁶⁶ Another argues, in the context of collegiate hazing:

a duty should be imposed on members of student groups to protect other students from injury to the extent that they are unable to protect themselves. If injury results due to a student’s helpless state, criminal penalties should be imposed upon members whose actions contributed to the student’s helpless state, who knew the student was helpless, and who failed to take reasonable steps to protect the student from injury.³⁶⁷

Such approaches are problematic.³⁶⁸ There are many reasons why bystander intervention for witnesses to harms like school bullying, college sexual misconduct, and workplace harassment should not be mandatory. One is that bystanders may be in vulnerable positions themselves. Bystander intervention seems to envision a very empowered, resourceful bystander and offer a sort of “ableist response.”³⁶⁹ In reality, though, bystanders themselves may be in positions of extreme vulnerability.

364. RANTOUL TOWNSHIP HIGH SCH. DIST. 193, SCHOOL BOARD POLICY 360: ANTI-BULLYING POLICY 2 (2012) <http://www.rths.k12.il.us/SRO/documents/AntiBullyingPolicy.pdf>.

365. Education Act, S.A. 2012, c. E-0.3, pt. 3, div. 1 (Can. Alta.).

366. Benzmilller, *supra* note 112, at 943 (“A Bad Samaritan law carrying criminal penalties will attack the code of silence and encourage the (not so) innocent bystanders of clearly harmful cyberbullying to report the abuse to law enforcement.”).

367. Brandon W. Chamberlin, “*Am I My Brother’s Keeper?*”: *Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925, 927–28 (2014).

368. Similarly, mandatory reporter policies have been controversial. Some institutions require school employees to whom a sexual assault has been disclosed to report that assault to the police. Anderson, *supra* note 244, at 1004. Such policies can deter students from reporting sexual misconduct. *Id.*

369. *See* Elk & Devereaux, *supra* note 5.

Also, bystanders may offer inappropriate or ineffective help. They may have personal histories and biases that color their actions and behaviors, making their assistance ineffective at best and harmful at worst. Despite the attempts of workshops to teach intervention skills, the ability of individuals to implement them will vary greatly, and those who feel compelled to intervene because of a fear of sanctions may so clumsily act that it would have been best for them to do nothing at all.

There can also be real costs to intervention. If a direct confrontation is attempted, there is a risk of physical violence. Even if a more indirect route is attempted, there is a risk that the intervenor will face social approbation and other negative consequences. Insisting that individuals intervene, without regard to the differing circumstances of each incident and the involved parties, is difficult to justify.

2. REIFYING TRADITIONAL GENDER ROLES

Second, bystander intervention often seems to reify the very gender norms that it purports to work against. In fact, the very idea of bystander intervention and “rescue” has gendered connotations. Many bystander intervention programs appeal to traditional masculinity standards, asking men to take on a heroic mantle to intervene to save others. In this way, these programs participate in the expectation that men must meet a standard of “manly courage” in order “to adhere to an ideal of manliness.”³⁷⁰ Men are “expected to prove their manliness through acts of valor,”³⁷¹ of which bystander intervention is one demonstration.

Indeed, the literature on rescues demonstrates its gendered nature. “Most rescuers are young males, particularly when strangers are rescued or the rescue is risky.”³⁷² And, “[m]en are more likely to help in emergency situations or when ‘heroic, chivalrous’ help is appropriate” than they are in non-emergency situations.³⁷³ Men have been found to increase their helping behaviors when groups of female bystanders are present, likely because they “embrace the sex role

370. John M. Kang, *Does Manly Courage Exist?*, 13 *NEV. L.J.* 467, 470 (2013).

371. *Id.*

372. Hyman, *supra* note 108, at 657.

373. Shawn Meghan Burn, *A Situational Model of Sexual Assault Prevention Through Bystander Intervention*, 60 *SEX ROLES* 779, 782 (2009) (quoting Alice H. Eagly & Maureen Crowley, *Gender and Helping Behavior: A Meta-Analytic Review of the Social Psychological Literature*, 100 *PSYCHOL. BULL.* 283, 283 (1986)).

stereotype that men should intervene heroically and are thus significantly more likely to intervene themselves.”³⁷⁴

Rather than relying on stereotypes about men as heroes and women as requiring rescue, bystander intervention programs should focus on bystander intervention as something that responsible human beings do. Instead of enjoining men to “man up” and intervene, bystander intervention training should encourage intervention as an act of good citizenship and civic responsibility that human beings living together in a society should perform in order to promote human flourishing.

3. RACE AND BYSTANDER INTERVENTION

Finally, there is a significant risk that bystander intervention could be deployed in a racialized manner. There is a long history of law ascribing to black men the intent to rape white women,³⁷⁵ and, because of racial biases, black men are often perceived as more “threatening” than white men.³⁷⁶ Further, white people have historically been very quick to intervene in the lives of members of other racial groups, particularly in the areas of child protection and welfare, and may be prone to do so again in this context.³⁷⁷ Moreover, people of color usually comprise just a small minority of students on college campuses, and bystander intervention programs and studies have acknowledged that their over-dependency on white students as their source of information may mean that bystander intervention plays out in a different way for students of color, and in particular for black students. One study, which focused on “race as a function of bystander behavior,” emphasized that bystanders tend to be less motivated to intervene in problems involving “‘out groups’ or groups with whom the bystander does not feel socially connected.”³⁷⁸ In “staged emergency

374. Banyard, *supra* note 7, at 224 (quoting Mark Levine & Simon Crowther, *The Responsive Bystander: How Social Group Membership and Group Size Can Encourage as Well as Inhibit Bystander Intervention*, 95 J. PERSONALITY & SOC. PSYCHOL. 1429, 1433 (2008)).

375. See, e.g., Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015) (“From Emmett Till to the Central Park Five, American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women . . .”).

376. DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (2010).

377. See, e.g., Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432 (1991).

378. Whitcomb, *supra* note 64, at 9.

situations,” white participants offered help “more slowly and less often” when the target of the emergency was black.³⁷⁹ Further, “white participants constructed the situation as less severe when the target was black.”³⁸⁰ Thus, a bystander witnessing a staged “aggressive fight between the couple outside the party may not intervene because of . . . gender or race. If the victim was female, or black, for example (given that the bystander is a white male) he may feel less inclined to help due to their lack of common ground,” in terms of both gender and race.³⁸¹ These issues, in addition to those raised by the aforementioned legal impediments, will need to be addressed if bystander intervention is to be a helpful tool in resolving the serious social issues of bullying, sexual misconduct, and harassment.

CONCLUSION

Bullying in schools and online, sexual misconduct on college campuses, and harassment in the workplace are significant social problems for American society. Bystander intervention training represents the next wave in attempting to prevent and address these harms, but social problems have been notoriously difficult to combat. One scholar describes the path commonly taken when trying to solve these kinds of difficult issues:

In working against racial discrimination, sexual harassment, and domestic violence, our society has followed a similar sequence of reactions to the behavior. First, we denied that the behavior existed, did significant harm, or was intentional. Included in this denial phase were attitudes that rationalized the abusive behavior. As recently as the 1970s, I can remember hearing people explaining domestic violence by saying, “He just doesn’t know his own strength,” or “Men are like that.”

Second, we blamed targets by claiming that they provoked the abusive behavior through their own actions or inactions. A woman reporting sexual harassment might have been told, “Look at the blouses you wear!” We advised targets about how to stop the abusive behavior, as though they had the power to make the abuser stop. Targets of domestic violence were advised to avoid spousal abuse by learning to cook better or submit to their husband in order to protect the

379. *Id.*

380. *Id.*

381. *Id.*

fragile male ego. There is a significant risk that this advice further solidified beliefs held by targets that they were to blame for the abuse. This intervention does little to change abusive behaviors and nothing to hold abusers responsible for their actions.

The next step we traveled in all these examples of abuse represents a critical shift from holding targets responsible to holding abusers responsible. In this step our society attempted to convince abusers to stop through public information campaigns stressing the negative effects of abusive behavior.

Although these campaigns were well meaning, by themselves these efforts have been largely ineffective because they ignore the reality that many abusers already know that their behavior hurts their targets and choose their actions for that purpose.

Finally, our society has worked for successful change through a combination of strategies. These strategies include clearly defining the behavior to be changed, enforcing rules and laws to raise the cost of the behavior to the perpetrator, modeling positive behavior, and changing the widespread acceptance of the behavior. This combination of interventions has been the most effective tool in changing social patterns of abuse.³⁸²

Now, to this combination of interventions, we add bystander intervention training. Policymakers and advocates are optimistic about its potential and believe that bystander intervention represents our best hope of solving these problems. However, if it is to achieve these aspirations, bystander intervention must grapple with a powerful countervailing force: the law and its legal norms of nonintervention. Bystander intervention tries to create a norm of intervention, but legal norms of nonintervention conflict with that project. Legal norms, particularly those surrounding the no-duty-to-rescue and no-state-duty-to-protect rules, push back against the possibility of intervention. Further, a lack of legal accountability for the institutional actors that contribute to these harms has created a culture of indifference that discourages bystander intervention. Finally, a fear of personal liability or other legal risks also weighs in favor of non-intervention.

In order to overcome these legal impediments, four changes need to occur. First, the duty to rescue and report currently found in a minority of states should be expanded to more jurisdictions. Second,

382. DAVIS & DAVIS, *supra* note 67, at 30-31.

campuses should enact and publicize Good Samaritan protections for bystanders who do intervene. Third, bystander intervention training programs need to more explicitly acknowledge and address the conflict created by legal norms. And, finally, a community responsibility framework in which the state, institutions, small organizations, and individual perpetrators themselves are all held accountable must be implemented. While some additional concerns will also need to be addressed as bystander intervention initiatives develop, perhaps, with these legal impediments thus overcome, bystander intervention can flourish and assist in finally eliminating these significant social harms.