Police Policing Police

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Abstract

Police killings of George Floyd and at least 2,218 other Black Americans since 2015 amplified a racial reckoning and intensified demands for meaningful, overdue police reform. This Article is the first legal scholarship to argue that Congress and state legislatures across the United States should enact criminal laws creating a law enforcement officer duty to intervene in their colleagues' misuse of force. These federal and state statutes should be bolstered by law enforcement agencies' internal policies mandating the same obligation. Introducing criminal liability for inaction could prod officers to stop their peers' serious misconduct and would promote accountability for those officers who remain bystanders. This Article presents a model statute for this officer duty to intervene and rebuts counterarguments, drawing on a case study of Derek Chauvin murdering Floyd for illustrations.

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This Article is current as of March 1, 2023. Any errors are mine alone.

Quis custodiet ipsos custodes?
[Who is to guard the guards themselves?]
—Juvenal (Roman Poet)[1]

INTRODUCTION

Police have killed at least 2,219 Black Americans since 2015[2]—more than three times the rate of White Americans,[3] despite Black Americans representing less than a fifth of the White population in the United States.[4] Similarly, Native Americans[5] and Hispanic Americans[6] are disproportionately slain by officers. Fatality rates among *un-*

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1 Juvenal, *Satire VI*, *in* THE SATIRES OF JUVENAL, PERSIUS, SUPICIA, AND LUCILIUS 51 (Lewis Evans trans., London, Henry G. Bohn 1852); D. IUNII IUVENALIS, SATIRAE 71 (John Delaware Lewis trans., London, Trübner & Co. 1873).

2 *See National Trends*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/nationaltrends [https://perma.cc/F23M-DL2V] (compiling and analyzing data of every fatal use of force against Black victims by on- and off-duty police officers from January 2015 to December 2022). Exact figures are unknown because police killings in the United States have reportedly been undercounted by more than half in recent decades. *See* Andrew Ba Tran, Marisa Iati & Claire Healy, *As Fatal Police Shootings Increase, More Go Unreported*, WASH. POST (Dec. 6, 2022, 6:30 AM), https://www.washingtonpost.com/investigations/interactive/2022/fatal-police-shootings-unreported/ [https://perma.cc/54FY-CH9U]; Fablina Sharara et al., *Fatal Police Violence by Race and State in the USA, 1980–2019: A Network Meta-Regression*, 398 LANCET 1239 (2021); Tim Arango & Shaila Dewan, *More Than Half of Police Killings Are Mislabeled, New Study Says*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/30/us/police-killings-undercounted-study.html [https://perma.cc/3E8C-XSRN]; Peter Neufeld, Keith Findley & Dean Strang, Opinion, *Thousands of Missed Police Killings Prove We Must Address Systemic Bias in Forensic Science*, WASH. POST (Oct. 15, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/10/15/medical-examiners-forensics-bias-police-killings/ [https://perma.cc/SG6T-34YY].

3 *See* Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013–2017*, PLOS ONE (June 24, 2020), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0229686&type=printable [https://perma.cc/46CP-RFMM] (finding that, from 2013 to 2017, Black people were 3.23 times more likely than White people to be killed by police).

4 *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/L4YN-SGU3] (indicating that, based on the U.S. Census, the race and Hispanic origin category of "White alone" comprised 75.8% of the total U.S. population in 2021, and the category of "Black or African American alone" constituted 13.6%).

5 U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 31 (2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/X5HL-SWAE] ("Native Americans are . . . being killed in police encounters at a higher rate than any other racial or ethnic group.").

6 *See* Russell Contreras, *Activists: Police Killings of Latinos Lack Attention*, WASH. POST (Aug. 17, 2020, 1:36 PM), https://www.washingtonpost.com/health/activists-police-killings-of-latinos-lack-attention/2020/08/17/33b47b4c-e0b0-11ea-82d8-5e55d47e90ca_story.html [https://perma.cc/HW6C-SLTY]; Silvia Foster-Frau, *Latinos Are Disproportionately Killed by Police but Often Left Out of the Debate About Brutality, Some Advocates Say*, WASH. POST (June 2, 2021, 6:00 AM), https://www.washingtonpost.com/national/police-killings-latinos/2021/05/31/657bb7be-b4d4-11eb-a980-a60af976ed44_story.html [https://perma.cc/N2LG-LQUL].

armed minorities are especially high as compared with their White counterparts.[7] Commentators have characterized this slew of deaths as evidence of "systemic racism,"[8] a "public health emergency" for minorities,[9] and even part of a broader "Crime[] against Humanity" against Black people in the United States.[10] In many of these fatal incidents, as well as in encounters that are not lethal,[11] police misused force in the presence of other officers who chose not to intervene.[12]

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7 Elle Lett, Emmanuella Ngozi Asabor, Theodore Corbin & Dowin Boatright, *Racial Inequity in Fatal US Police Shootings, 2015–2020*, 75 J. EPIDEMIOLOGY & CMTY. HEALTH 394, 394 (2021) (finding that fatal police shootings of unarmed Black victims were three times higher and of unarmed Native Americans victims were forty-five percent higher than for White victims).

8 Stephanie Nebehay, *U.N. Rights Chief Says George Floyd Murder Case Shows Scale of Systemic Racism*, REUTERS (Apr. 21, 2021, 4:40 PM), https://www.reuters.com/world/us/un-rights-chief-says-george-floyd-murder-case-shows-scale-systemic-racism-2021-04-21/ [https://perma.cc/V6AQ-DP6N].

9 Lett et al., *supra* note 7, at 394; Brita Belli, *Racial Disparity in Police Shootings Unchanged over 5 Years*, YALENEWS (Oct. 27, 2020), https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years [https://perma.cc/CXR2-TR8J].

10 *E.g.*, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON SYSTEMIC RACIST POLICE VIOLENCE AGAINST PEOPLE OF AFRICAN DESCENT IN THE UNITED STATES 16 (2021), https://inquirycommission.org/website/wp-content/uploads/2021/04/Commission-Report-15-April.pdf [https://perma.cc/VV2L-NCP8] ("The Commissioners find a *prima facie* case of Crimes against Humanity warranting an investigation by the International Criminal Court (ICC). The crimes under the Rome Statute include: Murder, Severe Deprivation of Physical Liberty, Torture, Persecution of people of African descent, and other Inhumane Acts, which occurred in the context of a widespread or systematic attack directed against the civilian population of Black people in the U.S.").

11 Unlike with fatal police shootings, there is no comprehensive data on such incidents that are nonlethal. *See* Brian Howey, Wesley Lowery & Steven Rich, *The Unseen Toll of Nonfatal Police Shootings*, WASH. POST (Oct. 21, 2022, 6:30 AM), https://www.washingtonpost.com/investigations/interactive/2022/police-shootings-non-fatal/ [https://perma.cc/TU9G-FPN8].

12 *See, e.g.*, Figueroa v. Mazza, 825 F.3d 89, 108 (2d Cir. 2016) (concluding that an assault of less than twenty seconds does not, as a matter of law, absolve present officers of their duty to intervene); Mendoza v. Mclean, No. 14-CV-3231, 2016 WL 3542465, at *5 (S.D.N.Y. June 23, 2016) ("[A] reasonable jury could conclude Officer Hollifield should have perceived the use of force by Officer McLean via K9 Rommel was excessive, and that Officer Hollifield had the opportunity and sufficient time to stop it, yet he allowed it to continue."); Simcoe v. Gray, 577 F. App'x 38, 40 (2d Cir. 2014) (finding that the district court failed to address plaintiff's testimony that he was assaulted after being handcuffed and that bystander officers failed to intervene); Anderson v. Branen, 17 F.3d 552, 557–58 (2d Cir. 1994) (finding that the district court failed to consider evidence indicating that the bystander officer had a realistic opportunity to intervene during the incident); *see also* ACTIVE BYSTANDERSHIP FOR L. ENF'T (ABLE) PROJECT, THE LEGAL DUTY TO INTERVENE BY LAW ENFORCEMENT OFFICERS: A COMPENDIUM OF KEY CIRCUIT CASES (2021), https://drive.google.com/file/d/1ZLGqtt7puWyA9NIVdSco5fy3yP-NcP9E/view [https://perma.cc/RTK9-U9YJ] (identifying cases in each U.S. federal circuit involving police bystanderism amid their peers' misuse of force); MARK G. PETERS & PHILIP K. EURE, POLICE USE OF FORCE IN NEW YORK CITY: FINDINGS AND RECOMMENDATIONS ON NYPD'S POLICIES AND PRACTICES 1, 31 (2015), https://www.nyc.gov/html/oignypd/assets/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf [https://perma.cc/5VFV-A4AQ] (The New York Police Department's Civilian Complaint Review Board identified a substantial number of

Even in situations where the nonintervening witnessing officers could have attempted to help the victim and were arguably required to do so, few of them have been held accountable.[13]

In one of the most high-profile recent cases ("the Chauvin case"), on May 25, 2020, Derek Chauvin killed George Floyd in Minneapolis, Minnesota, while three other officers who were at the scene declined to intervene.[14] Indeed, Floyd might still be alive had one or more of them tried to stop Chauvin's misuse of force.[15] (Other scholars make the same argument about additional instances of fatal police violence in the presence of other officers.[16])

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the 179 substantiated allegations of excessive or unnecessary force between 2010 and 2014 in which "a bystander officer . . . was present and, . . . could have intervened and potentially prevented the use of force. Despite such opportunities, however, bystander officers intervened in very few instances."); Joseph B. Evans, *Promise for Plaintiffs in Civil Bystander Liability Claims Against Police Officers*, FORDHAM URB. L.J. (July 17, 2016), https://news.law.fordham.edu/fulj/2016/07/17/promise-for-plaintiffs-in-civil-bystander-liability-claims-against-police-officers/ [https://perma.cc/5C9C-EFFG] (discussing *Figueroa* and *Mendoza*); BARBARA ATTARD, THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: INDEPENDENT OVERSIGHT AND POLICE PEER INTERVENTION TRAINING PROGRAMS THAT BUILD TRUST AND BRING POSITIVE CHANGE 4 (2015), https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/115/attachments/original/1458136192/Barbara-Attard-Task-Force-on-21st-Century-Policing.pdf [https://perma.cc/Z5G6-5U3C] ("Many, if not most [police] officers, will, at some point in their career, find themselves caught between two very unsatisfactory choices. While they do not perpetrate serious misconduct or crimes themselves, they are often passive bystanders and observers of misconduct by fellow officers.").

13 *See, e.g.*, *infra* note 308 and accompanying text.

14 *See* Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/HGA6-BPPS].

15 Maryland's former chief medical examiner, Dr. David Fowler, testified during the Chauvin trial that the sudden cardiac arrest that he believes killed Floyd could have been reversible. *See* Laurel Wamsley & Vanessa Romo, *Defense Medical Expert: Floyd's Manner of Death "Undetermined," Not "Homicide,"* NAT'L PUB. RADIO (Apr. 14, 2021, 4:01 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/14/987134841/watch-live-defense-testimony-resumes-in-derek-chauvins-trial [https://perma.cc/H7RP-8VR9]; Will Wright, *13 Key Moments that Shaped the Trial of Derek Chauvin*, N.Y. TIMES (June 25, 2021), https://www.nytimes.com/2021/04/20/us/derek-chauvin-trial-george-floyd-recap.html [https://perma.cc/PN5P-K3MZ]; *see also* W. Neil Eggleston, Opinion, *George Floyd Might Still Be Alive if an Officer like Cariol Horne Had Been There*, WASH. POST (June 25, 2021, 3:56 PM), https://www.washingtonpost.com/opinions/2021/06/25/cariol-horne-police-duty-intervene-chauvin/ [https://perma.cc/4JNQ-2BS3] ("If only someone like Horne were present during the arrest of Floyd . . . , Floyd would still be alive.").

16 *See, e.g.*, Akiv J. Dawson, Kwan-Lamar Blount-Hill & Guy Hodge II, *Officer-Involved Deaths and the Duty to Intervene: Assessing the Impact of DTI Policy in New York City, 2000-2019*, 45 POLICING: AN INT'L J. 662, 670 (2022) ("Many notable [multiple police officer-involved deaths,] such as Eric Garner, Freddie Gray, and Laquan MacDonald, may have been prevented had bystander officers intervened.").

For his active part in the killing, Chauvin was convicted in state court of murder and manslaughter,[17] and he pleaded guilty in federal court to willfully depriving Floyd of his constitutional rights in violation of 18 U.S.C. § 242 (regarding deprivation of rights under color of law).[18] The other policemen who were present—J. Alexander Kueng, Thomas Lane, and Tou Thao—were convicted in federal court, also under 18 U.S.C. § 242.[19] All three were found guilty of willfully failing to provide Floyd medical aid.[20] Kueng and Thao were additionally found guilty of willfully depriving Floyd of his right to be free from unreasonable force when they willfully failed to intervene in Chauvin's abuse.[21] In state court, Kueng and Lane pleaded guilty to aiding and abetting second degree manslaughter.[22] As of March 1, 2023, Thao still faces state charges for aiding and abetting second degree

17 Tim Arango, *Derek Chauvin Is Sentenced to 22 and a Half Years for Murder of George Floyd*, N.Y. Times (July 14, 2021), https://www.nytimes.com/2021/06/25/us/derek-chauvin-22-and-a-half-years-george-floyd.html [https://perma.cc/6ZZ8-JSYA].

18 Press Release, U.S. Dep't of Just., Former Minneapolis Police Officer Derek Chauvin Pleads Guilty in Federal Court to Depriving George Floyd and a Minor Victim of Their Constitutional Rights (Dec. 15, 2021), https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-pleads-guilty-federal-court-depriving-george [https://perma.cc/KPT8-GTFB].

19 Press Release, U.S. Dep't of Just., Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022), https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death [https://perma.cc/P3WC-LHN7].

20 *Id.*

21 *Id.* Lane was not charged with failing to intervene because of his (ineffective) questioning to Chauvin about repositioning Floyd. *See* Tim Arango, Nicholas Bogel-Burroughs & Jay Senter, *Ex-Officers Guilty in Federal Trial over George Floyd's Death*, N.Y. Times (Feb. 24, 2022), https://www.nytimes.com/live/2022/02/24/us/george-floyd-trial-verdict [https://perma.cc/2SA6-T5V4] (noting that Lane twice asked Chauvin if they should roll Floyd on his side so he could breathe more easily).

22 Brad Parks & Eric Levenson, *Ex-Minneapolis Police Officer Thomas Lane Pleads Guilty to Aiding and Abetting Second-Degree Manslaughter in George Floyd's Death*, CNN (June 6, 2022, 10:32 AM), https://www.cnn.com/2022/05/18/us/thomas-lane-george-floyd-guilty/index.html [https://perma.cc/DRK3-8AE4]; Jon Collins, *Kueng Pleads Guilty to Aiding Manslaughter in George Floyd's Killing*, MPRNews (Oct. 24, 2022, 10:07 AM), https://www.mprnews.org/story/2022/10/23/two-former-officers-charged-in-george-floyds-killing-begin-state-court-trial [https://perma.cc/C7K3-7R8F].

manslaughter.[23] All three officers may have also violated their police department's policy.[24]

The successful prosecutions of Kueng, Lane, and Thao demonstrate that officers declining to intervene in their colleagues' misuse of force can constitute *criminal* misconduct. However, Kueng, Lane, and Thao's convictions at the federal level, Kueng and Lane's guilty pleas at the state level, and Thao's possible conviction at the state level, do not obviate the need for more—and more effective—avenues of passive-police accountability. Such convictions and guilty pleas are rare,[25] if not unprecedented,[26] and difficult to obtain under current laws because acts and omissions of police officers who witness their colleagues' misuse of force are not as overtly criminal as the colleagues' misconduct.[27] This all-too-familiar situation of officer inaction during their peers'[28] abuse underscores the need for new laws and regulations aimed at preventing and punishing police "bystanderism."[29] Indeed,

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23 Laurel Wamsley, *Just Before a Trial Concerning George Floyd's Murder, An Ex-Officer Pleads Guilty*, NAT'L PUB. RADIO (Oct. 24, 2022, 11:56 AM), https://www.npr.org/2022/10/24/1129993078/george-floyd-tou-thao-j-alexander-kueng-trial [https://perma.cc/WFP5-KAMG]. Evidence in Thao's state court bench trial is due to be submitted to the presiding judge by January 31, 2023, with a verdict expected within ninety days of that deadline. *See 27-CR-20-12949: State v. Tou Thao*, MINN. JUD. BRANCH, https://www.mncourts.gov/Media/StateofMinnesotavTouThao.aspx [https://perma.cc/8H3Y-88B9].

24 *See infra* note 367 and accompanying text.

25 Shaila Dewan, *A New Message for Police: If You See Something, Say Something*, N.Y. TIMES (Feb. 27, 2022), https://www.nytimes.com/2022/02/27/us/police-intervention-minneapolis-george-floyd.html [https://perma.cc/3NGF-BR6V] (referring to the federal trial of Kueng, Lane, and Thao as "one of the rare attempts to hold officers to account" for bystanderism).

26 The prosecution of Kueng, Lane, and Thao was "the very first federal criminal trial of an officer for failing to intervene against a superior officer." William Brangham, Courtney Norris & Sam Lane, *What a Minnesota Trial Says About Police Officers' Responsibility to Intervene*, PBS NEWSHOUR (Feb. 17, 2022, 6:40 PM) (quoting Interview by William Brangham with Christy Lopez, former Deputy Chief, C.R. Div., U.S. Dep't of Just.), https://www.pbs.org/newshour/show/what-a-minnesota-trial-says-about-police-officers-responsibility-to-intervene [https://perma.cc/LXK6-DTPR].

27 Paul Butler, Opinion, *The Most Important Trial of Police Officers for Killing a Black Man Has Not Yet Happened*, WASH. POST (Apr. 29, 2021, 5:14 PM), https://www.washingtonpost.com/opinions/2021/04/29/next-trial-killing-george-floyd-will-be-real-test/ [https://perma.cc/WJ7N-A56H] (arguing that, because the misconduct of Kueng, Lane, and Thao "is less extreme [than Chauvin's], prosecutors will have a tougher time convincing a jury that these three former officers are criminals").

28 Police who fail to intervene in another officer's misuse of force may be of the same, higher, or lower rank. However, this Article uses "peer" as a synonym for "colleague" as shorthand and because a popular term of art in the literature on police bystanderism is "peer intervention." *See, e.g.*, SUBJECT TO DEBATE (Police Exec. Rsch. F., Wash., D.C.) July–Sept. 2016, at 1, http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2016/debate_2016_julsep.pdf [https://perma.cc/43H2-J7VX].

29 "Bystanderism" is the phenomenon of a person acting as a "bystander." A "bystander"

the trials of Kueng, Lane, and Thao may prove even more consequential than Chauvin's by stimulating police reform specifically involving officers who decline to prevent or stop their colleagues' misuse of force.

The decision by Kueng, Lane, Thao, and so many other "law enforcement officers"[30] ("officers") not to intervene while their colleagues misuse force against civilians raises urgent life-or-death questions. Because a fundamental objective of law enforcement is[31]—and should be[32]—public safety, shouldn't that include disrupting colleagues who violate civilians' rights? Indeed, some police experts have characterized intervening to prevent violence as law enforcement's "central duty" and "core role."[33] In the face of immediate, potentially fatal harm to the victim of violence, the only thing that can stop one officer from misusing force may be another officer.[34] Therefore,

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is "[a] person who is present when something is happening but is not involved; a spectator or onlooker." *Bystander*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/25640?redirectedFrom=bystander#eid [https://perma.cc/6FRY-2EU8].

30 This Article employs "law enforcement officers" as a subject of the Article's proposed duty to intervene because the term is broader than "police," and this Article's discussion applies to such officers beyond police. This Article defines "law enforcement officers" (or "officers") as any federal, state, county, or municipal employee or contractor, authorized by law or by a government agency, whose primary duties are maintaining order and investigating, apprehending, or detaining individuals suspected or convicted of criminal offenses. Law enforcement officers include, but are not limited to, FBI agents, police officers, sheriffs, sheriff deputies, state patrol officers, and corrections officers. For similarly broad definitions of "law enforcement officers," see, for example, 5 C.F.R. § 842.802; 34 U.S.C. § 10534(C)(3); TEX. GOV'T CODE ANN. § 614.171(2) (West 2021).

31 Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 793 (2021).

32 Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 614 (2016) ("[L]aw enforcement culture should seek to instill in officers the priorities of the Guardian: protecting civilians from unnecessary indignity and harm.").

33 Christy E. Lopez, Opinion, *The Uvalde Paradox: So Many Police, So Little Protection*, WASH. POST (July 25, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/07/25/uvalde-report-police-violence-prevention/ [https://perma.cc/G2GT-FUGN].

34 *See* Ruben Navarrette Jr., Opinion, *Haunting Question After George Floyd Killing: Should Good Cops Have Stopped a Bad Cop?*, USA TODAY (June 15, 2020, 12:29 PM), https://www.usatoday.com/story/opinion/2020/06/15/george-floyd-killing-good-cops-must-stop-bad-cops-column/5342116002/ [https://perma.cc/44GJ-LP2R] ("What can stop a bad cop from using excessive force? A good cop. In fact, that may be the only answer."). This perspective is a variation on the National Rifle Association's mantra that "the only thing that stops a bad guy with a gun, is a good guy with a gun." *See* Peter Overby, *NRA: "Only Thing That Stops a Bad Guy with a Gun Is a Good Guy with a Gun,"* NAT'L PUB. RADIO (Dec. 21, 2012, 3:00 PM), https://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun [https://perma.cc/Y7UP-SCD5] (quoting Interview with Wayne LaPierre, Exec. Vice President, Nat'l Rifle Ass'n). However, an officer with a gun is different than a civilian with a gun in, inter alia, the amount of training and experience. *See infra* notes 172–73 and accompanying text.

should criminal laws explicitly require officers to undertake such interventions? If so, what should these statutes entail, and what should be the consequence for violating them? Given that some laws already exist arguably or clearly mandating an officer duty to intervene ("ODTI"), why are they insufficient, and how can they be amended or augmented to be made more effective?

In the wake of so much police abuse, scholars and activists have demanded more effective measures to prevent, prosecute, and punish this violence. Proposals include improving officer training,[35] ensuring police accountability,[36] prohibiting law enforcement from using certain restraints (such as chokeholds[37]), and defunding or even abolishing the police.[38] Litigation against individual officers and their

35 *See, e.g.*, Debo P. Adegbile, *Policing Through an American Prism*, 126 YALE L.J. 2222, 2244–45, 2258 (2017); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 250–52 (2017); Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 976–77, 1007 (2020); Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 231–32 (2015).

36 *See, e.g.*, Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1420 (2015); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 438–39 (2016).

37 *See* Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111, 130–31 (2022) (recommending absolute bar on both air chokes and carotid chokes); *see also* Anna Swanson, Comment, *Revisiting* Garner *with Garner: A Look at Deadly Force and the Use of Chokeholds and Neck Restraints by Law Enforcement*, 57 S. TEX. L. REV. 401, 442–43 (2016) (proposing uniform categorization of neck restraints as deadly force); Nick Cahill & Nicholas Iovino, *Newsom Tells California Police to Stop Using Carotid Chokehold*, COURTHOUSE NEWS SERV. (June 5, 2020), http://www.courthousenews.com/newsom-tells-california-police-to-stop-using-carotid-chokehold/ [https://perma.cc/2M56-VTMQ]; *Denver Fully Bans Chokeholds, Requires Report for Aimed Guns*, AP NEWS (June 8, 2020), https://apnews.com/article/b3db8e06fe1dd75e3e0612875ff9fca2 [https://perma.cc/D9R5-96XJ]; Tammy Webber & Amy Forliti, *Chief Struggles to Change Minneapolis Police Culture; Chokeholds Banned*, NBC L.A. (June 5, 2020, 2:44 PM), https://www.nbclosangeles.com/news/national-international/chief-struggles-to-change-minneapolis-police-culture/2375413/ [https://perma.cc/CN8E-U4JM].

38 *See* ALEX S. VITALE, THE END OF POLICING 4, 30 (2017) (arguing that "most . . . [police] reform[s] fail to deal with the fundamental problems inherent to policing" and that police should be replaced with empowered communities); *see also* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 106–12 (2020) (discussing aspirations of police abolitionists); Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 124–27 (2021) (discussing abolitionist alternatives to police reform); Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 735–37 (2021) (outlining abolitionist framework as an alternative to police reform); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617–20 (2019) (proposing "abolition democracy" that displaces policing and imprisonment); Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1355–58 (2021) (arguing that institutional entrenchment prevents adequate police reform and thus police should be disbanded); Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 320–22 (2020) (advocating for fundamentally rethinking police funding as an alternative to full

departments—including some that is unprecedented[39]—and legislation promoting law enforcement reform and accountability—such as the unenacted George Floyd Justice in Policing Acts of 2020 and 2021[40]—also aim to curb patterns of police brutality.

This Article argues for an additional approach: explicitly punishing "bystander"[41] officers and prodding them to act instead as "upstanders."[42] The frequent law enforcement credo of "to protect and to serve"[43] should apply even—and perhaps especially—when the protection needed is from fellow officers. Indeed, courts have characterized passive police in such situations as "enablers"[44] of the abuse rather than mere bystanders[45] and have effectively found "that officers owe a greater responsibility to intervene to protect individuals

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abolition); Simonson, *supra* note 31, at 811–13 (discussing reforms aimed at increasing direct community control and influence on policing, including police abolition). For broader discussion of police funding and costs, see Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 879–84, 901–05 (2015).

39 For example, in January 2021, the New York State Attorney General sued the New York City Police Department for the first time in state history, alleging widespread abuse in response to protests the previous year against police brutality and systemic racism. Matt Stieb, *New York State Attorney General Sues NYPD for "Pattern of Abuse" at BLM Protests*, N.Y. MAG.: INTELLIGENCER (Jan. 14, 2021), https://nymag.com/intelligencer/2021/01/letitia-james-sues-nypd-for-violent-tactics-at-blm-protests.html [https://perma.cc/8UGU-ST6H].

40 The month after Chauvin killed Floyd, Democrats in the U.S. House of Representatives introduced the original version of this legislation. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020). After the bill failed to advance in the U.S. Senate, Democrats in the House re-introduced it. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021). That bill also failed. *See* Felicia Sonmez & Mike DeBonis, *No Deal on Bill to Overhaul Policing in Aftermath of Protests over Killing of Black Americans*, WASH. POST (Sept. 22, 2021, 7:35 PM), https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34b_story.html [https://perma.cc/SA8Q-W4XY].

41 For the definition of "bystander," see *Bystander*, *supra* note 29.

42 *Upstander*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/220189?rskey=OS8ejT&result=1#eid [https://perma.cc/3B4T-V6Z7] (an "upstander" is "[a] person who speaks or acts in support of a cause, *esp.* one who intervenes on behalf of a person being attacked or bullied"). For the history of this term, see Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1327 n.42 (2019) [hereinafter Kaufman, *Protectors of Predators or Prey*].

43 This credo originated in the Los Angeles Police Department in February 1955. *The Origin of the LAPD Motto*, L.A. POLICE DEP'T, https://www.lapdonline.org/lapd-motto/ [https://perma.cc/27GN-3GJQ].

44 *Enabler*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/61510?redirectedFrom=enabler#eid [https://perma.cc/DSZ3-4EWJ] (an "enabler" is "[a] person who intentionally or unintentionally encourages or enables negative or self-destructive behaviour in another").

45 *See, e.g.*, O'Neill v. Krzeminski, 839 F.2d 9, 12 (2d Cir. 1988) (characterizing certain police bystanders as "tacit collaborator[s]"); United States v. Koon, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994) ("[T]he constitutional right violated by the passive [police officer aware of a peer's

from harm inflicted by fellow officers than they do to protect individuals from harm inflicted by members of the general public."[46] Officers should not only be statutory "mandatory reporters" (which some other professions already are[47]), but they should also be what I would call statutory "mandatory interveners" (which at least one other professional already is, although only of subordinates[48]).

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misuse of force] is analytically the same as the right violated by the person who strikes the blows."), *rev'd on other grounds*, 518 U.S. 81 (1996).

46 ACTIVE BYSTANDERSHIP FOR L. ENF'T (ABLE) PROJECT, AN OVERVIEW OF THE LEGAL DUTY TO INTERVENE BY LAW ENFORCEMENT OFFICERS 5 (2021) (citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989)), https://drive.google.com/file/d/1cN3tfgLgQqU8Nnm-NnTjtibb3733BEx1/view [https://perma.cc/N2M5-A3S7].

47 Mandatory reporter laws (also known as "mandatory reporting laws") require certain professionals to report particular misconduct. Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37–38 (2013) (describing the history of mandatory reporting laws in the context of child abuse). All fifty U.S. states have enacted such statutes. Jonathan Todres, *Can Mandatory Reporting Laws Help Child Survivors of Human Trafficking?*, 2016 WIS. L. REV. FORWARD 69, 70. The ABA Model Rules of Professional Conduct impose on lawyers a duty to report certain misconduct of other lawyers and of judges. MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 1983). All fifty U.S. states have adopted this model rule or a variation of it. CPR POL'Y IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.3 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-3.pdf [https://perma.cc/6X74-WM3R].

48 The ABA Model Rules of Professional Conduct impose on lawyers who are partners, managers, or supervisors in a law firm a duty to intervene in certain misconduct of a subordinate lawyer. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 1983). All fifty U.S. states have adopted this model rule or a variation of it. CPR POL'Y IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.1 (2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-5-1.pdf [https://perma.cc/2C68-3Z9W].

Some other professionals—such as physicians, nurses, babysitters, lifeguards, bodyguards, firefighters, and even police officers themselves—are *required to intervene by contract* in certain circumstances. *See* Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) (identifying "where one has assumed a contractual duty to care for another" as a situation "in which the failure to act may constitute breach of a legal duty"); People v. Beardsley, 113 N.W. 1128, 1129 (Mich. 1907) (recognizing that death immediately and directly caused by the omission of a legal duty, whether "imposed by law or by contract," supports a charge of manslaughter); People v. Montecino, 152 P.2d 5, 13 (Cal. Distr. Ct. App. 1944) (holding that a nurse who had been contracted to provide care at an individual's home is liable for failing to render aid); Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 693 (2002) ("Under contract law, there is a duty to rescue—a duty imposed on an actor in a contractual context to bestir himself to take a low-cost, low-risk, and otherwise reasonable action that will forestall a major loss to another."); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 557–58 (1988) ("An express contract to provide services creates an obligation to perform those services properly. Where those services are closely related to protecting or caring for dependent persons, courts have imposed criminal liability when a failure to provide the services leads to a prohibited harm such as death. Further, at least one court has found, in the absence of an express agree-

Because Congress has failed to enact meaningful nationwide police reform[49] and possesses limited authority over state and local law enforcement,[50] pursuing this proposal only at the federal level may not be effective.[51] Therefore, Congress *and* all state legislatures should enact criminal laws, and all "law enforcement agencies"[52] ("agencies")

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ment, an implied contract to provide necessities or essential care to a dependent person that give rise to a legal duty to provide such care." (footnote omitted)); Peter M. Agulnick & Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT'L L. REV. 93, 101–02 (1998) ("[C]ontractual parties sometimes have a duty to rescue victims in peril—especially those whom they contracted to protect. Thus, a physician has a duty to his patient, and a babysitter has a duty to protect a minor child under his care. . . . Any omission of these duties is usually criminal. . . . [O]ne can be guilty for failing to rescue another, even though the victim in peril was not a contracting party. For instance, if a municipality contracts with a lifeguard to watch a beach, the lifeguard owes a duty to the swimmers even though he has not contracted with each individual swimmer." (footnotes omitted)); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 426 (1985) ("[T]he duty [to render aid] may be brought about by contract. A lifeguard, for example, agrees to rescue drowning swimmers as one of the terms of his employment. Firemen, police, nurses, babysitters, and many others enter into agreements that require them to render aid." (footnote omitted)); Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 396 (1998) ("A duty to aid or assist another may be created by contract. This contractual obligation can be expressed or implied. Typical examples of how an obligation arises in this category include a lifeguard's duty owed to a swimmer, a babysitter's duty owed to a child[,] and a doctor's duty owed to his patient. The person in peril need not be a party to the contract for the duty to exist." (footnotes omitted)); David C. Biggs, *"The Good Samaritan Is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 22 U. DAYTON L. REV. 225, 228 (1997) ("Sometimes the duty to act and the criminal responsibility imposed for failure to act are based upon contract. A security person hired to protect another cannot fail to perform the duties he contracted to complete. If his failure to act causes physical harm to another, the individual with the duty will be held criminally liable.").

Additional professionals—such as flight crew members and medical staff—are *encouraged to intervene by organizational policy* in particular situations. *See* Jonathan Aronie & Christy E. Lopez, *Keeping Each Other Safe: An Assessment of the Use of Peer Intervention Programs to Prevent Police Officer Mistakes and Misconduct, Using New Orleans' EPIC Program as a Potential National Model*, 20 POLICE Q. 295, 300–03 (2017).

49 Hassan Kanu, *Congress Fails on Police Reform. Now What?*, REUTERS (Oct. 12, 2021, 12:42 PM), https://www.reuters.com/legal/government/congress-fails-police-reform-now-what-2021-10-08/ [https://perma.cc/XP4Z-KVSN].

50 *See* JARED P. COLE, CONG. RSCH. SERV., R44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES (2016), https://sgp.fas.org/crs/misc/R44104.pdf [https://perma.cc/BAC3-99NE] (discussing constitutional constraints on Congress's ability to enact police reform legislation).

51 *See* Erwin Chemerinsky, Opinion, *To Rein In the Police, Look to the States, Not the Court*, N.Y. TIMES (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/opinion/police-supreme-court-states.html [https://perma.cc/4MQH-MMSR] ("At least for now, . . . protections against the police must come from state and local governments.").

52 This Article employs "law enforcement agencies" as a subject of the Article's proposed duty to intervene because the term is broader than "police departments" and this Article's discussion applies to such agencies beyond police departments. This Article defines "law enforce-

should adopt internal rules, imposing a duty on officers to intervene in their peers' misuse of force against civilians. To make this duty—which the overwhelming majority of officers themselves already generally favor in principle[53]—effective, officers should receive compulsory training on when and how to intercede and should suffer appropriate sanctions for noncompliance. A legal duty requiring officer peer intervention would be a type of "Bad Samaritan law": a statute that imposes a legal duty to assist others in peril through interceding directly (also known as "the duty to intervene," "the duty to rescue," or "the duty to aid") or notifying authorities (also known as "the duty to report").[54]

This Article is the first piece of legal scholarship to comprehensively consider the role of officers as bystanders and upstanders in their peers' misuse of force against civilians and to propose *criminal* Bad Samaritan laws specifically mandating officer peer intervention. The narrowness of this Article's proposed duty to intervene—just by officers and only when their colleagues attempt to or actually misuse force in their presence—makes it more likely to be enacted and enforced than a broader Bad Samaritan law. In contrast, most legal scholarship on bystanders and upstanders (by others[55] and myself[56]) concentrates on civilian conduct. Such literature primarily examines

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ment agencies" (or "agencies") as any federal, state, county, or municipal agency, authorized by law or by a government agency, which employs law enforcement officers. Law enforcement agencies include but are not limited to the FBI, police departments, and sheriffs' offices. For similarly broad definitions of "law enforcement agencies," see 34 U.S.C. § 10534(c)(2); TEX. GOV'T CODE ANN. §§ 614.015(a), 614.171(1) (West 2021).

53 *See infra* notes 449, 482 and accompanying text.

54 Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1122 (2021) [hereinafter Kaufman, *Digital Age Samaritans*] (defining "Bad Samaritan laws"); Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1325 (same).

55 For recent discussion of Good and Bad Samaritanism by other scholars, see, for example, Travis Coon, Comment, *Hike at Your Own Risk: In Support of No-Rescue Wilderness Designations*, 124 PENN ST. L. REV. 529, 532–43 (2020) (addressing the context of Americans venturing into remote and wild areas); Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, 21 GERMAN L.J. 598, 599–600 (2020) (addressing the context of migration); Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 652–59 (2020) (same); Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1028–35 (discussing bystander intervention initiatives). For a list of additional scholarship on Good and Bad Samaritanism, see Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1328 n.43.

56 *See generally* Kaufman, *Digital Age Samaritans*, *supra* note 54 (centering on spectators who view, document, or share evidence of crimes electronically, including through social media and mobile devices); Kaufman, *Protectors of Predators or Prey*, *supra* note 42 (focusing on witnesses to sexual crimes in the United States); Zachary D. Kaufman, *Lessons from Rwanda: Post-Genocide Law and Policy*, 31 STAN. L. & POL'Y REV. ONLINE 1, 20–21 (2019) (arguing that one of ten lessons from the 1994 Genocide against the Tutsi in Rwanda is that, amid atrocity crimes, "upstanderism is imperative").

three case studies, all involving sexual crimes among *civilians*.[57] What little legal scholarship exists on mandating *officer* intervention to protect civilians is distinct from this Article. A recent article concentrates on *agency policy* and proposes *agency adoption* of one such *existing model ODTI*.[58] In contrast, this Article focuses on *statutory law* and prescribes *legislative enactment* of an *original, improved model ODTI*. A brief commentary that discusses police peer nonintervention proposes only *civil* remedies[59] rather than the *criminal* sanctions recommended by this Article. A student essay focuses on an ODTI where the origin of the harm is either *a civilian or is unspecified*[60] rather than caused, as in this Article, specifically by *a fellow officer*. That student proposal, in addition to *not being enacted* by legislatures, has also been *explicitly rejected* by the U.S. Supreme Court.[61]

Although the suggestion to sanction officer peer nonintervention may appear foreign to the American legal system—which generally rejects both criminal[62] and tort[63] liability for inaction—related statutes

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57 For discussion of limited, repetitive case studies in legal scholarship on bystanders and upstanders, see Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1127; Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1328.

58 Delores Jones-Brown, Akiv Dawson, Kwan Lamar Blount-Hill, Kenethia McIntosh Fuller, Paul Oder & Henry F. Fradella, *Am I My Brother's Keeper? Can Duty to Intervene Policies Save Lives and Reduce the Need for Special Prosecutors in Officer-Involved Homicide Cases?*, 34 CRIM. JUST. STUD. 306, 307–08 (2021) (finding that, of the policies in the police departments of the thirty largest cities in the United States, twelve have duties to intervene). Like this Article finds about statutory laws mandating an ODTI, *see infra* Part I, that article finds significant variation among the agency policies it describes, *see* Jones-Brown et al., *supra*, at 332–33.

59 Frank Rudy Cooper, Suzette Malveaux & Catherine E. Smith, Opinion, *How Allowing Civil Lawsuits Against Bystander Cops Could Change Police Culture*, WASH. POST (June 17, 2020, 11:47 AM), https://www.washingtonpost.com/opinions/2020/06/17/we-must-tear-down-blue-wall-silence-heres-how-civil-lawsuits-could-help/ [https://perma.cc/FCT9-2WC2].

60 Almost forty years ago, a law school student published a comment advocating "a police duty to rescue, by which police and highway patrol officers owe a legal duty to come to the aid of citizens in danger of serious physical harm." Lisa McCabe, Comment, *Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?*, 72 CALIF. L. REV. 661, 669 (1984). In contrast to that Comment, which recommends *tort* liability for violating such a duty, *id.* at 661, this Article proposes *criminal* sanctions. Furthermore, although that Comment's suggested police duty applies *generally* to any member of the public in distress, *id.* at 673, this Article's proposal focuses on civilians *specifically* subject to officers' misuse of force.

61 *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989); Castle Rock v. Gonzalez, 545 U.S. 748, 768–69 (2005). For further discussion of *DeShaney* and *Castle Rock*, see Laura Oren, DeShaney*'s Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine:* DeShaney *Is Still Wrong and* Castle Rock *Is More of the Same*, 16 TEMP. POL. & C.R. L. REV. 47 (2006); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990).

62 *See* John Kleinig, *Criminal Liability for Failures to Act*, 49 L. & CONTEMP. PROBS. 161,

that apply regardless of profession have already been enacted throughout the United States. As I have previously documented in an article[64] and a database,[65] Bad Samaritan laws are far more prevalent and longstanding in the United States than other scholars have previously recognized.[66] Such laws in the United States date back to the eighteenth century.[67] Many were prompted by cases of bystanderism that shocked the public conscience, particularly incidents involving sexual crimes.[68] Bad Samaritan laws applying to most or all physically present witnesses already exist, with varying scopes and requirements, in twenty-nine states—including Minnesota,[69] where Chauvin killed Floyd—and Puerto Rico,[70] and Congress enacted a narrow federal

161 (1986) ("In Anglo-American law, the failure to act provides a ground for criminal sanctions only where there is a pre-existing legal duty to act.").

63 *See* Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law,* 82 TUL. L. REV. 1447, 1452 (2008) ("With a few exceptions, the general rule in American tort law is that bystanders will not be liable to a victim for their failure to affirmatively aid.").

64 Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1326, 1345–48.

65 *Bad Samaritan Laws*, ZACHARY D. KAUFMAN [hereinafter *Database 1*], http://www.zacharykaufman.com/bad-samaritan-laws [https://perma.cc/TA3G-TXEU] (containing more than 200 Bad Samaritan laws from around the world and throughout history).

66 Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1326, 1345–46 (arguing that scholars undercount or mischaracterize Bad Samaritan laws in the United States).

67 A federal statutory crime of misprision of felony was first enacted in 1790 and is currently codified at 18 U.S.C. § 4. Gabriel D.M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 721 (2003). However, this crime involves proactive concealment of a felony rather than mere failure to report or otherwise intervene. *See* 18 U.S.C. § 4; United States v. Johnson, 546 F.2d 1225, 1227 (5th Cir. 1977) ("The mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C.A. § 4."). For discussion of this statute, see Ciociola, *supra*, at 721–23 (stating that the statute requires a "positive act of concealment"); Alison M. Arcuri, Comment, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 474–76 (2000) (providing an overview, including the elements, of misprision of felony); Royal G. Shannonhouse, III, *Misprision of a Federal Felony: Dangerous Relic or Scourge of Malfeasance?*, 4 U. BALT. L. REV. 59 (1974).

In 1855, Louisiana became one of the first three states to enact a misprision statute resembling the federal one, but this law was repealed in 1942. 1855 La. Acts 139 (repealed 1942); Ciociola, *supra*, at 723–24. Vermont later became the first state, in 1967, to enact a genuine Bad Samaritan law criminalizing only omissions that remains in force. 1967 Vt. Acts & Resolves 273 (codified at VT. STAT. ANN. tit. 12, § 519(a) (2022)) ("A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or herself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others."); *see also* Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 55 (1972) (stating, at the time, that "the Vermont statute is unique in American law").

68 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1337 (noting that reforms have "occasionally occurred after notorious, egregious cases of sexual misconduct").

69 MINN. STAT. § 604A.01, subdiv. 1 (2022) ("Duty to assist").

70 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1345–47 n.150–52. The

Bad Samaritan law in 2018.[71] Of all states with Bad Samaritan laws—some of which have more than one such statute—five feature duties to *rescue* (although some of those laws can be discharged through reporting alone) and twenty-eight states (four of which overlap with the five states featuring duty-to-rescue laws) plus Puerto Rico have enacted duties to *report*.[72] Such statutes also exist in dozens of foreign countries and multiple subfields of international law.[73]

Bad Samaritan laws—which vary by, inter alia, subject matter, victims to whom they apply, and individuals who must comply—are controversial, especially in the United States. I have previously addressed debates about the laws' origins, operations, outcomes, and objections—constitutional and otherwise.[74] These statutes are seldom, if ever, enforced.[75] A key question about an ODTI, then, is whether this particular type of Bad Samaritan law, even if carefully drafted and enacted widely, would be effective at holding bystander officers accountable or promoting officer upstanderism.[76]

To supplement my past primary-source research on Bad Samaritan laws, for the purposes of this Article, I have compiled a database of U.S. laws requiring officer peer intervention.[77] These statutes—

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twenty-nine states are: Alaska, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.*; *Database 1*, *supra* note 65 (listing all Bad Samaritan laws in the United States, including Puerto Rico).

71 Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018) (codified at 36 U.S.C. § 220542). The statute provides in part that "all adults authorized by such members [of a national governing body] to interact with an amateur athlete[shall] report immediately any allegation of child abuse of an amateur athlete who is a minor to . . . law enforcement . . . ." *Id.* § 220542(a)(2)(A). This law was motivated by revelations of Larry Nassar's sexual abuse of hundreds of female gymnasts. *See* Des Bieler, *Nassar Furor Spurs Congress to Action*, WASH. POST, Jan. 26, 2018, at D8.

72 Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1346; *Database 1*, *supra* note 65.

73 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1326, 1342–43; *Database 1*, *supra* note 65. Among other foreign countries, this database includes Albania, Algeria, Angola, Argentina, Armenia, Austria, Azerbaijan, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Central African Republic, Chad, Chile, Comoros, Croatia, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Russia, Ukraine, and Uzbekistan. *Database 1*, *supra* note 65.

74 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1335–42 (analyzing critiques of Bad Samaritan laws' impetus, nature, consequences, and effectiveness).

75 *See id.* at 1341; Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1186.

76 *See infra* Section II.D.

77 *Officer Duty to Intervene Laws*, ZACHARY D. KAUFMAN [hereinafter *Database 2*], https://www.zacharykaufman.com/projects/officer-duty-to-intervene-laws [https://perma.cc/

which exist in a minority of U.S. jurisdictions and are particularly rare at the local level—vary in their designs, including by types of force requiring intervention; level of awareness an officer must have of their colleague's misuse of force; methods and objectives of intervention, if any, that are required; penalties, if any, for noncompliance; training, if any, that is mandated; and antiretaliation provision, if any, that is included. As of June 2022, such ODTIs appear in twenty-one states' laws,[78] encompassing forty-two percent of states, and in only three of the top one hundred most populous cities in the United States, constituting only three percent of such municipalities.[79]

8E7P-BEK8] (containing twenty-four state or local ODTIs currently enacted in the United States).

78 Statewide ODTIs have been enacted in California, Colorado, Connecticut, Florida, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *See* CAL. GOV'T CODE § 7286 (West 2022); CONN. GEN. STAT. § 7-282e (2021); FLA. STAT. § 943.1735 (2022); 720 ILL. COMP. STAT. 5/7-16 (2021); KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022); MD. CODE ANN., PUB. SAFETY § 3-524(e)(2) (LexisNexis 2022); MASS. GEN. LAWS ch. 6E, § 15(a) (2022); NEB. REV. STAT. § 81-1414.17 (Supp. 2022); NEV. REV. STAT. § 193.308 (2021); N.C. GEN. STAT. § 15A-401 (2022); OR. REV. STAT. § 181A.681 (2021); TENN. CODE ANN. § 38-8-129 (2022); TEX. CODE CRIM. PROC. ANN. art. 2.1387 (West 2021); UTAH CODE ANN. § 53-6-210.5 (LexisNexis 2022); VT. STAT. ANN. tit. 20, § 2368 (2022); VA. CODE ANN. § 19.2-83.6(A) (2022); WIS. STAT. § 175.44 (2023).

Colorado has two separate duties relating to different types of force. COLO. REV. STAT. §§ 18-8-802(1.5)(a), 18-8-805(5)(a) (2022); *see also infra* notes 178–79 and accompanying text.

Minnesota and Washington each also have two relevant laws, one of which contains the duty, MINN. STAT. § 626.8475 (2022); WASH. REV. CODE § 10.93.190 (2022), and the other of which concerns requirements for law enforcement agencies to update their policies relating to the duty, MINN. STAT. § 626.8452; WASH. REV. CODE § 43.101.495.

South Carolina features two relevant laws, as well. One contains the duty, S.C. CODE ANN. § 23-23-85(A)(3) (2022), and the other defines misconduct under the duty. *Id.* § 23-23-150(A)(3)(f).

79 For a list of the top one hundred most populous cities in the United States, see *City and Town Population Totals: 2010–2019*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html [https://perma.cc/Q54P-7L75]. ODTIs have been enacted in Buffalo, New York; Pittsburgh, Pennsylvania; and St. Louis, Missouri.

On July 9, 2020, the legislature in St. Louis enacted its ODTI. *See* ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022).

On July 31, 2020, the legislature in Pittsburgh enacted its ODTI. *See* PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

On October 28, 2020, the legislature in Buffalo enacted its ODTI. *See* Cariol's Law, Buffalo, N.Y., Local Law No. 3 (2020) (to be codified at BUFFALO, N.Y., CHARTER §§ 13-21 to 13-21.5); Mike Desmond, Thomas O'Neil-White & Marian Hetherly, *A Month After Passage, Mayor Brown Signs Cariol's Law*, WBFO (Oct. 28, 2020, 11:10 PM), https://www.wbfo.org/local/2020-10-28/a-month-after-passage-mayor-brown-signs-cariols-law [https://perma.cc/Q3GB-VNTV]. The law is named after Cariol Horne. For more discussion of Horne and her eponymous law, see *infra* note 114 and accompanying text.

Seven related prescriptions are outside the scope of this Article and its proposal to criminalize officer nonintervention in their peers' misuse of force. Each suggestion should be implemented alongside this Article's recommendations. First, officer omissions should not only be addressed through *criminal* law but also through *tort* law. Extant federal law—through 42 U.S.C. § 1983—already provides one such mechanism.[80] Second, not only should *officers* themselves be held individually culpable for their peer nonintervention, but *their agency* should also be held institutionally liable. Such dual accountability is possible and even mutually supportive.[81] Third, officers should not only be required to *intervene* in their peers' misuse of force against civilians, but they should also be required to both *report* such misconduct and *render aid* to any person injured as a result of the use of force. Although necessarily intertwined with the duty to *intervene*, duties to *report* and *render aid* face separate concerns.[82] Fourth, officers should not only be obligated to intervene in their peers' *misuse of force* against civilians, but they should also be obligated to intervene during their colleagues' *other kinds of abuse* against civilians, such as sexual misconduct.[83] Although misuses of force and sexual misconduct are both types of officer abuse, they involve distinct challenges and solutions.[84] Fifth, would-be bystanders should be prodded to be upstanders through *both* carrots (what I have called "upstander prizes," which would be created, designed, and administered by what I have called "upstander commissions") *and* sticks (Bad Samaritan laws).[85] Yet, as Professor Lawrence Rosenthal has observed, "[t]he striking thing about [the police] reform agenda . . . is that it is all stick and no

80 *See infra* Section II.A.1.b.

81 *See Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice [https://perma.cc/4LTT-MFK2] (summarizing criminal and civil cases of police misconduct that the U.S. Department of Justice ("DOJ") investigates).

82 *See, e.g.*, Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1325 n.31 (discussing how some concerns of the duties to rescue and report overlap while others are distinct).

83 For discussion of police sexual misconduct, see, for example, Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CALIF. L. REV. 1487 (2020); Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 153 (2016).

84 *See, e.g.*, Trombadore, *supra* note 83, at 171 (noting that police sexual misconduct can take "nonviolent" forms).

85 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1397–1403 (discussing upstander prizes and commissions).

carrot."[86] Some upstander prizes have already been established for officers who intervene,[87] but more should be created. Sixth, *private* security should also be subject to Bad Samaritan laws, at least including a duty to report specified violent offenses of which they are aware.[88] Although private security often serves similar functions as official law enforcement,[89] and although private security forces frequently include sworn police officers "moonlighting" in uniform and with their badges,[90] the fact that private security forces are not employed by the state, or at least not while working in a private capacity,[91] distinguishes their societal role and thus the duties to which they should be subject.[92] Finally, in addition to establishing a comprehensive, clear, and consistent conceptual framework for ODTIs, the law should clarify what, exactly, constitutes officer misuse of force in the first place. Determining whether police violence is justified is a natural, necessary precursor to evaluating which situations warrant discharging an ODTI. Other scholars seek to bring clarity and coherence to the legal-

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86 Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 678 (2016).

87 For example, in August 2021, the Baltimore Police Department established a "Peer Intervention Medal" for members of the Department "who have intervened, on behalf of a fellow colleague, in a situation in which a failure to act would have resulted in misconduct leading to the serious or fatal injury of a person . . . ." BALT. POLICE DEP'T, POLICY 1712: DEPARTMENTAL AWARDS AND COMMENDATIONS (2021), https://public.powerdms.com/BALTIMOREMD/tree/documents/57138 [https://perma.cc/6PR3-L2P9].

88 *See* Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1121 (arguing that certain witnesses should be held criminally accountable for failing to report the following specified violent offenses of which they are aware: murder, kidnapping, sexual assault, aggravated assault, and felonious assault).

89 *See* Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573 (2005) (analyzing different types of "private police" according to their functions and comparing such forces with "public police" officers); Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 119 (2017) (illustrating "the operational overlap between public and private policing" and describing "four different phenomena that can blur the blue line: private policing, semi-public private policing, semi-private public policing, and public policing").

90 *See* Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 U. ILL. L. REV. 1847, 1881 (describing how "moonlighting" contracts provide supplemental income for active-duty police officers); *cf.* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014) (examining similar problems rooted in revenue considerations in the courts and proposing an administrative solution).

91 *See, e.g.*, Bracken v. Okura, 869 F.3d 771, 775 (9th Cir. 2017) (off-duty police officer "was not serving a public, governmental function while being paid . . . to provide private security"). *See generally* Patricia Kubovsak Golla, Annotation, *Performance of Public Duty by Off-Duty Police Officer Acting as Private Security Guard*, 65 A.L.R.5th 623 (1999) (collecting cases on the persistence of police duties when officers are privately employed).

92 *Cf.* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) (examining in depth the unique legal nature of private security forces and the difficulties they pose).

ity of police uses of force, which is currently incomplete and indeterminate and varies by jurisdiction.[93] This Article's proposed model statute, like some extant ODTIs, addresses this unsolved problem simply by referring to officer uses of force that are prohibited by applicable law and agency policy.[94]

Also outside the scope of this Article is considering whether officers should be held criminally liable for peer nonintervention on bases other than statutes imposing such a duty. At common law, at least three other situations have been recognized as grounds for criminal omission liability that could apply to officers declining to intercede in their colleagues' misuse of force: "where one stands in a certain status relationship to another," "where one has assumed a contractual duty to care for another," and "where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid."[95] Given officers' mantra and societal role of protecting and serving the public,[96] a special relationship exists between law enforcement and laymen that perhaps should be considered a qualifying status relationship. Officers sign employment contracts that arguably obligate them to care for civilians. When officers assert custody over a civilian, they voluntarily assume care of that person[97] and sometimes prevent others from rendering aid.[98]

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93 *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119 (2008) (discussing inconsistencies in federal courts' evaluation of police misconduct under the Fourth Amendment and 42 U.S.C. § 1983). For additional analysis on this topic, see generally SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE (2020); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521 (2021).

94 *See infra* Section I.B.4.

95 Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962).

96 *See infra* note 173; *infra* Section II.B.4.

97 *See, e.g.*, CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, BASIC COURSE WORKBOOK SERIES 1-3 to 1-4 (2020), https://post.ca.gov/portals/0/post_docs/basic_course_resources/workbooks/LD_31_V-6.5.pdf [https://perma.cc/XV6E-SNZA] ("Peace officers who have custody of arrested persons are lawfully responsible for the care and safekeeping of those individuals."); AUSTIN POLICE DEP'T, GENERAL ORDERS 212–13 (2022), https://www.austintexas.gov/sites/default/files/files/Police/General_Orders.pdf [https://perma.cc/J9FS-HVHB] ("Until arrested persons are accepted at the booking facility, their care and custody shall be the responsibility of the arresting/transporting officers. . . . The law imposes a duty of care on the transporting officer to protect prisoners from injury.").

98 For example, Thao prevented a firefighter, who is a trained emergency medical technician, from rendering aid to Floyd. *See* Amy Forliti, Steve Karnowski & Tammy Webber, *Dying George Floyd "Needed Help and Wasn't Getting It," Testifies Firefighter*, PBS NewsHour (Jan. 27, 2022, 8:26 AM), https://www.pbs.org/newshour/nation/dying-george-floyd-needed-help-and-wasnt-getting-it-testifies-firefighter [https://perma.cc/N6LP-RGZA].

This Article proceeds in three parts. Part I describes how some state and city legislatures have sought to promote officer upstanderism by enacting laws that mandate some form of an ODTI in their colleagues' misuse of force. That several jurisdictions have already passed such laws indicates that doing so is feasible. However, although these extant duties represent meaningful progress on officer accountability for nonintervention, they are seriously flawed, require amendment, and should therefore not be used as models to introduce such duties in other cities, other states, or at the federal level.

Because an ODTI amid peer misuse of force could be controversial, Part II presents and rebuts potential counterarguments to this proposal. Opposition could view such an obligation ranging from unnecessary, unreasonable, or inappropriate to ineffective or even counterproductive. This Part engages with both police abolitionists and apologists while drawing on the Chauvin case for illustrations.

Following a brief conclusion in Part III, the Appendix proposes a more nuanced and improved model statute to better guide Congress as well as state and municipal legislatures on amending existing or introducing new ODTIs. This model statute adopts some elements of the existing laws analyzed in Part I, rejects most other aspects, and proposes many new and different features. The result is a more comprehensive and potentially effective ODTI.

I. Extant Officer Duties to Intervene

Twenty-four jurisdictions have enacted laws explicitly containing some form of an ODTI in their colleagues' misuse of force.[99] This Part provides an overview of these laws and describes provisions relating to fulfillment of the duties, punishment, training, and antiretaliation. Although each of these jurisdictions deserves praise for taking this bold initiative, analyzing these statutes' features reveals severe deficiencies in all existing ODTIs.

This Part considers the conceptual design of extant ODTIs, not their empirical application. Given the recency of most of these laws' enactment, accurately analyzing their actual impact is beyond the scope of this Article.

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99 *See supra* notes 78–79 and accompanying text.

A. Overview

The twenty-four jurisdictions with ODTIs vary by government level, enactment date, whether they overlap with other Bad Samaritan laws, and whether the duty is directly or indirectly created.

1. Government Level

The twenty-four jurisdictions with ODTIs are not all at the same government level. Twenty-one are statewide—in California, Colorado, Connecticut, Florida, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin[100]—and three are at the municipal level—in Buffalo, New York; Pittsburgh, Pennsylvania; and St. Louis, Missouri.[101] The three city ordinances create ODTIs in states—Missouri, New York, and Pennsylvania—that do not have such statewide laws.

Statewide laws mandating ODTIs, such as the model statute this Article proposes, are superior to local ordinances. Because state laws encompass all municipalities therein, such legislation ensures consistency across the state and obviates the need to navigate a patchwork of regulations. Through preemption, state laws can, in general, nullify a conflicting local ordinance.[102] State laws can therefore mandate an ODTI despite potential resistance from localities. Such pushback against statewide police reform is already occurring at the local level. For example, in response to Colorado enacting a wide-ranging police reform law—including an ODTI—in 2020,[103] Greenwood Village City Council adopted a resolution declaring its commitment to indemnify its police officers against liability under the law.[104] Other municipalities have considered passing similar resolutions.[105] To counteract such

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100 *See supra* note 78.

101 *See supra* note 79.

102 For discussion of the interaction between state laws and municipal ordinances, see, for example, Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2018), https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf [https://perma.cc/VTT2-UQWY]. For a seven-part test to determine whether a state legislature has preempted a particular field, see *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 87 (Md. 1993).

103 2020 Colo. Sess. Laws 455 (codified at COLO. REV. STAT. § 18-8-802 (2022)).

104 Greenwood Vill. City Council Res. 40, Series of 2020 (Colo. 2020); *see also* John Aguilar, *Denver Suburb Passes Resolution Shielding Officers from Key Portion of Colorado's New Police Reform Law*, DENVER POST (July 8, 2020, 8:03 PM), https://www.denverpost.com/2020/07/08/police-brutality-greenwood-village-bad-faith-reform/ [https://perma.cc/FL7P-MD7L].

105 *See, e.g.*, Julia Donovan, *El Paso County Establishing Board to Determine Financial*

local attempts to undermine an ODTI, the duty should be statewide and should explicitly include an anti-indemnification provision, as the model statute does.

Unless and until more statewide ODTIs are enacted, however, local ODTIs still represent progress. As Buffalo does,[106] some municipalities may have direct experience with police peer nonintervention that motivates an ODTI. Other municipalities may simply be more willing, or more able, to enact such an ordinance than their state.

2. Enactment Dates

Only one of the twenty-four jurisdictions' laws predates Chauvin murdering Floyd in 2020. California's legislation was enacted in 2019,[107] and its author's stated purpose was to "make[] fundamental changes to how law enforcement officers interact with the public and the tactics that they use to get cooperation" and "pave the way to restoring the public trust and mutual respect that is needed."[108]

Floyd's killing then helped propel enactment of the laws in the remaining twenty-three jurisdictions,[109] including the three municipal-level ODTIs. For example, the ordinance in Buffalo is known as "Cariol's Law," named after Cariol Horne.[110] In 2006, Horne, then a Buffalo Police Department officer, verbally and physically intervened to stop a fellow officer who was using a chokehold on an unarmed, handcuffed suspect.[111] As a result of her intervention, Horne was fired, a few months before the required twenty years of service to re-

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Liability in Use of Force Incidents, KRDO (July 7, 2020, 1:23 PM), https://krdo.com/news/local-news/2020/07/07/el-paso-county-establishing-board-to-determine-financial-liability-in-use-of-force-incidents/ [https://perma.cc/Q7D8-KK8P].

106 *See infra* note 114 and accompanying text.

107 2019 Cal. Stat. 2835 (codified at CAL. GOV'T CODE § 7286 (West 2020); CAL. PENAL CODE § 13519.10 (West 2020)) ("Filed with the Secretary of State September 12, 2019.").

108 CAL. ASSEMB. COMM. ON APPROPRIATIONS, SB 230, 2019–2020 Leg., Reg. Sess., at 1 (2019).

109 *See, e.g.*, *RELEASE: Minnesota House Passes Police Accountability Act*, MINN. LEGISLATURE (July 21, 2020), https://www.house.leg.state.mn.us/members/profile/news/12266/30437 [https://perma.cc/LG5S-ZACV] (referencing "George Floyd's tragic killing by Minneapolis police officers"); *see also* Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/LP3B-VUM8] (reviewing changes and proposed changes to state law that occurred in the year following Floyd's murder).

110 Eggleston, *supra* note 15.

111 Evan Simko-Bednarski, *Black Buffalo Police Officer Fired for Trying to Stop Chokehold Wins Ruling, to Get Pension*, CNN (Apr. 15, 2021), https://www.cnn.com/2021/04/14/us/buffalo-officer-reinstated-trnd/index.html [https://perma.cc/6KJZ-DNSC].

ceive a pension.[112] After fifteen years of litigation, a judge in New York ruled that Horne be granted back pay and a pension.[113] In 2020, Horne's eponymous law was enacted in Buffalo.[114] Horne should be considered a "law entrepreneur," an individual who spearheads an innovative law.[115] The success of her litigation and legislation, both of which commenced years before Floyd's death, are largely attributable to that tragedy.[116]

3. Overlap with Other Bad Samaritan Laws

Sixteen of the twenty-one states with an ODTI had already enacted at least one Bad Samaritan law that applies regardless of profession.[117] These sixteen states have thus adopted the use of criminal law

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112 Eggleston, *supra* note 15.

113 *Id.*

114 For further discussion of Horne's intervention and her eponymous law, see, for example, CARIOL'S LAW, https://www.cariolslaw.com [https://perma.cc/RWD9-KUFS]; *Cariol's Law*, STRATEGIES FOR JUST., https://www.strategiesjustice.com/cariols-law [https://perma.cc/8K58-NTH7]; Jonah E. Bromwich, *Court Vindicates Black Officer Fired for Stopping Colleague's Chokehold*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/nyregion/cariol-horne-police-chokehold.html [https://perma.cc/RU6P-THD8]; *A Buffalo Police Officer Says She Stopped a Fellow Cop's Chokehold on a Black Suspect. She Was Fired.*, CBS NEWS (June 19, 2020, 9:35 AM), https://www.cbsnews.com/news/cariol-horne-buffalo-police-chokehold/ [https://perma.cc/E7HW-6UZ5]; April Siese, *Former Buffalo Officer Who Stopped Fellow Cop's Chokehold on Suspect Will Get Pension After Winning Lawsuit*, CBS NEWS (Apr. 15, 2021, 7:06 AM), https://www.cbsnews.com/news/cariole-horne-former-buffalo-police-officer-pension-lawsuit-win/ [https://perma.cc/48HQ-KRSN]; Ross Todd, *Litigators of the Week: This Kirkland/Harvard Law Team Vindicated a Fired Cop Who Intervened When a Colleague Used Excessive Force*, LAW.COM (Apr. 16, 2021, 7:30 AM), https://www.law.com/litigationdaily/2021/04/16/litigators-of-the-week-this-kirklandharvard-law-team-vindicated-a-fired-cop-who-intervened-when-a-colleague-used-excessive-force/ [https://perma.cc/ZC9S-B4PR]; Elaine McArdle, *HLS Professors Win Case for Former Buffalo Police Officer Fired for Intervening in a Chokehold*, HARV. L. TODAY (Apr. 20, 2021), https://hls.harvard.edu/today/hls-professors-win-case-for-former-buffalo-police-officer-fired-for-intervening-in-a-chokehold/ [https://perma.cc/N7TK-F5UN]; Mark Wozniak, *Long Legal Fight Ends, Cariol Horne to Receive Her BPD Pension*, WBFO (Apr. 14, 2021, 7:43 AM), https://www.wbfo.org/crime/2021-04-14/long-legal-fight-ends-cariol-horne-to-receive-her-bpd-pension [https://perma.cc/W682-YG5F].

115 Others have used "law entrepreneur" in a similar way. *See, e.g.*, David G. Post, *Governing Cyberspace: Law*, 24 SANTA CLARA COMPUT. & HIGH TECH. L.J. 883, 912–13 (2008) (referring to people who develop laws in virtual worlds as "law entrepreneurs").

116 *See* McArdle, *supra* note 114 (noting that Floyd's murder brought Horne's case "back to life" and that Cariol's Law "was an underground effort that Cariol and her team began back in 2016 . . . [that then] gained momentum after George Floyd's killing" (quoting Interview with Intisar A. Rabb, Professor, Harv. L. Sch.)); Cariol's Law, Buffalo, N.Y., Local Law No. 3, § 3 (2020) (noting Floyd's death while officers who were present declined to intervene).

117 The sixteen overlapping states are California, Colorado, Florida, Kentucky, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. *See supra* notes 70, 78 and accompanying text.

Florida, Massachusetts, and Washington each have two Bad Samaritan laws, all of which are

in a variety of contexts to punish bystanderism and prod upstanderism. None of the three states featuring cities that have ODTIs—Missouri, New York, and Pennsylvania—has a Bad Samaritan law at the state level.[118]

That such a high proportion—seventy-six percent—of states with an ODTI also have at least one Bad Samaritan law that applies regardless of profession is significant. This statistic shows that a strong predictor of whether a state will enact an ODTI is apparently whether it already has a Bad Samaritan law that applies regardless of profession. That finding is unsurprising, given that enactment of Bad Samaritan laws that apply *regardless* of profession logically suggests openness to enacting Bad Samaritan laws that apply to a *particular* profession. To increase the likelihood of enacting more statewide ODTIs, advocates should thus target the thirteen states that do not currently have such a statewide duty but do have at least one Bad Samaritan law that applies regardless of profession.[119]

4. Direct or Indirect Duty

Twenty of the twenty-four jurisdictions *directly* impose on officers a duty to intervene.[120] The remaining four jurisdictions—California, Nebraska, South Carolina, and St. Louis—do so *indirectly* by provid-

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duties to report. *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1346–47 (citing FLA. STAT. §§ 39.201, 794.027 (2019); MASS. GEN. LAWS ch. 268, § 40 (2019); *id.* at ch. 269, § 18; WASH. REV. CODE §§ 9.69.100, 9A.36.160 (2019)).

Texas has three Bad Samaritan laws, one of which is a duty to rescue *or* to report, and the other two of which are duties to report. *See id.* (citing TEX. PENAL CODE ANN. §§ 38.17, 38.171 (West 2019); TEX. FAM. CODE ANN. § 261.101 (West 2019)).

118 *See Database 1*, *supra* note 65.

119 The thirteen states are Alaska, Delaware, Hawai'i, Idaho, Indiana, Mississippi, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, and Wyoming. *See supra* notes 70, 78 and accompanying text.

120 Those jurisdictions are Colorado, Connecticut, Florida, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, North Carolina, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Buffalo, and Pittsburgh. *See* COLO. REV. STAT. § 18-8-802(1.5)(a) (2022); CONN. GEN. STAT. § 7-282e(a)(1) (2021); FLA. STAT. § 943.1735(d) (2022); 720 ILL. COMP. STAT. 5/7-16(a) (2021); KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022); MD. CODE ANN., PUB. SAFETY § 3-524 (e)(2) (LexisNexis 2022); MASS. GEN. LAWS ch. 6E, § 15(a) (2022); MINN. STAT. § 626.8452 (2022); NEV. REV. STAT. § 193.308(1) (2021); N.C. GEN. STAT. § 15A-401 (2022); OR. REV. STAT. § 181A.681 (2021); TENN. CODE ANN. § 38-8-129 (2022); TEX. CODE CRIM. PROC. ANN. art. 2.1387(a) (West 2021); UTAH CODE ANN. § 53-6-210.5 (LexisNexis 2022); VT. STAT. ANN. tit. 20, § 2368 (2022); VA. CODE ANN. § 19.2-83.6(A) (2022); WASH. REV. CODE § 10.93.190 (2022); WIS. STAT. § 175.44 (2023); Cariol's Law, Buffalo, N.Y., Local Law No. 3 (2020) (to be codified at BUFFALO, N.Y., CHARTER §§ 13-21 to 13-21.5); PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

ing relevant standards and requiring law enforcement agencies to include such a duty in their policies.[121]

Direct imposition of an ODTI is superior. First, establishing all requirements of intervention in the law itself prevents agencies in the same jurisdiction from mandating different—and potentially conflicting—guidance. Second, directly enacting a legal duty better enables accountability by facilitating judicial remedies rather than relying on agencies to self-police. Especially given concerns over "the blue wall of silence"—the well-documented, notorious conspiratorial code within law enforcement that inhibits accountability for misconduct[122]—external oversight is more likely to prove effective. To promote consistency and accountability, the model statute both directly imposes an ODTI and requires law enforcement agencies to incorporate that duty verbatim into their policies.

B. Requirements

The twenty-four jurisdictions with ODTIs vary by the perspective, comprehension, ability, and misuse-of-force requirements for the would-be intervening officer.

1. Perspective

The twenty-four jurisdictions vary in the type of perspective, if any, an officer must have of their colleague's misuse of force in order to trigger the duty to intervene. The laws in eight jurisdictions have no perspective requirement.[123] Nevada has the least restrictive perspective requirement—meaning that the would-be intervening officer is held to the highest standard—in that it applies to an officer who "observes . . . or reasonably should have observed" the conduct.[124] Ten of

121 *See* CAL. GOV'T CODE § 7286(b)(9) (West 2022); NEB. REV. STAT. § 81-1414.17 (Supp. 2022); S.C. CODE. ANN. § 23-23-85(A)(3) (2022); ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022).

122 *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) (defining the "blue wall of silence" as "an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer"); *id.* at 237–40 (citing court opinions, scholarly literature, news reports, and police investigatory commission reports examining the "blue wall of silence"); *see also infra* Section II.D.2.

123 Those jurisdictions are Colorado, Kentucky, Maryland, Nebraska, Oregon, Texas, Pittsburgh, and St. Louis. *See* COLO. REV. STAT. § 18-8-802(1.5)(a); KY. REV. STAT. ANN. § 15.391(1)(f)(1); MD. CODE ANN., PUB. SAFETY § 3-524(e)(2); NEB. REV. STAT. § 81-1414.17; OR. REV. STAT. § 181A.681(2); TEX. CODE CRIM. PROC. ANN. art. 2.1387; PITTSBURGH, PA., CODE § 116.02A; ST. LOUIS, MO., CODE § 15.185.030.

124 Nev. Rev. Stat. § 193.308(1)(a) (2021).

the laws feature more restrictive perspective requirements in that they impose the duty to intervene on officers who are *either* "presen[t]" at,[125] "witness,"[126] "observ[e],"[127] or "directly observe"[128] the conduct. One jurisdiction includes an even more restrictive perspective requirement, imposing the duty only on an officer who is *both* "present and knowingly observes" the conduct.[129] Four jurisdictions adopt the most restrictive perspective requirement, mandating that officers must intervene only if they are *both* "present and observing" the conduct, without requiring that such observing must be knowingly.[130]

The model statute features a different perspective requirement than any of these laws: it applies to an officer who is *both* "physically present" *and* "either observes, reasonably should have observed, or otherwise reasonably believes" that another officer is misusing or attempting to misuse force.[131] Including a perspective requirement at all is better than not because it would be unreasonable to require an officer to intervene in a colleague's misuse of force of which the officer had no perspective.

Mandating a perspective requirement of mere "presence" is insufficient. In the digital age, people can witness a crime while being either *physically* or, through social media or mobile devices, *virtually* present.[132] Any duties to *intervene* should explicitly apply only to the former because the latter are not necessarily in a position to intercede personally. However, *virtually* present witnesses could—and, in certain situations, should—be subject to a duty to *report*.[133]

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125 That jurisdiction is Illinois. *See* 720 ILL. COMP. STAT. 5/7-16(a) (applying ODTI to incidents occurring in the "presence" of the intervening officer).

126 Those jurisdictions are Connecticut, Virginia, and Washington. *See* CONN. GEN. STAT. § 7-282e(a)(1) (2021); VA. CODE ANN. § 19.2-83.6(A) (2022); WASH. REV. CODE § 10.93.190(1) (2022).

127 Those jurisdictions are Florida, North Carolina, South Carolina, Vermont, and Wisconsin. *See* FLA. STAT. § 943.1735(d) (2022); N.C. GEN. STAT. § 15A-401(d1) (2022); S.C. CODE ANN. § 23-23-85(A)(3) (2022); VT. STAT. ANN. tit. 20, § 2368(b)(7) (2022); WIS. STAT. § 175.44 (2023).

128 That jurisdiction is Tennessee. *See* TENN. CODE ANN. § 38-8-129(a) (2022).

129 That jurisdiction is Utah. *See* UTAH CODE ANN. § 53-6-210.5(2)(a) (LexisNexis 2022).

130 Those jurisdictions are California, Massachusetts, Minnesota (both ODTIs), and Buffalo. *See* CAL. GOV'T CODE § 7286(b)(9) (West 2022); MASS. GEN. LAWS ch. 6E, § 15(a) (2022); MINN. STAT. §§ 626.8452, 626.8475 (2022); Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21(A)).

131 *See infra* Appendix.

132 Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1124–25, 1160, 1177–78.

133 *See id.* at 1189–91 (proposing a model duty-to-report statute applying to certain crime witnesses who are "virtually" present).

An officer's willful blindness to their colleague's misuse of force should not excuse the officer from a duty to intervene. Including a perspective requirement like "reasonably should have observed" addresses such a scenario. An additional or alternative perspective requirement that legislators could consider including in ODTIs to address an officer's willful blindness is that the officer "unreasonably did not observe."

Although Nevada's perspective requirement of "observes . . . or reasonably should have observed"[134] covers actual knowledge and addresses willful blindness, it should still be supplemented with a third alternative: "otherwise reasonably believes" that another officer is misusing or attempting to misuse force. Even if an officer does not actually observe or is not willfully blind to their colleague's misuse of force, the officer may still possess sufficient contextual information to formulate a reasonable belief that their colleague is misusing or will misuse force. For example, although an object may obstruct an officer viewing—or a cacophony of nearby sounds may obscure an officer hearing—their colleague's misuse of force, the officer may reasonably believe that their colleague is misusing or will misuse force because of what the officer had already witnessed. Actions by the colleague that may give rise to such a reasonable belief could include the colleague unreasonably pointing a gun at and verbally threatening to shoot the civilian,[135] otherwise verbally threatening the person, aggressively treating a suspect who is handcuffed,[136] uttering racial epithets against the civilian, or demonstrating inappropriately aggressive body language toward the person. In addition to adopting "reasonably believes" in its perspective requirement, the model statute includes an exemption for officers who lack sufficient contextual information to assess whether intervention is warranted.[137]

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134 *See* NEV. REV. STAT. § 193.308(1)(b) (2021).

135 *See* Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 46 (1st Cir. 2005) (noting that similar events gave rise to an incident of police misuse of force and related failure to intervene claim); Michael J. Jacobsma, *Non-Contact Excessive Force by Police: Is that Really a Thing?*, 52 U. RICH. L. REV. ONLINE 1 (2017) (describing federal circuit courts that have and have not held that unreasonably pointing a gun at a suspect can violate that person's rights).

136 *See* United States v. Pagán-Ferrer, 736 F.3d 573 (1st Cir. 2013) (affirming convictions of police officers for charges stemming from misuse of force, which began with rough treatment of a suspect who was handcuffed in custody).

137 *See infra* Appendix.

2. Comprehension

The twenty-four jurisdictions' ODTIs vary in the type of officer comprehension about their colleague's misuse of force, if any, that triggers the duty to intervene. The laws in thirteen of the jurisdictions have no comprehension requirement,[138] suggesting that any nearby officer is responsible for intervening in their colleague's misuse of force, regardless of their level of understanding or suspicion that the force is misused. Ten other jurisdictions do feature comprehension requirements to impose the ODTI, including either that the officer "knew,"[139] "has knowledge of,"[140] "has notice of,"[141] "objectively knows,"[142] "knows or should know,"[143] "knows or reasonably should know,"[144] "knowingly observes,"[145] or "reasonably believes"[146] that the colleague's use of force constitutes misconduct. The final jurisdiction states that the colleague's misuse of force must be "clear and apparent" to the would-be intervening officer.[147]

As with the perspective requirement, including a comprehension requirement at all is appropriate because it would be unreasonable to require an officer to intervene in a colleague's misuse of force that the officer had no reason to interpret as constituting misconduct. The model statute adopts the "knows or reasonably should know" comprehension requirement because an officer should be required to intervene where the officer possesses actual knowledge of or is expected to be able to identify their colleague's misuse of force. Under the model

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138 Those jurisdictions are California, Colorado, Florida, Illinois, Maryland, Massachusetts, Minnesota, Nevada, Vermont, Virginia, Washington, Wisconsin, and St. Louis. *See* CAL. GOV'T CODE § 7286(b)(9) (West 2022); COLO. REV. STAT. § 18-8-802(1.5)(a) (2022); FLA. STAT. § 943.1735 (2022); 720 ILL. COMP. STAT. 5/7-16(a) (2021); MD. CODE ANN., PUB. SAFETY § 3-524(e)(2) (LexisNexis 2022); MASS. GEN. LAWS ch. 6E, § 15(a) (2022); MINN. STAT. §§ 626.8452, 626.8475 (2022); NEV. REV. STAT. § 193.308(1); VT. STAT. ANN. tit. 20, § 2368(b)(7) (2022); WASH. REV. CODE § 10.93.190(1) (2022); WIS. STAT. § 175.44(4)(a) (2023); ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022).

139 That jurisdiction is South Carolina. S.C. CODE. ANN. § 23-23-150(A)(3)(f) (2022).

140 That jurisdiction is Tennessee. TENN. CODE ANN. § 38-8-129(a) (2022).

141 That jurisdiction is Pittsburgh. PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

142 That jurisdiction is Connecticut. CONN. GEN. STAT. § 7-282e(a)(1) (2021).

143 That jurisdiction is Texas. TEX. CODE CRIM. PROC. ANN. art. 2.1387(2) (West 2021).

144 That jurisdiction is Oregon. OR. REV. STAT. § 181A.681(2) (2021).

145 That jurisdiction is Utah. UTAH CODE ANN. § 53-6-210.5(2)(a) (LexisNexis 2022).

146 Those jurisdictions are Nebraska, North Carolina, and Buffalo. *See* NEB. REV. STAT. § 81-1414.17 (Supp. 2022); N.C. GEN. STAT. § 15A-401(d1) (2022); Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21(A)).

147 That jurisdiction is Kentucky. KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022).

statute, which mandates officer training on identifying misuses of force, such a requirement would be reasonable.[148]

3. Ability

The twenty-four jurisdictions vary in the type of ability, if any, an officer is required to possess to intervene in their colleague's misuse of force in order to trigger the duty to do so. Nine of the jurisdictions do not include an ability requirement.[149]

Other jurisdictions focus on the officer's personal ability or the ability the circumstance makes possible. Minnesota requires intervention if an officer is "physically or verbally able to do so";[150] Washington mandates intervention when an officer is "in a position to do so";[151] Illinois, South Carolina, and Cariol's Law require intervention if an officer "has an opportunity,"[152] "had an opportunity,"[153] or "has a realistic opportunity,"[154] respectively; Tennessee obligates intervention if an officer "has an opportunity and means";[155] Virginia mandates intervention when it is "feasible";[156] and Florida requires intervention when it is "reasonable based on the totality of the circumstances."[157]

Still other laws focus on whether intervention would be perilous. Massachusetts requires intervention "unless intervening would result in imminent harm to the officer or another identifiable individual,"[158] Kentucky obligates intervention "when it is safe and practical to do so,"[159] Nevada and Wisconsin both mandate performance of the duty only if "it is safe for" the officer to intervene,[160] and Utah imposes its

148 *See infra* Appendix.

149 Those jurisdictions are California, Colorado, Connecticut, Maryland, Nebraska, Oregon, Texas, Vermont, and St. Louis. *See* CAL. GOV'T CODE § 7286(b)(9) (West 2022); COLO. REV. STAT. § 18-8-802(1.5)(a) (2022); CONN. GEN. STAT. § 7-282e(a)(1) (2021); MD. CODE ANN., PUB. SAFETY § 3-524(e) (LexisNexis 2022); NEB. REV. STAT. § 81-1414.17; OR. REV. STAT. § 181A.681(2); TEX. CODE CRIM. PROC. ANN. art. 2.1387(a) (West 2021); VT. STAT. ANN. tit. 20, § 2368(b)(7) (2022); ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022).

150 MINN. STAT. § 626.8475(a)(2) (2022).

151 WASH. REV. CODE § 10.93.190(1) (2022).

152 720 ILL. COMP. STAT. 5/7-16(a) (2021).

153 S.C. CODE ANN. § 23-23-150(A)(3)(f) (2022).

154 Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21(A)).

155 TENN. CODE ANN. § 38-8-129(a) (2022).

156 VA. CODE ANN. § 19.2-83.6(A) (2022).

157 FLA. STAT. § 943.1735(2)(d) (2022).

158 MASS. GEN. LAWS ch. 6E, § 15(a) (2022).

159 KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022).

160 NEV. REV. STAT. § 193.308(1)(b) (2021); WIS. STAT. § 175.44(4)(a)(2) (2023).

ODTI only if the officer is "in a position to do so safely and without unreasonable risk to the safety of the officer or another individual."[161]

North Carolina and Pittsburgh impose their ODTIs only when it is *both* possible *and* not perilous. North Carolina limits such action to when there is "a reasonable opportunity to intervene" and "it is safe to do so."[162] Pittsburgh restricts such intervention to when the officer has "a realistic and reasonable opportunity to intervene" but excludes situations "where such intervention could be physically dangerous to either the individual being deprived of a right, the intervening party, or other member of the public."[163]

Most of these laws' ability requirements create potential loopholes that may undermine the duty's effectiveness. An ODTI should certainly consider opportunity. But including in the statute an *unqualified* opportunity as a prerequisite for intervention—as in Illinois, Tennessee, and Washington[164]—provides nonintervening officers with too many excuses because such an opportunity could be *unreasonable*. In contrast, only if an officer did not have a *reasonable* opportunity to intervene—as required by Florida, North Carolina, Cariol's Law (with its arguably synonymous "realistic" caveat), and the model statute[165]—should the officer not be held liable.[166]

None of the existing laws strikes the right balance when it comes to peril. Neither Massachusetts, Nevada, Utah, nor Wisconsin clarifies which officer's safety should be taken into consideration: the would-be intervenor or the one misusing force.[167] Kentucky's and North Carolina's laws are ambiguous about whose safety at all should be considered: one of the officers' or someone else's.[168] Pittsburgh explicitly excuses officers who would imperil themselves,[169] but that is inappropriate and counterproductive in this context. Although the well-being of *civilians* should be factored into whether an officer is required to

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161 UTAH CODE ANN. § 53-6-210.5(2)(a) (LexisNexis 2022).

162 N.C. GEN. STAT. § 15A-401(d1) (2022).

163 PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

164 *See* 720 ILL. COMP. STAT. 5/7-16(a) (2021); TENN. CODE ANN. § 38-8-129(a) (2022); WASH. REV. CODE § 10.93.190(1) (2022).

165 *See* FLA. STAT. § 943.1735(2)(d) (2022); N.C. GEN. STAT. § 15A-401(d1); Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21(A)); *infra* Appendix.

166 *See infra* Section II.B.3.

167 *See* MASS. GEN. LAWS ch. 6E, § 15(a) (2022); NEV. REV. STAT. § 193.308(1)(b) (2021); UTAH CODE ANN. § 53-6-210.5(2)(a) (LexisNexis 2022); WIS. STAT. § 175.44(4)(a) (2023).

168 *See* KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022); N.C. GEN. STAT. § 15A-401(d1).

169 *See* PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

intervene (as the model statute clarifies in its list of exemptions[170]), danger to the would-be intervening officer and their colleague who is misusing force should not.[171] Significant distinctions between the public and officers justify ODTIs not excusing the latter. These differences include law enforcement's unique or heightened training (including in de-escalation and rescuing civilians), expertise and experience (in use of force), standards of professional conduct (in interacting with civilians), equipment (such as weapons, body armor, and restraints), status (in protecting and serving the public), perceptions (that officers will or at least should safeguard civilians), and voluntary risk-taking (in choosing employment as a law enforcement officer, a dangerous occupation,[172] in the first place).[173] Outcry over police officers' catastrophic response to the May 24, 2022, mass shooting at Robb Elementary School in Uvalde, Texas—including the decision by several officers to delay entering the room where multiple children were being murdered for more than an hour[174]—underscores the widespread view that law enforcement should fulfill their oath to protect the public even if doing so risks the officers' lives.[175] Indeed,

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170 *See infra* Appendix.

171 *See infra* Section II.A.1.

172 *See, e.g.*, Illya Lichtenberg, *The Dangers of Warrant Execution in A Suspect's Home: Does an Empirical Justification Exist for the Protective Sweep Doctrine?*, 54 SANTA CLARA L. REV. 623, 628–32 (2014) (pointing out the basic assumption of the Supreme Court in *Terry v. Ohio*, 329 U.S. 1 (1968), *Michigan v. Long*, 463 U.S. 1032 (1983), and *Maryland v. Buie*, 494 U.S. 325 (1990), that policing is a dangerous occupation and there is a great risk of intentional harm being inflicted on the police in the course of their duties); Aronie & Lopez, *supra* note 48, at 306 ("Some of the research literature indicate that law enforcement officers generally experience higher mortality rates and long-term health problems than other occupations and the general public . . . .").

173 *See, e.g.*, McCabe, *supra* note 60, at 666, 674–81 (discussing distinctions between the police and the public); Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 588–90, 601–07 (2020) (same).

174 Shaila Dewan & Mike Baker, *For Families in Uvalde, Laws Limit Paths to Accountability*, N.Y. TIMES (June 4, 2022), https://www.nytimes.com/2022/06/04/us/uvalde-police-liability.html [https://perma.cc/SSE2-PYXL].

175 *See, e.g.*, Rodney L. Stenlake, Case Note, *The Fireman's Rule and Police Officers—Who Are We Protecting?:* Berko v. Freda*, 93 N.J. 81, 459 A.2d 663 (1983)*, 19 FORUM 350, 357 (1984) (noting that officer's voluntary acceptance of pay and risk determines their legal duties); Art Acevedo, Opinion, *Police Are Supposed to Put Their Lives on the Line: Uvalde Was a Failure*, CNN (June 3, 2022, 7:17 AM), https://www.cnn.com/2022/06/02/opinions/shooting-uvalde-guns-texas-police-acevedo/ [https://perma.cc/2XEB-GN3X]; John P. Caves III, Opinion, *Sometimes Police—and the Rest of Us—Need to Accept Risk*, THE HILL (Aug. 11, 2020), https://thehill.com/changing-america/opinion/511506-sometimes-police-and-the-rest-of-us-need-to-accept-risk/ [https://perma.cc/43JB-CN2A]. For discussion of the line between reasonable and unreasonable risks in policing, and the extent to which officers should be expected to take the former but not latter, see, e.g., STOUGHTON ET AL., *supra* note 93, at 155–58; Cynthia Lee, *Officer-Created Jeop-*

Uvalde police training materials themselves state: "A first responder unwilling to place the lives of the innocent above their own safety should consider another career field."[176]

4. Force

Among the twenty-four jurisdictions, there are a multitude of what I call "force prerequisites," or types of misuses of force that trigger the ODTI. This aspect of ODTIs can be divided into two groups. Two states' ODTIs feature *specific* force prerequisites, or force prerequisites relating to particular types of force, and the remaining ODTIs involve *general* force prerequisites, or force prerequisites relating to broad categories of force.

Vermont, an outlier, has *only* a specific force prerequisite, which requires intervention when an officer observes their colleague using a chokehold.[177] Colorado is another outlier, in that it has *two* ODTIs: one with a specific force prerequisite (involving a colleague's use of ketamine in pursuance of law enforcement duties[178]) and the other with a general force prerequisite (applying to force that "exceeds the degree of force permitted" by law[179]).

Like Colorado's latter statute, the remaining twenty-two jurisdictions feature general force prerequisites of varying descriptions. Also like Colorado's latter statute, two of these force prerequisites refer only to the *legality* of the force. Wisconsin's force prerequisite is "force that does not comply with the standards" of its state law,[180] and Maryland's is force "beyond what is authorized" under its state law.[181]

Eleven other force prerequisites relate just to the *nature* of the force. California's force prerequisite concerns force "clearly beyond that which is necessary";[182] Nevada's involves force that is "not justi-

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ardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force, 89 GEO. WASH. L. REV. 1362 (2021).

176 Jesus Jiménez, Shaila Dewan & Mike Baker, *In Mass Shootings, Police Are Trained to "Confront the Attacker,"* N.Y. TIMES (May 27, 2022), https://www.nytimes.com/2022/05/27/us/active-shooting-trainings.html [https://perma.cc/R7ZG-7G5V] (quoting Uvalde police officer training materials); *see also* TEX. COMM'N ON L. ENF'T, ACTIVE SHOOTER RESPONSE FOR SCHOOL-BASED LAW ENFORCEMENT (2020), https://www.tcole.texas.gov/content/active-shooter-response-school-based-law-enforcement [https://perma.cc/HN5G-NTYU].

177 VT. STAT. ANN. tit. 20, § 2368(b)(7) (2022).

178 COLO. REV. STAT. § 18-8-805(5)(a) (2022).

179 *Id.* § 18-8-802(1.5)(a).

180 WIS. STAT. § 175.44(4)(a) (2023).

181 MD. CODE ANN., PUB. SAFETY § 3-524 (e)(2) (LexisNexis 2022).

182 CAL. GOV'T CODE § 7286(b)(9) (West 2022).

fied";[183] Oregon's refers to force that constitutes "misconduct";[184] Florida's, Nebraska's, North Carolina's, Virginia's, Washington's, and St. Louis's feature "excessive" force;[185] Pittsburgh's involves force that is "unreasonable";[186] and Cariol's Law involves force "clearly beyond that which is objectively reasonable under the circumstances."[187]

The nine remaining jurisdictions contain force prerequisites featuring two or even three characterizations relating to the *legality* of the force, the *nature* of the force, or *both*. Illinois's force prerequisite is "unauthorized force or force that exceeds the degree of force permitted";[188] Massachusetts's is force "beyond that which is necessary or objectively reasonable based on the totality of the circumstances";[189] Minnesota's concerns "force in violation of" its state law "or otherwise beyond that which is objectively reasonable under the circumstances";[190] Kentucky's relates to "unlawful and unjustified excessive or deadly force";[191] South Carolina's applies when "another officer [is] physically abusing a person" and "the person's rights [are] being violated";[192] Tennessee's concerns "excessive" force that violates "state or federal law";[193] and Connecticut's is "unreasonable, excessive, or illegal" force.[194] Texas's and Utah's general force prerequisites are the most detailed. Texas's refers to force that satisfies *all* of the following conditions: it "violates state or federal law," "puts a person at risk of bodily injury . . . and is not immediately necessary to avoid imminent bodily injury to a peace officer or other person," and "is not required to apprehend the person suspected of committing an offense."[195] Utah's refers to force that satisfies *any* of the following conditions: it "is clearly excessive in type or duration, clearly beyond what is objec-

183 NEV. REV. STAT. § 193.308(1) (2021).

184 OR. REV. STAT. § 181A.681(a) (2021).

185 FLA. STAT. § 943.1735(1)(d) (2022); NEB. REV. STAT. § 81-1414.17(1) (Supp. 2022); N.C. GEN. STAT. § 15A-401(d1) (2022); VA. CODE ANN. § 19.2-83.6(A) (2022); WASH. REV. CODE § 10.93.190(1) (2022); ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022).

186 PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

187 Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21(A)).

188 720 ILL. COMP. STAT. 5/7-16(a) (2021).

189 MASS. GEN. LAWS ch. 6E, § 15(a) (2022).

190 MINN. STAT. § 626.8475(a)(2) (2022).

191 KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022).

192 S.C. CODE ANN. § 23-23-150(A)(3)(f) (2022).

193 TENN. CODE ANN. § 38-8-129 (2022).

194 CONN. GEN. STAT. § 7-282e(a)(1) (2021).

195 TEX. CODE CRIM. PROC. ANN. art. 2.1387(a)(2)(A) (West 2021).

tively reasonable under the circumstances, or clearly not subject to legal justification . . . ."[196]

The wide array of force prerequisites indicates a lack of consensus on the type of force that warrants peer intervention—or is even objectionable.[197] Moreover, the force prerequisites in each of the existing ODTIs are flawed because they are too narrow, vague, or subjective. The model statute thus features a different force prerequisite: "force that is prohibited by local, state, or federal law or relevant law enforcement agency policy."[198] This force prerequisite is broad, clear, objective, and accommodates evolution in law and policy on what constitutes misuse of force.

To maximize application of ODTIs, the model statute employs a *general* force prerequisite, thus rejecting the overly circumscribed approaches taken in Vermont's law and in one of Colorado's laws. After all, many police brutality victims, including Floyd, were neither placed in chokeholds nor administered ketamine.[199]

To minimize ambiguity about ODTIs, the model statute's force prerequisite is objective (by referring to prohibited uses of force) rather than subjective (by referring to force that is, for example, unnecessary, unjustified, or excessive unaccompanied by an objective standard), thus rejecting extant duties relating only or partially to the subjective *nature* of the force. To further promote clarity, the model statute explicitly states the sources of the prohibitions of the use of force, which is clearer than Illinois's reference to "unauthorized" force and force not "permitted" without identifying the authority for those bans. However, unlike the laws in Maryland and Wisconsin, which refer only to the *legality* of the force, the model statute also includes force prohibited by relevant law enforcement agency policy. Indeed, such policies can disallow uses of force beyond those that are

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196 UTAH CODE ANN. § 53-6-210.5(1)(d)(i) (LexisNexis 2022).

197 *See, e.g.*, Kathleen Y. Murray, *Exploring a "Necessary Standard" for the Use of Excessive, Deadly Force by Law Enforcement: A Flawed Solution with Positive Potential*, 52 U. TOL. L. REV. 397, 397–99, 410–12 (2021) (describing variations in standards states have adopted on permitted uses of force); Zamoff, *supra* note 173, at 585 ("Excessive force jurisprudence in America is in disarray. Although the Supreme Court mandated over thirty years ago that courts determine the constitutionality of allegedly excessive force from the perspective of a reasonable officer on the scene, courts have never seemed more confused about how to make that determination.").

198 *Infra* Appendix.

199 Chauvin applied a neck restraint to Floyd but not a chokehold. *See* Michael Tarm, *EXPLAINER: Was Officer's Knee on Floyd's Neck Authorized?*, AP NEWS (Apr. 5, 2021), https://apnews.com/article/was-officer-knee-on-george-floyd-neck-authorized-639cab5a670173ea9cc311db4386abf2 [https://perma.cc/BM4L-NF8P].

strictly illegal in the jurisdiction.[200] As the model statute requires law enforcement agencies to train officers on identifying misuses of force under both law and law enforcement agency policy,[201] officers would be expected to know relevant prohibitions of each.

Texas's law, which mandates that the force violate law *and* other conditions, is too restrictive. In comparison, the model statute's force requirement pertains only to uses of force that are illegal *or* violate relevant policy. However, like Tennessee's and Texas's laws and unlike the laws in Maryland, Minnesota, and Wisconsin, the model statute applies to force that violates more laws than just in the statute's state. The model statute is more comprehensive than even Tennessee's and Texas's references to "state or federal law" by also including *local* law.

C. Intervention

The twenty-four jurisdictions with ODTIs vary by the methods and objectives of intervention, if any, imposed on officers to discharge the duty when confronting a colleague misusing force.

1. Methods

The twenty-four jurisdictions vary in the method of intervention, if any, that is required. Twenty-three jurisdictions do not specify any particular method. In contrast, Minnesota's ability requirement mandating that an officer must intervene if "physically or verbally able to

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200 For example, some police departments, such as in New York and Houston, banned chokeholds as a matter of policy long before that restraint was legally banned in their states. *See* Monika Evstatieva & Tim Mak, *How Decades of Bans on Police Chokeholds Have Fallen Short*, HOUS. PUB. MEDIA (June 16, 2020, 5:11 AM), https://www.houstonpublicmedia.org/npr/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short/ [https://perma.cc/APP2-Y3YD] (noting that the NYPD's ban began in November 1993); Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html [https://perma.cc/YQ5B-TKCU] (noting that New York's legal prohibition occurred in June 2020); Mario Orellana, *Union Says HPD Has Not Used Chokehold in Decades After Mayor Turner Issues Ban*, CLICK2HOUSTON.COM (June 9, 2020, 9:54 PM), https://www.click2houston.com/news/local/2020/06/10/union-says-hpd-has-not-used-chokehold-in-decades-after-mayor-turner-issues-ban/ [https://perma.cc/TTJ9-LP27] ("The Houston Police Department has not permitted chokeholds for the last 40 years (can only confirm back that long) and quite possibly has never permitted them." (quoting statement by Houston Police Officers' Union)); Chuck Lindell, *Texas Senate Passes Bill to Ban Police Chokeholds in Unanimous Vote*, AUSTIN AMERICAN-STATESMAN (Apr. 29, 2021, 1:44 PM), https://www.statesman.com/story/news/2021/04/28/texas-senate-passes-bill-banning-police-choke-holds/4879476001/ [https://perma.cc/JV62-9S4Y] (noting that Texas's legal prohibition occurred in April 2021).

201 *See infra* Appendix.

do so"[202] implies that its officers must intervene through either physical or verbal means.

All of these laws are defective. A method of intervention—and one that indicates a *standard* of such involvement—should be specified in the ODTI to provide guidance to officers about the duty's tactical requirements. Although Minnesota implies that physical *or* verbal methods must be used during an intervention, it does not direct the officer on when verbal methods are sufficient or when physical *and* verbal methods—or physical methods alone—may be needed. The model statute thus specifies that the intervening officer "must use reasonable verbal, physical, or both measures."[203] In addition, to ensure that officers do not intervene half-heartedly to avoid liability for not doing so at all, the model statute cautions that applying "unreasonably insufficient measures" does not discharge the duty to intervene.[204]

2. Objectives

The twenty-four jurisdictions vary in the objective, if any, that an intervening officer is required to meet. Six jurisdictions—California, Kentucky, Minnesota, Nebraska, South Carolina, and Vermont—do not state any particular objective.[205] The other eighteen jurisdictions mandate that the officer must act *before* their colleague's misuse of force, *during* such misconduct, or *either*.

Connecticut requires officers only to "attempt to stop" actual misuses of force.[206] Similarly, Pittsburgh and St. Louis mandate officers to "stop or attempt to stop" actual misuses of force.[207] Two other laws both obligate officers only to stop a misuse of force by stating that officers must "intervene . . . to end the [actual misuse of force] . . . or to prevent the further use of [that force]."[208] As another way of effectively imposing an obligation to stop an actual misuse of force, Utah mandates officers to "intervene to prevent the misconduct

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202 MINN. STAT. § 626.8475(a)(2) (2022).

203 *Infra* Appendix.

204 *Infra* Appendix.

205 *See* CAL. GOV'T CODE § 7286 (West 2022); KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022); MINN. STAT. § 626.8475; NEB. REV. STAT. § 81-1414.17 (Supp. 2022); NEV. REV. STAT. § 193.308 (2021); S.C. CODE ANN. § 23-23-150(A)(3)(f) (2022); VT. STAT. ANN. tit. 20, § 2368 (2022).

206 CONN. GEN. STAT. § 7-282e(a)(1) (2021).

207 PITTSBURGH, PA., CODE § 116.02A (Supp. 2022); ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022).

208 VA. CODE ANN. § 19.2-83.6(A) (2022); WASH. REV. CODE § 10.93.190(1) (2022).

from continuing to occur."[209] Florida goes further, requiring officers "to end" the actual or even attempted misuse of force.[210] Another three laws mandate that an officer intervene only to "prevent" an actual misuse of force.[211] As a variation on prevention, North Carolina requires officers to "attempt to intervene to prevent" the misuse of force.[212]

All of these laws are faulty. Jurisdictions that state no objective omit crucial guidance on the purpose of intervention—and how to know when an officer's duty to intervene has been achieved. Jurisdictions that only require officers to "prevent" a misuse of force leave ambiguous what is expected of officers who confront a misuse of force *as it is occurring*. Similarly, jurisdictions that only require officers to stop an *actual* misuse of force do not address situations in which an officer knows or reasonably should know that their colleague is *attempting* to misuse force but has not done so yet. ODTIs mandating an "attempt" to intervene are also problematic because such an attempt, even one that is unreasonable and thus has no likelihood of actually preventing or stopping the misuse of force, might still satisfy the duty.

The remaining seven jurisdictions' objectives are superior. These laws mandate that an officer must meet effectively the same synonymous objectives: either "prevent or stop,"[213] "stop or prevent,"[214] or "prevent or terminate"[215] a misuse of force. This objective of preventing *or* stopping/terminating a misuse of force—which also appears in the model statute—appropriately covers scenarios in which the misuse of force is either expected or underway. However, the model statute prefaces this objective's construct with "reasonably attempt to," which permits liability where an officer's attempt to avert or halt the misuse of force was unreasonable.[216] Of course, if required to prevent an activity that has not yet occurred, officers may make incorrect predictions and intervene unnecessarily and potentially counterproductively.

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209 UTAH CODE ANN. § 53-6-210.5(2)(a) (LexisNexis 2022).

210 FLA. STAT. § 943.1735(2)(d) (2022).

211 *See* MASS. GEN. LAWS ch. 6E, § 15(a) (2022); TENN. CODE ANN. § 38-8-129(a) (2022); Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21(A)).

212 N.C. GEN. STAT. § 15A-401(d1) (2022).

213 COLO. REV. STAT. § 18-8-802(1.5)(a) (2022); 720 ILL. COMP. STAT. 5/7-16(a) (2021); NEV. REV. STAT. § 193.308(1) (2021); OR. REV. STAT. § 181A.681(2) (2021); WIS. STAT. § 175.44(4)(a) (2023).

214 TEX. CODE CRIM. PROC. ANN. art. 2.1387(a) (West 2021).

215 MD. CODE ANN., PUB. SAFETY § 3-524(e)(2) (LexisNexis 2022).

216 *Infra* Appendix.

Still, given contextual clues that can lead officers to correctly anticipate misuse of force,[217] requiring intervention even just for prevention would still, on balance, be helpful. Indeed, officers often must act without perfect information.[218]

D. Punishment

The twenty-four jurisdictions vary in the type of punishment, if any, is imposed for violating the ODTI. Seven of the jurisdictions do not specify any penalty for noncompliance with their ODTIs.[219]

Eight jurisdictions *allow* disciplinary action—for example, retraining, suspension, demotion, decertification, termination—to be taken by their officers' law enforcement agency or standards and training commission.[220] Three other jurisdictions *mandate* disciplinary action.[221]

Three jurisdictions impose defined fines, imprisonment, or both. For violations of its ODTI, St. Louis imposes a fine not exceeding $1,000, nonpayment of which can be punished with imprisonment not exceeding 100 days.[222] Violation of Colorado's ODTI is a class 1 misdemeanor,[223] which carries a maximum sentence of a fine not exceeding $1,000, 364 days imprisonment, or both.[224] Wisconsin allows a fine of up to $1,000, imprisonment of up to six months, or both.[225]

The final two jurisdictions are each unique. Connecticut pegs its punishment to violations of the underlying crime. The state warns that officers who fail to intervene may be prosecuted and punished for the

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217 *See supra* notes 135–36 and accompanying text.

218 *See infra* note 305 and accompanying text.

219 Those jurisdictions are Florida, Maryland, Nebraska, Nevada, North Carolina, Tennessee, and Texas. *See* FLA. STAT. § 943.1735 (2022); MD. CODE ANN., PUB. SAFETY § 3-524(e)(2); NEB. REV. STAT. § 81-1414.17(1) (Supp. 2022); NEV. REV. STAT. § 193.308(1); N.C. GEN. STAT. § 15A-401 (2022); TENN. CODE ANN. § 38-8-129 (2022); TEX. CODE CRIM. PROC. ANN. art. 2.1387(a).

220 Those jurisdictions are Illinois, Kentucky, Massachusetts, Minnesota, Oregon, Utah, Vermont, and Washington. *See* 720 ILL. COMP. STAT. 5/7-16(a) (2021); KY. REV. STAT. ANN. § 15.391(1)(f)(1) (West 2022); MASS. GEN. LAWS ch. 6E, § 15(a) (2022); MINN. STAT. § 626.8475(c) (2022); OR. REV. STAT. § 181A.681(2) (2021); UTAH CODE ANN. § 53-6-210.5 (LexisNexis 2022); VT. STAT. ANN. tit. 20, § 2368 (2022); WASH. REV. CODE § 10.93.190(1) (2022).

221 CAL. GOV'T CODE § 7286(b)(19) (West 2022); VA. CODE ANN. § 19.2-83.7 (2022); PITTSBURGH, PA., CODE § 116.02A (Supp. 2022).

222 *See* ST. LOUIS, MO., CODE § 15.185.030 (Supp. 2022), at E; ST. LOUIS, MO., CHARTER art. IV, § 24 (Supp. 2022).

223 COLO. REV. STAT. § 18-8-802(1.5)(d) (2022).

224 *Id.* § 18-1.3-501(1)(a.5).

225 WIS. STAT. § 175.44(4)(c) (2023).

same acts as the officer who misused force,[226] effectively under a theory of accomplice liability.[227] Cariol's Law contains elements that appear in other jurisdictions' punishments, but also some distinct features: officers who fail to intervene under the ordinance "may be held criminally liable for any Penal Law offense under which the failure to intervene satisfies all of the elements of the offense,"[228] "may be disciplined internally,"[229] and "may be found to be in dereliction of his/her duty to intervene . . . and asked to reimburse the City for any civil judgments rendered by a court of law for his actions."[230]

The approach to punishment that almost all extant ODTIs take is flawed. First, unlike the jurisdictions with no stated punishment for noncompliance, ODTIs should explicitly feature penalties so that officers, their agencies, prosecutors, courts, and the public are aware of potential consequences for violations. Announced punishments for ODTIs are more likely to deter violations,[231] promote the perception that violations are morally wrong,[232] and signal to the public that the government takes seriously both the misuse of force and the failure to intervene. Indeed, many would question whether a prohibition—including on nonintervention—without a penalty even constitutes a law.[233]

Second, the jurisdictions that enable disciplinary action by extrajudicial bodies leave too much discretion to entities that may be biased. Given concerns over "the blue wall of silence,"[234] agencies

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226 CONN. GEN. STAT. § 7-282e(a)(1) (2021).

227 *See id.* § 53a-8(a) (codifying accomplice liability).

228 Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21.2(A) (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21.2(A)).

229 *Id*. § 13-21.2(B). Note that this section describes discipline of officers for failing to intervene to prevent any violation of a citizen's constitutional rights, not just failure to intervene in a colleague's misuse of force.

230 *Id*. § 13-21.2(C).

231 *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 857 (2002) ("To achieve general deterrence, the appearance or publicity of punishment is crucial.").

232 Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1227 (2001) ("[P]unishment practices may influence individuals' views about the wrongfulness of acts and the legitimacy of the legal system . . . ."); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 25 (2d ed. 1986) (discussing the theory that punishment serves to educate the public about the difference between good and bad conduct).

233 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 32 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1885) ("An imperfect law . . . is a law which wants a sanction, and which, therefore, is not binding."); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 57–59 (1941) ("[L]aw sets up coercive measures as sanctions that are to be directed under definite conditions against definite individuals.").

234 *See supra* note 122 and accompanying text; *infra* Section II.D.2.

should not be the sole arbiter of whether and, if so, how to reprimand officers who violate their duty to intervene.

Third, the sole jurisdiction that allows the same punishment for an officer's failure to intervene as for their colleague's misuse of force categorizes nonintervention too narrowly. Connecticut's requirement to prove the elements of accomplice liability does not contemplate failures to intervene that do not necessarily feature the same mens rea as the misuse of force itself.[235]

Finally, Cariol's Law's unique approach to punishment is also problematic. Because the ordinance only holds criminally liable nonintervention accompanied by an act that qualifies the conduct as an existing offense, the ordinance does not penalize nonintervention alone.[236] The ordinance's allowance for internal discipline raises the same concern about institutional bias as already noted. *Requesting* reimbursement is weaker than *requiring* it.

Punishments that clearly specify potential fines and imprisonment—as in St. Louis, Colorado, and Wisconsin—are most appropriate and likely to be most effective. The model statute takes the same approach but opts for a felony classification and decertifies violators as officers. Such a serious penalty is warranted for both retributive and utilitarian reasons given the different societal role of officers as compared with civilians[237] and the potentially—and frequently—fatal consequence of officer peer nonintervention. Officers who breach their duty to intervene—a duty that could prevent injuries and deaths—deserve severe punishment, including facing incarceration and forfeiting their career in law enforcement. Carceral punishment—especially for officers, who have particular reason to avoid imprisonment[238]—could deter violations of the duty[239] better than financial settlements and judgments alone, which are almost always paid by

235 *See infra* Section II.A.1.e.

236 *See* Cariol's Law, Buffalo, N.Y., Local Law No. 3 (2020) (to be codified at BUFFALO, N.Y., CHARTER §§ 13-21 to 13-21.5).

237 *See supra* note 173 and accompanying text.

238 *See* Koon v. United States, 518 U.S. 81, 81, 84 (1996) (holding that that the district court acted within its discretion in considering police officers' high susceptibility to abuse in prison as a factor upon which to base downward departure from the applicable sentencing range under the sentencing guidelines); James Greig, *How Former Police Officers Are Treated in Prison*, VICE (Dec. 30, 2020, 6:00 AM), https://www.vice.com/en/article/4adxd9/how-former-police-officers-are-treated-in-prison [https://perma.cc/QK73-LYQ5] (quoting author of book on prison survival stating that a "moral code of criminals" in prison is that "cops get maimed").

239 For discussion of retributive and utilitarian theories of punishment, see JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 33–44 (8th ed. 2019).

officers' agency employers rather than officers themselves.[240] Many law enforcement agencies consider felony—but only certain misdemeanor—convictions as employment disqualifiers,[241] further incentivizing individuals who would prefer to remain officers to comply with ODTIs classified as felonies even if ODTIs themselves do not require violators to be decertified. Although some juries may hesitate to impose sentences if they view them as excessive,[242] widespread outrage over officer misuse of force[243] suggests that juries would likely be amenable to convicting ODTI violators as felons.

E. Training

Only four of the twenty-four jurisdictions—California, Florida, Washington, and St. Louis—mandate training for officers on discharging their duty to intervene.[244] Pittsburgh's law requires training, but of the public's civil and constitutional rights, not explicitly the ODTI.[245] The omission in the other nineteen jurisdictions leaves officers insufficiently prepared to confront colleagues misusing force.

A different jurisdiction that does *not* mandate an ODTI—Arkansas—does, however, impose such trainings annually on all officers in the state as part of their certification requirements.[246] This law is flawed, however, for the opposite reason: although it requires training for such a duty, it does not mandate the duty itself.

Like the laws in California, Florida, Washington, and St. Louis, the model statute explicitly directs law enforcement agencies to train their officers on complying with the ODTI.[247] The model statute is more specific, though, in two ways. First, the model statute explicitly states when and how to conduct the required peer intervention. Second, unlike Florida's and St. Louis's ODTI trainings, which are lim-

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240 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014) ("Police officers are virtually always indemnified.").

241 Hilary Rau, Kim S. Buchanan, Monique L. Dixon & Phillip A. Goff, *State Regulation of Policing: Post Commissions and Police Accountability*, 11 U.C. Irvine L. Rev. 1349, 1367 (2021) (Most states "disqualify prospective police officers who have been convicted of felony offenses or specified misdemeanors.").

242 Daniel Epps & William Ortman, *The Informed Jury*, 75 Vand. L. Rev. 823, 835 (2022) ("Informed juries are more prone to acquit than ignorant juries when they perceive the potential punishment to be excessive.").

243 *See supra* notes 35–40.

244 Cal. Gov't Code § 7286(b)(19) (West 2022); Fla. Stat. § 943.1735(3) (2022); Wash. Rev. Code § 43.101.495(3) (2022); St. Louis, Mo., Code § 15.185.030(D) (Supp. 2022).

245 Pittsburgh, Pa., Code § 116.02A(c) (Supp. 2022).

246 Ark. Code Ann. § 12-9-125 (2022).

247 *See infra* Appendix.

ited to trainees,[248] the model statute imposes training on *both* rookies and, annually, on existing officers, like in Arkansas. This training could be modeled after the Ethical Policing Is Courageous ("EPIC") program administered by the New Orleans Police Department ("NOPD"),[249] the Active Bystandership for Law Enforcement ("ABLE") project led by Georgetown University Law Center,[250] and the Law Enforcement and Society ("LEAS") program co-created by the U.S. Holocaust Memorial Museum and the Anti-Defamation League.[251]

F. Antiretaliation

Twelve of the twenty-four jurisdictions feature an antiretaliation provision to protect intervening officers[252] while the remaining twelve do not.[253] However, even the laws that do contain antiretaliation provisions are incomplete. Eight prohibit such misconduct but do not specify any penalty or judicial relief for it.[254] Oregon both prohibits retaliation and provides guidance for violations but only addresses such misconduct by an "employer."[255] Similar to Oregon's antiretalia-

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248 FLA. STAT. § 943.1735(3) (2022) (imposing ODTI training only on "officers to obtain initial certification"); ST. LOUIS, MO., CODE § 15.185.030(D) (imposing ODTI training only on police "trainees").

249 For more information about EPIC, see *EPIC*, CITY OF NEW ORLEANS, http://epic.nola.gov/home/ [https://perma.cc/5AQQ-EPW7].

250 For more information about ABLE, see *Active Bystandership for Law Enforcement (ABLE) Project*, GEO. L. [hereinafter *ABLE*], https://www.law.georgetown.edu/cics/able/ [https://perma.cc/PX24-YA4S].

251 For more information about the LEAS program, see *Law Enforcement*, U.S. HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/outreach-programs/law-enforcement [https://perma.cc/X4HC-HZ9X].

252 These jurisdictions are Colorado, Connecticut, Illinois, Nevada, Oregon, Tennessee, Utah, Virginia, Washington, Wisconsin, Buffalo, and Pittsburgh. *See* COLO. REV. STAT. § 18-8-802(1.5)(c) (2022); CONN. GEN. STAT. § 7-282e(a)(3) (2021); 720 ILL. COMP. STAT. 5/7-16(c) (2021); NEV. REV. STAT. § 193.355(4)(a) (2021); OR. REV. STAT. § 181A.681(5) (2021); TENN. CODE ANN. § 38-8-129(c) (2022); UTAH CODE ANN. § 56-6-210.5(4) (LexisNexis 2022); VA. CODE ANN. § 19.2-83.6(B) (2022); WASH. REV. CODE § 10.93.0002(3) (2022); WIS. STAT. § 175.44(5) (2023); Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21.1 (2020) (to be codified at BUFFALO, N.Y., CHARTER § 13-21.1); PITTSBURGH, PA., CODE § 116.02A(b) (Supp. 2022).

253 Although Massachusetts's law is among the jurisdictions without an antiretaliation provision as part of its officer duty to *intervene*, it does contain such a provision as part of its officer duty to *report*. *See* MASS. GEN. LAWS ch. 6E, § 15(c) (2022).

254 COLO. REV. STAT. § 18-8-802(1.5)(c) (2022); 720 ILL. COMP. STAT. 5/7-16(c) (2021); NEV. REV. STAT. § 193.355(4)(a) (2021); TENN. CODE ANN. § 38-8-129(c) (2022); VA. CODE ANN. § 19.2-83.6(B) (2022); WASH. REV. CODE § 10.93.0002(3) (2022); WIS. STAT. § 175.44(5) (2023); PITTSBURGH, PA., CODE § 116.02A(b).

255 OR. REV. STAT. § 181A.681(5) (2021).

tion provision, Connecticut's antiretaliation provision concerns only a "law enforcement unit employing a police officer,"[256] and Tennessee's provision applies only to "a law enforcement agency."[257] Cariol's Law is unique among existing ODTIs in explicitly applying antiretaliation provisions retroactively.[258] However, although Cariol's Law extends sufficiently into the past—twenty years preceding the law's enactment—to have applied to Horne herself,[259] *all* current and former officers should benefit from such protections. The model statue thus contains an antiretaliation provision extending retroactively without a time limit, prohibiting retaliation by the agency or any of its employees, and including penalties with treble damages and other judicial relief for violations. As a result, the model statute protects all current and former employees of the agency, prohibits retaliation by more than just employers or the agency as a whole, and strongly deters retaliatory conduct.[260]

Given the multitude of serious flaws in existing laws mandating some form of an ODTI, an alternative is needed. The Appendix partially draws on this Part's examination to propose an improved model statute mandating officer peer intervention.

II. Officer Duties to Intervene: Counterarguments and Rebuttals

Skeptics of mandating law enforcement ODTIs could mount various counterarguments. These critics may contend that such obligations are unnecessary, unreasonable, inappropriate, ineffective, or even counterproductive. This Part presents—and rebuts—these counterarguments.

A. Necessity

Skeptics of enacting statutes mandating law enforcement upstanderism could argue that doing so is unnecessary because extant laws, policies, and trainings are sufficient. However, these statutes, rules, and programs are inadequate, as demonstrated by the fact that

256 Conn. Gen. Stat. § 7-282e(a)(3) (2021).

257 Tenn. Code Ann. § 38-8-129(c) (2022).

258 Cariol's Law, Buffalo, N.Y., Local Law No. 3, sec. 3, § 13-21.1 (2020) (to be codified at Buffalo, N.Y., Charter § 13-21.1).

259 *Id.*

260 *See, e.g.*, Tryon v. Mass. Bay Transp. Auth., 159 N.E.3d 177, 189 (Mass. App. Ct. 2020) ("Treble damages are appropriate where conduct 'is so egregious that it warrants public condemnation and punishment' to 'deter such behavior.'" (quoting Haddad v. Wal-Mart Stores, Inc., 914 N.E.2d 59, 75 (Mass. 2009))).

officer peer nonintervention continues and includes fatal consequences like in the Chauvin case.[261] An explicit ODTI law should thus be adopted, implemented, and enforced in each state and at the federal level and with penalties commensurate with the seriousness of noncompliance.

1. Existing Laws

Officers who have decided not to intervene in their colleagues' misuse of force have been or could be charged with violating various existing laws other than a specific, explicit ODTI. Enacting such statutes is still necessary, however, because, as discussed in this Section, the other laws either do not address the full range of officer peer nonintervention, only encompass an actus reus or mens rea that is not always involved in officer bystanderism, or do not provide sufficient punishment.[262] These other laws include Bad Samaritan laws that apply regardless of profession, civil and criminal violations of civil rights, criminal lying, accomplice liability, and the felony murder rule.

a. Bad Samaritan Laws That Apply Regardless of Profession

Skeptics of an ODTI might argue that these statutes are rendered unnecessary by existing Bad Samaritan laws that apply regardless of profession. After all, Bad Samaritan laws punish bystanderism and prod upstanderism and can be crafted in ways that implicitly include officer peer intervention. For example, Minnesota—site of the Chauvin case—*requires* that "[a] person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall . . . give reasonable assistance to the exposed person."[263] The "person at the scene" could thus be an officer, the "grave physical harm" could be caused by their colleague, and the person who "is exposed to or has suffered" that harm could be the target of that colleague's misuse of force.[264]

However, Bad Samaritan laws that apply regardless of profession are insufficient, at least in the United States, to address the specific context of an ODTI. First, not all U.S. states and territories have these laws,[265] and the federal law enacted in 2018 is too narrow to encom-

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261 *See supra* note 14 and accompanying text.

262 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1347–48.

263 MINN. STAT. § 604A.01 (2022).

264 *Id.*

265 *See supra* note 70 and accompanying text.

pass police brutality.[266] So, even if Bad Samaritan laws in the United States that apply regardless of profession could be interpreted to include an ODTI, such statutory requirements do not cover all potential situations throughout the country.

Second, very few Bad Samaritan laws in the United States that apply regardless of profession could even be interpreted to include an ODTI. Only a tiny portion of such statutes require intervention. Instead, almost all of these laws in the United States impose only a duty to report,[267] and some others explicitly permit reporting to discharge a duty to intervene.[268] Actual officer peer intervention could only arguably be imposed in two states, Rhode Island[269] and Vermont,[270] which have nearly identical duties to aid. Accordingly, an ODTI could be read into a maximum of four percent of U.S. states. These two states are among the smallest and least populated, with a joint total of only half a percent of the overall U.S. population[271] and an even smaller proportion of the country's overall area.[272] Even if an ODTI were implicitly imposed by Rhode Island's and Vermont's Bad Samaritan laws, which apply regardless of profession, the vast majority of the country's states, population, and area would still not be covered.

Third, most Bad Samaritan laws in the United States that apply regardless of profession include an exemption that is ill suited to, and would undermine, an ODTI. The broader statutes typically are[273]—or,

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266 *See supra* note 71 and accompanying text.

267 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1346 (noting that Bad Samaritan "[l]aws that explicitly require *only* reporting are much more widespread in the United States").

268 *See id.* ("The laws in three of these states . . . explicitly note that the duty can be discharged through reporting alone, effectively making these statutes duties to rescue *or* to report.").

269 11 R.I. GEN. LAWS § 11-56-1 (2022) ("Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall . . . give reasonable assistance to the exposed person.").

270 *See supra* note 67 and accompanying text.

271 *See QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/VT,RI,US/PST045221 [https://perma.cc/87LE-GZKE] (noting that, in 2020, Rhode Island's population was 1,097,379; Vermont's population was 643,077; and the overall U.S. population was 331,449,281). The combined populations of Rhode Island and Vermont in 2020 was thus 1,740,456, which is 0.525% of the overall U.S. population.

272 *See State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU (Dec. 16, 2021), https://www.census.gov/geographies/reference-files/2010/geo/state-area.html [https://perma.cc/7YQG-6YLZ] (noting that Rhode Island's land area is 1,034 square miles, Vermont's land area is 9,217 square miles, and the overall U.S. land area is 3,531,905 square miles). The combined land area of Rhode Island and Vermont is thus 10,251 square miles, which is 0.29% of the overall U.S. land area.

273 *See Database 1*, *supra* note 65 (compiling Bad Samaritan laws, some of which list fear of

if not, should be[274]—explicitly inapplicable to potential upstanders, especially *civilians*, who reasonably fear that their conduct would imperil themselves.[275] For example, Minnesota's Bad Samaritan law applies only "to the extent that the person can [give reasonable assistance] without danger or peril to self."[276] However, because policing is dangerous to begin with,[277] and intervening amid a colleague's use of force is especially so, including such an exemption in a specific *officer* duty to intervene would grant virtually all violators a compelling defense that would nullify the obligation or at least render it highly discretionary. Given the differences between officers and the public,[278] officers should be expected to accept peril to themselves from intervening in their colleagues' misuse of force.[279] Therefore, unlike many Bad Samaritan laws in the United States that apply regardless of profession, the model statute does not include this exemption.

Finally, Bad Samaritan laws in the United States that apply regardless of profession feature a criminal category and penalties that are too lenient to deter violations of an ODTI or to address the egregiousness of noncompliance with such a specialized duty. These

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physical injury as an excuse for noncompliance). Alaska's Bad Samaritan laws provide examples of this feature. *See* Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1159 n.275 ("[B]oth of Alaska's Bad Samaritan laws—which divide duties to report violent crimes into separate statutes applying to victims who are children and adults—include fear of physical injury as an affirmative defense."); ALASKA STAT. § 11.56.765(b)(1) (2022) ("[I]t is an affirmative defense that the defendant . . . did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury . . . ."); *id.* § 11.56.767(b)(1)(A) ("[I]t is an affirmative defense that the defendant . . . did not report as soon as reasonably practicable because the defendant reasonably believed that . . . doing so would have exposed the defendant or others to a substantial risk of physical injury . . . .").

274 *See* Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1182 ("If this exemption is not already part of the statute, as in Ohio's general Bad Samaritan law, then legislators should amend such laws to include it." (footnote omitted)); *id.* at 1190 (including as an exempted group in the model duty to report specified violent crimes "[i]ndividuals who reasonably fear that, by reporting, they would place themselves or someone else in danger of suffering serious bodily injury or death").

275 *See id.* at 1158–59, 1182.

276 MINN. STAT. § 604A.01 (2022). As other examples, Rhode Island's duty only applies where the potential upstander can render assistance "to the extent that he or she can do so without danger or peril to himself or herself or to others," 11 R.I. GEN. LAWS § 11-56-1 (2022), and Vermont's duty only applies "to the extent that [assistance] can be rendered without danger or peril to himself or herself or without interference with important duties owed to others," VT. STAT. ANN. tit. 12, § 519(a) (2022).

277 *See supra* note 172 and accompanying text.

278 *See supra* note 173 and accompanying text.

279 *See supra* Section I.B.3.

broader statutes, such as the one in Minnesota,[280] are classified as misdemeanors and usually exclude imprisonment.[281] Those two features are appropriate to avoid exacerbating the problem of "mass incarceration"[282] and other valid concerns with creating or spreading criminal laws in the United States.[283] In contrast, violation of an ODTI should be classified as a felony and should include imprisonment, as in the model statute, given distinctions between officers and civilians[284] and the potentially lethal result to civilians of officer peer nonintervention.[285]

b. Civil Violation of Civil Rights

Federal courts have found some officers civilly liable for their peer nonintervention under 42 U.S.C. § 1983,[286] which enables a civil action for deprivation of constitutional and federal statutory rights.[287] As the U.S. Court of Appeals for the Seventh Circuit stated fifty years ago when referring to an affirmative officer duty to intervene under this federal statute, "We believe it is clear that one who is given the

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280 MINN. STAT. § 604A.01 (2022) ("A person who violates this subdivision is guilty of a petty misdemeanor.").

281 *See Database 1*, *supra* note 65 (collecting misdemeanor Bad Samaritan laws excluding prison under the "Misdemeanor," "Civil Penalty," and "Violation" search filter categories).

282 *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2 (2016); Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004).

283 *See* Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1180 ("Bad Samaritan laws should not include imprisonment among potential sanctions."); *see also id.* at 1180, 1191 (noting that violating the model duty to report specified violent crimes constitutes a misdemeanor punishable by a fine, citation, probation, or community service, but not imprisonment).

284 *See supra* note 173 and accompanying text.

285 *See supra* notes 237–43 and accompanying text (arguing for classifying ODTIs as felonies).

286 *See, e.g.*, Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); Gagnon v. Ball, 696 F.2d 17 (2d Cir. 1982); Webb v. Hiykel, 713 F.2d 405 (8th Cir. 1983); McHenry v. Chadwick, 896 F.2d 184 (6th Cir. 1990); Knapps v. City of Oakland, 647 F. Supp. 2d 1129 (N.D. Cal. 2009).

287 The statute states, in part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge."[288]

State courts have also found some officers civilly liable for their bystanderism amid their colleagues' misuse of force. For example, in 1993, Massachusetts's supreme court affirmed a lower court's decision finding officers who failed to intervene to protect a criminal suspect's civil rights[289] liable under the state's Civil Rights Act,[290] which is similar to 42 U.S.C. § 1983.

Critics of an ODTI might therefore argue that *civil* suits under these federal and state statutes are sufficient, or even superior, to a *criminal* ODTI for two reasons. First, the success of some of these civil suits demonstrate that they may be adequate, obviating the need to mandate officer peer intervention separately and specifically. Second, because liability under civil suits requires a lower standard of proof—preponderance of the evidence—than criminal statutes—proof beyond a reasonable doubt[291]—the former are more likely to be successfully prosecuted and, thus, promote officer accountability.

Civil suits under § 1983 and its analogues in Massachusetts and other states, however, are insufficient to address the seriousness and variety of officer peer nonintervention. Section 1983 and its state analogues fail to address the seriousness of such nonintervention because they only facilitate tort liability, such as in the form of money damages or injunctive or other equitable relief, for nonfeasance. In any case, officer liability under § 1983 is limited by the qualified immunity doctrine,[292] and municipal liability under § 1983 requires a stringent standard of proving the agency's violation was the result of an executed local policy or custom.[293] Furthermore, instead of officers and agencies directly bearing the financial consequences of lawsuits, their cities and insurers may incur these costs.[294] Even where agencies bear costs of tort liability, those agencies do not necessarily sanction officers re-

288 *Byrd*, 466 F.2d at 11; *see also* O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988) ("A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers.").

289 *See* Commonwealth v. Adams, 624 N.E.2d 102, 106 (Mass. 1993).

290 MASS. GEN. LAWS ch. 12, § 11H (2022).

291 *See In re* Winship, 397 U.S. 358, 367–68 (1970).

292 *See infra* Section II.C.3.

293 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

294 *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (answering the question, "When a plaintiff recovers damages against the government, who foots the bill?").

sponsible for the lawsuits or implement other remedial measures.[295] Thus, pursuing liability under § 1983 may neither be successful nor deter police misconduct because of legal barriers potentially impeding suits, officers and agencies lacking sufficient incentive to reform, and any reform possibly being ineffective.[296]

Although the model statute does provide for *civil* liability, legally mandating officer peer intervention with *criminal* sanctions for noncompliance is still necessary to impose more appropriately severe, individualized penalties on violators, such as imprisonment. Criminal sanctions aim more than civil sanctions to deter and express society's moral condemnation of noncompliance, as well as to impose retribution and ensure incapacitation.[297] Accordingly, criminal sanctions are more appropriate for officer peer nonintervention.[298] By imposing penalties on officers themselves, criminal sanctions strengthen the deterrent effect that would otherwise be weakened by the possibility of municipal liability or insurance coverage. Moreover, the specific threat of imprisonment for noncompliance would be a compelling means to prod upstanderism, especially for a current officer.[299] Other scholars have similarly argued that criminal punishment is more appropriate than civil sanctions in certain contexts.[300]

Regarding the variety of officer peer nonintervention, courts' interpretation of the plaintiff's burden of proof in § 1983 suits precludes liability for the full range of such cases. Unlike 18 U.S.C. § 242,[301] the criminal counterpart of § 1983,[302] § 1983 itself does not explicitly in-

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295 *Id*. at 1195–1202 (finding no evidence to support the view "that litigation costs would prompt law enforcement agencies to gather and analyze information about these suits, determine areas of risk and liability, and take steps through improved hiring, training, and supervision to reduce the risk of future claims against line officers and leadership").

296 Rachel Harmon, The Law of the Police 654–56 (2021).

297 *See* Dressler & Garvey, *supra* note 239, at 1–2, 38–39, 40–41.

298 *See supra* text accompanying notes 173, 237.

299 *See supra* note 238 and accompanying text.

300 *See generally*, Bradley J. Sauer, *Deterring False Claims in Government Contracting: Making Consistent Use of 18 U.S.C. § 287*, 39 Pub. Cont. L.J. 897 (2010) (arguing that criminal enforcement of the False Claims Act would be better than civil enforcement).

301 *See infra* note 314.

302 Courts and commentators often characterize 18 U.S.C. § 242 as the criminal counterpart of 42 U.S.C. § 1983 or the latter as the civil counterpart of the former. *See, e.g.*, United States v. Price, 383 U.S. 787, 794 n.7 (1966) (referring to § 1983 as the "civil counterpart" of § 242); Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 Fla. L. Rev. 1773, 1821 (2016) (referring to § 242 as the "criminal counterpart" of § 1983); Leslie B. Arffa, Comment, *The Crime of "Causing Traffic": Can the Criminal Civil Rights Statutes Target Public Corruption?*, 36 Yale L. & Pol'y Rev. 523, 523 (2018) (referring to § 242 as the "criminal cousin[]" of § 1983).

clude a mens rea standard.[303] Still, § 1983 suits require a plaintiff to "prove a violation of the underlying constitutional right,"[304] and each right incorporates its own such standard.[305] For example, in cases regarding the alleged deprivation of a person's Eighth Amendment protection against cruel and unusual punishment in custodial contexts, the U.S. Supreme Court has imposed a standard of "deliberate indifference."[306] Concerning prison officials knowing the risk of serious harm to an inmate while failing to prevent such harm, the Court has described this "deliberate indifference" standard as entailing "something more than mere negligence" but "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[307] Officers who are merely negligent in their bystanderism amid their colleagues' misuse of force thus have not been[308]—and might not ever be—found liable under § 1983.

However, for the same reasons that noncompliance with an ODTI should be punished criminally, not just civilly, such nonintervention through mere negligence could still be prevented and punished. To address this gap in officer peer nonintervention cases, an ODTI, even one classified as a felony (as the model statute is[309]), could include a negligence mens rea standard.[310] Given understandable concerns over negligence mens rea standards for criminal offenses,[311] however, recklessness would be a valuable—and more

303 *See* 42 U.S.C. § 1983; Parratt v. Taylor, 451 U.S. 527, 534 (1981) ("Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement.").

304 Daniels v. Williams, 474 U.S. 327, 330 (1986).

305 *See* Graham v. Connor, 490 U.S. 386, 393–94 (1989).

306 *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

307 Farmer v. Brennan, 511 U.S. 825, 835 (1994).

308 *See, e.g.*, Tanner v. San Juan Cnty. Sheriff's Off., 864 F. Supp. 2d 1090 (D.N.M. 2012); Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976); Segreto v. Kirschner, 977 F. Supp. 553 (D. Conn. 1997).

309 *See supra* Section I.C.; *infra* Appendix.

310 Some other offenses with a negligence mens rea are classified as felonies. *See, e.g.*, MODEL PENAL CODE § 210.4 (AM. L. INST. 1985) (Negligent homicide); ME. REV. STAT. tit. 17-A, § 203(1)(A) (2023) (Manslaughter); OKLA. STAT. ANN. tit. 21, § 1751 (2023) (Railroads, injuries to); OKLA. STAT. ANN. tit. 21, § 1752 (2023) (Death from displacing of railroad equipment); OR. REV. STAT. ANN. tit. 16, § 166.165(1)(b) (West 2019) (Bias crime in the first degree); R.I. GEN. LAWS. ANN. § 11-25-6 (West 2022) (Officer negligently allowing escape); S.D. CODIFIED LAWS § 22-18-1.05 (2018) (Simple or aggravated assault against law enforcement officer, firefighter, ambulance personnel, department of corrections employee or contractor, health care personnel, or other public officer); TEX. PENAL CODE ANN. § 22.041(c) (West 2021) (Abandoning or endangering child); UTAH CODE ANN. § 76-5-208(2)(b)(ii) (West 2022) (Child abuse homicide); VT. STAT. ANN. tit. 13, § 4009 (West 2022) (Negligent use of gun).

311 Some scholars have argued that severe sanctions for negligent actions are not justified,

practical and reasonable—minimum mens rea standard for an ODTI. The model statute features this recklessness minimum mens rea standard.

c. Criminal Violation of Civil Rights

Federal courts have also found some officers, including Kueng and Thao,[312] criminally liable for their peer nonintervention[313] under 18 U.S.C. § 242.[314] Like § 1983, § 242 has state analogues.[315] However, also like § 1983, § 242 is insufficient to address the full range of officer peer nonintervention. Most importantly, the statute's mens rea element creates a substantial hurdle to prosecute violations successfully.[316]

Section 242 requires that a violator "willfully subjects" another person to the deprivation of guaranteed rights, privileges, or immuni-

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or at least less warranted than those for other mens rea. *See, e.g.*, Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 641 (1963) (arguing that punishment for negligence is not justified); Richard A. Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 92, 102–04 (1967) ("[T]he 'moral license' to punish is most persuasive if it is true that the actor chose to break the law. And it is this kind of choice that is hard to find in the case of negligence." (footnote omitted)).

312 *See supra* note 19–20 and accompanying text.

313 *See, e.g.*, United States v. Reese, 2 F.3d 870 (9th Cir. 1993); United States v. Serrata, 425 F.3d 886 (10th Cir. 2005); United States v. Scott, 833 Fed. App'x 884 (2d Cir. 2020); United States v. Pagán-Ferrer, 736 F.3d 573 (1st Cir. 2013); United States v. Broussard, 882 F.3d 104 (5th Cir. 2018).

314 The statute states, in whole,

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242.

315 *See, e.g.*, IND. CODE § 22-9.5-10-1 (2022) (criminalizing interference with another's rights); TEX. PENAL CODE ANN. § 39.03 (West 2021) (criminalizing official oppression).

316 *See* Michael J. Pastore, Note, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 171, 172 (2002).

ties.[317] The interpretation of the "willfully" mens rea standard of § 242, like for § 1983,[318] was judicially imposed. In a seminal case interpreting the mens rea standard of § 242's precursor, 18 U.S.C. § 52, the U.S. Supreme Court in 1945 found that "willfully" in this context means either "specific intent" to deprive a person of an established federal right[319] or a lower standard of "reckless disregard" of such a right.[320] The Court's seemingly contradictory endorsement of either interpretation of the mens rea element has caused confusion and induced inconsistency in applying § 242.[321] Circuit courts of appeal differ on whether they require specific intent,[322] reckless disregard,[323] or even, effectively, general intent.[324] This lack of clarity flows from two public policy concerns: first, assuring that a criminal is, or should be, aware that the act or omission is wrongful; and, second, holding accountable those who demonstrate at least a reckless disregard for their conduct and other people's constitutional rights.

Partly because the strictest interpretation of § 242's intent requirement is so onerous, potential violations of the statute are seldom prosecuted.[325] Indeed, federal prosecutors have acknowledged that

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317 *See supra* note 314.

318 *See supra* note 303–305 and accompanying text.

319 Screws v. United States, 325 U.S. 91, 103–04 (1945); *id.* at 101 (observing that "willful" in a criminal statute "generally means an act done with a bad purpose," such that "[a]n evil motive to accomplish that which the statute condemns becomes a constituent element of the crime" (quoting United States v. Murdock, 290 U.S. 389, 394 (1933))).

320 *Id.* at 104–05, 130.

321 *See* United States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997) (observing that, in interpreting willfulness in § 242's precursor, "*Screws* is not a model of clarity"); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crime*s, 67 TUL. L. REV. 2113, 2180–86 (1993) ("In the course of reformulating the standard, Justice Douglas [writing for the majority in *Screws*] slid from specific intent to violate a constitutional right to something akin to negligence.").

322 For example, the Fifth Circuit requires specific intent. *See* United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985); United States v. Kerley, 643 F.2d 299, 303 (5th Cir. 1981).

323 For example, the Third, Ninth, and Eleventh Circuits require reckless disregard. *See Johnstone*, 107 F.3d at 208; United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986); United States v. Brown, 934 F.3d 1278, 1296 (11th Cir. 2019).

324 For example, the Fourth Circuit effectively requires general intent. *See* United States v. Cobb, 905 F.2d 784, 785, 788–89 (4th Cir. 1990) (holding that the requisite intent could be "inferred from the circumstances of the assault" when the defendant's use of force is "not reasonably related to a legitimate nonpunitive governmental objective." (quoting Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988))).

325 *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009) ("Federal criminal civil rights prosecutions face significant legal and practical obstacles, including that federal law imposes an onerous intent requirement on civil rights crimes; that victim of police misconduct often make problematic witnesses; and that juries frequently believe and sympathize with defendant officers."); *Police Officers Rarely Charged for*

lack of evidence of criminal intent is one of two primary reasons they have so frequently declined to charge violations of this statute.[326] The specific intent element may actually be the most significant obstacle to effective prosecutions under § 242.[327]

Officer peer nonintervention may not yield proof beyond a reasonable doubt that the bystander "willfully" deprived a person of a federal right.[328] To prosecute a greater number of such criminal cases successfully, one or more initiatives is therefore needed. First, Congress could amend § 242 to remove the specific intent mens rea standard imposed by the Supreme Court and followed by some circuit courts of appeal.[329] Because the statute applies to *anyone* acting under color of law, however, that amendment could cause unintended consequences for officials other than law enforcement officers.[330] Second, Congress should enact a separate federal statute applying exclusively to law enforcement—or even more narrowly to situations involving officer misuse of force. That statute could either replicate language from § 242, with the exception of a lower mens rea standard,[331] or it could adopt a federal version of the model statute.[332] Because this supplemental statute would be federal, however, it would likewise require the investigatory and prosecutorial resources that officials claim are

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Excessive Use of Force in Federal Court, TRAC Reports (June 17, 2020), https://trac.syr.edu/tracreports/crim/615/ [https://perma.cc/D2RK-KT2R] ("[F]ederal prosecutors rarely bring relevant criminal charges known as 'deprivation of rights under the color of law' (18 U.S.C. 242) against law enforcement.").

326 *See Under Color of Law*, TRAC Reports (Dec. 1, 2004), https://trac.syr.edu/tracreports/civright/107/ [https://perma.cc/X79D-N2T6] (stating the four most common reasons prosecutors said they declined to prosecute § 242 cases); *Table 6. 18 U.S.C. 242—Disposition Reasons by Fiscal Year*, TRAC Reports (2004), https://trac.syr.edu/tracreports/civright/107/include/table_3.html [https://perma.cc/4KXD-XS6P] (indicating that lack of evidence of criminal intent was the second most common reason).

327 Richard M. Thompson II, Cong. Rsch. Serv., R44256, Police Use of Force: Rules, Remedies, and Reforms 14 (2015), https://sgp.fas.org/crs/misc/R44256.pdf [https://perma.cc/2B97-WLAV].

328 *See, e.g.*, John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 807–11 ("[F]ederal law enforcement is limited in its ability to intervene in cases of local government default due to the mens rea requirement of section 242.").

329 The U.S. Commission on Civil Rights made this recommendation in 2000. *See* U.S. Comm'n on C.R., Revisiting *Who Is Guarding the Guardians?*: A Report on Police Practices and Civil Rights in America 73 (2000), https://www.ojp.gov/pdffiles1/bja/249021.pdf [https://perma.cc/5UC8-A66K] (recommendation 5.4). Some commentators have echoed this proposal since. *See, e.g.*, James M. Durant III, *An Accountability Cometh: Amend 42 USC Section 1983 and 18 USC Sections 241, 242, Thereby Initiating a Path to Re-Imagining Peace Officers Acting Under the Color of State Law*, 14 DePaul J. for Soc. Just. 1, 19, 26–33, 60–61 (2021).

330 *See* Thompson II, *supra* note 327, at 19.

331 *See id.*

332 *See infra* Appendix.

lacking and cite as a reason more charges are not brought under § 242.[333] Third, all states should enact an ODTI that explicitly features a reasonable minimum mens rea standard—recklessness—as the model statute does. ODTIs that are criminal laws, as the model statute is, should certainly include *some* mens rea standard to avoid strict liability because strict liability contradicts the basic requirements in almost all modern criminal offenses of an actus reus *and* a mens rea.[334]

Although Kueng and Thao were convicted under § 242 for failure to intervene when Chauvin murdered Floyd, the need for this Article's proposed statute is as pressing as ever. First, accountability for Kueng and Thao under § 242 may be an aberration based on the high-profile nature of the case. Chauvin's murder of Floyd led to one of the most publicized trials in U.S. history.[335] Coming on the heels of widespread protests and demands for progress, the convictions under § 242 may continue to be an outlier rather than building toward a new norm.[336] Widespread enactment of the model statute would cure weaknesses of § 242 and help ensure accountability for bystander officers.

Second, Lane was not even charged with, let alone convicted of, failing to intervene under § 242. Prosecutors likely declined to pursue that charge for Lane because he asked Chauvin, ineffectively, if the officers should reposition Floyd.[337] Lane's meager "intervention" sits well below the measures required by the model statute. If another of-

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333 *See* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203–04 (2014) (statistically demonstrating that reform was accomplished after "it became increasingly clear that federal prosecution was an ineffective means to punish officers engaged in wrongdoing"); Table 6. 18 U.S.C. 242—Disposition Reasons by Fiscal Year, *supra* note 326 (reporting a lack of investigatory and prosecutorial resources as two reasons for § 242 dispositions from 2000–2004).

334 *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993).

335 *See* John Koblin, *More than 18 Million Tuned in for the Chauvin Verdict*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/business/media/chauvin-verdict-viewers.html [https://perma.cc/A8EQ-KKQM]; Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html [https://perma.cc/3CE6-ECSM] (reporting calls for racial justice reform after George Floyd's death "touch[ed] seemingly every aspect of American life on a scale that historians say had not happened since the civil rights movement of the 1960s").

336 *See, e.g.*, Josh Marcus, *From George Floyd to Amir Locke, Have Minneapolis Police Learned Nothing?*, INDEPENDENT (Mar. 1, 2022, 7:35 PM), https://www.independent.co.uk/news/world/americas/crime/amir-locke-george-floyd-minneapolis-police-b2022815.html [https://perma.cc/9DGX-D3QJ].

337 *See supra* note 21.

ficer in a similar situation merely posed such questions, they could still be charged and convicted under the model statute.

Lastly, unlike § 242, the model statute provides guidance and requires training and policies on police upstanderism. The model statute thus takes a more proactive, targeted, institutionalized approach to combating and punishing police bystanderism than the reactive measures imposed by a court under § 242 long after the police abuse victim's heart stops.

d. Criminal Lying

Critics of an ODTI might argue that criminal lying[338] already covers the matter. Indeed, some officer bystanders to their colleagues' misuse of force have been convicted of criminally lying about the encounter. For example, in 2005, rookie NOPD Officer Matthew Dean Moore did nothing to stop his field training officer, Melvin Williams, from severely beating suspect Raymond Robair. Robair subsequently died from the trauma.[339] The day of the incident, Williams and Moore wrote a report omitting mention of any use of force and instead describing Robair as having had a "medical" emergency.[340] Moore also later falsely told an FBI investigator that neither he nor Williams had used force against Robair.[341] In 2011, Moore was convicted of obstruction of justice and aiding and abetting obstruction of justice by filing a false police report, in violation of 18 U.S.C. § 1519, as well as making a false statement to the FBI, in violation of 18 U.S.C. § 1001.[342] Moore's convictions were affirmed on appeal two years later.[343]

However, criminal lying does not necessarily accompany officer peer nonintervention. Officers who are bystanders to their peers' misuse of force could report either truthfully about the incident or, like Moore, not. If they do report truthfully, then they could not be convicted of criminal lying and their nonintervention would be unaddressed. If the bystander officer does not report truthfully, then they could be convicted of criminal lying, as Moore was, but their nonintervention would still not be addressed. Although criminal lying could

338 For an overview of criminal lying, see Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515 (2009).

339 *See* United States v. Moore, 708 F.3d 639, 643–44 (5th Cir. 2013).

340 *Id.* at 644.

341 *See id.*

342 United States v. Moore, No. 10-213, 2011 WL 2020255, at *1 (E.D. La. May 24, 2011), *aff'd*, *Moore*, 708 F.3d 639.

343 *Moore*, 708 F.3d at 643.

thus promote some measure of accountability in certain instances of officer peer nonintervention, it would neither promote any accountability in other cases nor address the underlying nonintervention at all. Furthermore, prosecuting officers for criminal lying alone does nothing to address officer misuse of force as it is occurring. An ODTI is thus still necessary to address inaction whether or not it is accompanied by subsequent lying. Where such a legal duty existed, a bystander officer who later lies could be charged with *both* violating the duty and criminal lying.

e. Accomplice Liability

Skeptics of an ODTI might contend that such a separate statute is unnecessary because bystander officers can already be prosecuted as accomplices. The possibility of trying third parties under this criminal theory is certainly widespread; accomplice liability can be charged virtually everywhere in the United States.[344] Furthermore, skeptics of an ODTI may argue that such charges have been successfully brought against some officers who declined to intervene in their colleagues' misuse of force. This scenario occurred after Moore decided not to act during Williams's lethal beating of Robair.[345]

Accomplice liability, however, requires an actus reus and a mens rea not typically associated with mere inaction, or at least inaction without an accompanying legal duty to act. Rather, according to Professor Wayne LaFave, "It may generally be said that one is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement or failed to perform a legal duty to prevent it (b) with the intent thereby to promote or facilitate commission of the crime."[346] In Moore's case, he was convicted of aiding and abetting not for his passivity during Williams's fatal assault of Robair, but for Moore's obstruction of justice in jointly filing with Williams a false police report

344 *See* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); Lindsey Linder & Justin Martinez, *No Path to Redemption: Evaluating Texas's Practice of Sentencing Kids to De Facto Life Without Parole in Adult Prison*, 22 SCHOLAR 307, 336 (2020) ("Nearly every state has an accomplice liability law that ensures culpable individuals are not absolved of crimes they helped commit even if they were not the primary perpetrators.").

345 *See* Walker v. Jackson, 952 F. Supp. 2d 343, 352 (D. Mass. 2013) (finding five police officers liable for the harm from the defendant officer's excessive force because they "could have intervened at each step to prevent harm to" the victim).

346 WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 13.2 (3d ed. 2022); *see also* Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396–97 (2007) (discussing accomplice liability and the general rule that "one must 'aid and abet' another's commission of a crime in order to be guilty").

afterwards.[347] Separate from such offenses of *commission*, which are usually necessary to qualify as an accomplice, third parties to a crime may also engage in instances of *omission*.[348] Had Moore only remained passive during Williams's assault of Robair and not then cofiled the false police report, Moore may not have been convicted of, let alone prosecuted for, being Williams's accomplice. In that counterfactual, there may not have been sufficient evidence to prove that Moore assisted or encouraged Williams or that Moore intended to promote or facilitate Williams's crime. Indeed, the required mens rea for accomplice liability is more difficult to prove in cases of omission than commission because, as Professors Joshua Dressler and Stephen Garvey explain, "'non-doings' (omissions) are inherently more ambiguous than wrongdoings (acts)."[349]

An ODTI is thus necessary to address situations not encompassed by the actus reus and mens rea of accomplice liability. First, the duty could hold accountable police officers who omit helpful conduct, such as intervening, but do not commit harmful conduct, such as aiding and abetting. Second, the duty could promote such accountability where there is insufficient evidence to prove that the bystander officer intended to promote or facilitate their colleague's misuse of force. Both features appear in the model statute.

Critics of an ODTI might respond that nonintervention does or should qualify as aiding and abetting, at least for officer bystanders to their colleagues' misuse of force.[350] Equating these two types of conduct, however, fails to distinguish between *commissions* and *omissions*. This distinction is central to both criminal[351] and tort[352] law in the United States and often illustrated as the difference between killing a person and letting them die.[353] A duly enacted ODTI would ob-

347 *See supra* note 342 and accompanying text.

348 *See* Moore, *supra* note 346, at 427–28.

349 DRESSLER & GARVEY, *supra* note 239, at 146.

350 *See supra* notes 44–46 and accompanying text (equating police bystanders with enablers).

351 *See, e.g.*, DRESSLER & GARVEY, *supra* note 239, at 141–53; Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547 (1988); Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957 (2000).

352 *See, e.g.*, JOHN FABIAN WITT & KAREN M. TANI, TORTS: CASES, PRINCIPLES, AND INSTITUTIONS 379–90 (5th ed. 2020); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Charles O. Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DEPAUL L. REV. 30 (1951); Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778 (1953).

353 *See, e.g.*, Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad*

jectively clarify this legal obligation without having to rely on subjective and potentially conflicting judicial interpretations.

f. Felony Murder Rule

Critics of an ODTI could argue that the felony murder rule obviates the need for such a separate obligation. The felony murder rule, in its classic form, provides that "one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony."[354] In modern American practice, however, the doctrine applies only to certain felonies that are inherently violent or dangerous, such as arson, burglary, rape, robbery, and kidnapping.[355]

Officers could theoretically be convicted under the felony murder rule if they are in a jurisdiction that features the rule, they commit or attempt to commit any enumerated predicate felony, and a killing occurs. However, for at least four reasons, the felony murder rule leaves gaps in addressing officer peer nonintervention, which an explicit ODTI would instead cover.

First, the felony murder rule only relates to situations involving a killing. The doctrine would not apply to situations involving officer misuse of force that causes nonlethal injuries. High-profile examples in which at least one other officer was present amid nonfatal police brutality include the beatings of Rodney King in 1991,[356] Aaron Larry

Samaritanism, 44 GA. L. REV. 607, 612–13 (2010); Roni Rosenberg, *Between Killing and Letting Die in Criminal Jurisprudence*, 34 N. ILL. U. L. REV. 391, 392–93 (2014).

354 MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 6 at 30 (AM. L. INST., Official Draft and Revised Comments 1980).

355 *See* MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 6 at 32 n.78 (AM. L. INST., Official Draft and Revised Comments 1980); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 436, 451 (2011) [hereinafter Binder, *Best*]; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 64 (2004) [hereinafter Binder, *Origins*].

356 *See* Janny Scott, *Violence Born of the Group: The Beating of Rodney G. King Follows Patterns Observed by Researchers. Police, the Military and Other Embattled Entities Are Especially Susceptible.*, L.A. TIMES (Mar. 28, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-03-28-mn-1329-story.html [https://perma.cc/7PL4-LNP4].

Brown[357] and Aundre Howard[358] in 2019, and Thomas Jones in 2020,[359] as well as the shooting of Jacob Blake in 2020.[360]

Second, the felony murder rule typically requires a felony that is separate from and does not merge with the killing.[361] The doctrine thus usually does not apply if the underlying felony, such as aggravated assault, contains elements of the murder. As such, the felony murder rule generally could not apply where the only underlying felony was the murder itself.

Third, not all jurisdictions in the United States have a felony murder rule. As of 2021, forty-two U.S. states and Washington, D.C. do employ some form of the doctrine.[362] So, although the felony murder rule could be used in most of the United States, it could not be used everywhere in the country.

Finally, even where the felony murder rule exists, it may be abolished or at least limited. Longstanding, widespread criticism of the doctrine undergirds a movement to eliminate or narrow it in the United States,[363] just as most foreign countries have already ended or

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357 *See* Julian Mark, *Body-Cam Video Shows a Louisiana Trooper Beat a Black Man with a Flashlight 18 Times: "I'm Not Resisting!,"* WASH. POST (Aug. 26, 2021, 8:16 AM), https://www.washingtonpost.com/nation/2021/08/26/aaron-bowman-body-camera/ [https://perma.cc/YV2E-UG3Q].

358 *See* Pilar Melendez, *Ex-Houston Cop Indicted over Twisted Beating of Man Who Says He Defecated in Fear*, DAILY BEAST (July 12, 2021, 6:07 PM), https://www.thedailybeast.com/former-houston-cop-lucas-vieira-indicted-after-allegedly-beating-telling-colleague-to-shoot-aundre-howard [https://perma.cc/PF25-BUG8].

359 *See* Bryan Robinson, *Philadelphia Police Beat Suspect*, ABC NEWS (July 13, 2000), https://abcnews.go.com/US/story?id=96534&page=1 [https://perma.cc/7DYE-L2UC].

360 *See* Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Nov. 16, 2021), https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html [https://perma.cc/2KJ5-QDUJ].

361 Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in* State v. Heemstra*: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute*, 93 IOWA L. REV. 1565, 1573–76 (2008) (describing the merger limitation on the felony murder rule and noting that "[u]nder the merger limitation, a defendant is only guilty of felony murder if the underlying felony is independent from the resultant killing"); *see also* People v. Chun, 203 P.3d 425, 443 (Cal. 2009) ("When the underlying felony is assaultive in nature, . . . we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction.").

362 *See* Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. IRVINE L. REV. 905, 910 n.42 (2021).

363 *See, e.g.*, Binder, *Best*, *supra* note 355, at 404 (noting that the felony murder rule is "one of the most widely criticized features of American criminal law"); Binder, *Origins*, *supra* note 355, at 60 ("Felony murder liability is one of the most persistently and widely criticized features of American criminal law."); David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1155 (2009) ("The felony murder doctrine has long been a target for detractors."); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8

restricted the rule.[364] Due to such persistent, broad disapproval of the felony murder rule in the United States, the doctrine, already not available everywhere in the country, may in the future exist in fewer—or no—U.S. jurisdictions.

2. Agency Policies

Some agencies already have ODTIs written into their administrative policies. On May 20, 2022, the U.S. Department of Justice ("DOJ") adopted an updated use-of-force policy that includes an ODTI.[365] Five days later, on the second anniversary of Floyd's death, President Joe Biden issued an executive order reforming federal law enforcement policy that requires all such agencies to adopt policies that meet or exceed those in the new DOJ policy.[366] At a local level, the Minneapolis Police Department ("MPD") Policy and Procedure Manual's "duty to intervene," promulgated on July 28, 2016, and in effect when Chauvin killed Floyd, stated both that "[s]worn employees have an obligation to protect the public and other employees" and that "[i]t shall be the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt

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HARV. J.L. & PUB. POL'Y 359, 359 (1985) ("Scholars often criticize the felony murder doctrine."); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1105 (1990) (noting "the many criticisms of the felony murder rule"); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) ("Few legal doctrines have been as maligned . . . as the felony-murder rule."); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1441 (1994) (advocating abolition of the felony murder rule).

364 MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 6 at 39 (AM. L. INST., Official Draft and Revised Comments 1980) ("Arguments against the felony-murder rule have led to its abolition or severe restriction in most foreign countries."); Roth & Sundby, *supra* note 363, at 447 ("The United States . . . remains virtually the only western country still recognizing [the felony murder] rule . . . .").

365 *See* Memorandum from Merrick Garland, Att'y Gen., U.S. Dep't of Just. to Dir., FBI, Adm'r, Drug Enf't Admin., Acting Dir., Bureau of Alcohol, Tobacco, Firearms & Explosives, Dir., U.S. Marshals Serv., Dir., Bureau of Prisons & Inspector Gen., Off. of the Inspector Gen. (May 20, 2022), https://www.justice.gov/ag/page/file/1507826/download [https://perma.cc/54F7-KHAD].

366 *See* Exec. Order No. 14,074, 87 Fed. Reg. 32,945 (May 25, 2022), https://www.govinfo.gov/content/pkg/FR-2022-05-31/pdf/2022-11810.pdf [https://perma.cc/FZ83-ERDE]. For discussion of the limitations of this presidential executive order and DOJ policy, see Zachary D. Kaufman, Opinion, *Officers Should Intervene as Matter of Law, Not Just Policy*, ST. LOUIS POST-DISPATCH (June 8, 2022), https://www.stltoday.com/opinion/columnists/kaufman-officers-should-intervene-as-matter-of-law-not-just-policy/article_ecd7e73f-ec6b-54d4-8bca-d784307377c1.html [https://perma.cc/6RPK-ZDY4].

to stop another sworn employee when force is being inappropriately applied or is no longer required."[367]

Opponents of an ODTI law at the federal level or other jurisdictions, like Minneapolis, that feature an ODTI agency policy might contend that the law would be unnecessarily duplicative. However, the failures of Kueng, Lane, and Thao to intervene—and of the MPD to hold them accountable for that omission without external prompting—demonstrate that, alone, agency policies mandating an ODTI are insufficient. Quantitative research on such policies has similarly questioned their independent effectiveness.[368] The external check on agencies through criminal prosecution and punishment that an ODTI *law* offers better ensures that such a duty is enforceable and enforced. In addition, given the expressive function of law,[369] enactment of ODTIs validate the duty in a way that agency policies alone cannot. Rather than being mutually exclusive, ODTI laws and agency policies are mutually supportive.

Even then, however, lawyers may be reluctant to bring charges against law enforcement officers. Such prosecutors and police routinely collaborate, creating conflicts of interest.[370] Police union support is also often crucial to obtaining voters' trust in elected prosecutors.[371] Because of this close working relationship and related impact on public perception, full prosecutorial impartiality in police misconduct

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367 Minneapolis Police Dep't, Minneapolis Police Department Policy and Procedure Manual § 5-303.01 (2019) ("Duty to Intervene").

368 Dawson, Blount-Hill & Hodge, *supra* note 16, at 670 ("[T]he existence of a [law enforcement agency's duty to intervene policy] on its own . . . may be insufficient to compel officers to intervene to stop fatal misconduct by another.").

369 *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

370 *See* Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Conflicts of Interest and Excessive Use of Force by Police*, Crim. Just., Summer 2015, at 47, 48 (arguing that the close relationship between police and prosecutors likely leads to prosecutorial bias in favor of police); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447 (2016) (arguing that local prosecutors face a conflict of interest when prosecuting police); Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. Rich. L. Rev. 1097, 1103 (2020) (documenting, expressing concern about, and proposing measures to mitigate "overly cozy relationships between police and prosecutors"); Jay Sterling Silver, Opinion, *Fixing the Conflict of Interest at the Core of Police Brutality Cases*, Wash. Post (Dec. 4, 2014), https://www.washingtonpost.com/opinions/jay-sterling-silver-fixing-the-conflict-of-interest-at-the-core-of-police-brutality-cases/2014/12/04/0233e6e2-7b1d-11e4-b821-503cc7efed9e_story.html [https://perma.cc/XR4P-HCZN] ("[T]here is an inherent conflict of interest in giving local prosecutors so much control over the decision whether to charge police for allegations of bias or excessive use of force . . . .").

371 Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014, 12:16 AM), https://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts-msna473016 [https://perma.cc/Q54G-PGNE].

cases may be unrealistic.[372] Furthermore, such potential bias—whether real or perceived, intentional or unconscious, outcome determinative or not—undermines public confidence in the criminal justice system's ability to police the police.[373] To address this issue, as some scholars have generally proposed for cases involving police-suspects,[374] the model statute explicitly empowers special prosecutors to independently enforce ODTIs. Some states, such as New York,[375] have already taken such steps in contexts involving prosecution of officers.

3. Training Programs

ABLE, which amplified EPIC, and LEAS have already reached tens of thousands of police officers[376] and are continuing to spread throughout the country and world. If ABLE and LEAS were completely successful in promoting officer peer intervention, all law enforcement agencies in the United States would not only undertake their training but would also implement and enforce it. That ideal scenario would obviate the need for enacting ODTIs.

That outcome, however, is unrealistic. First, even for the agencies that voluntarily assign their officers to such training, there is no guarantee that the officers will follow through with, or that supervisors will enforce, the instruction. Indeed, for example, EPIC leaders acknowledge that their program's focus is not on noncompliant officers—who are left to be addressed, if at all, through other means—but rather on well-intentioned officers who genuinely seek guidance.[377] Courts must therefore be empowered to hold violators accountable, which the model statute would enable.

Second, precisely because agencies elect whether to assign ABLE or LEAS training, the programs, even if they were fully incorporated

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372 *See id.*

373 *See* Samantha Levitz, *Appointing an Independent Prosecutor in Cases of Police Misconduct: Repairing Trust in the Criminal Justice System* (Hofstra L. Student Works, Paper No. 18, 2020), https://scholarlycommons.law.hofstra.edu/hofstra_law_student_works/18/ [https://perma.cc/9RWB-D6QD].

374 *See, e.g.*, Caleb J. Robertson, Comment, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 877 (2018).

375 *See* N.Y. Exec. Order No. 147 (July 8, 2015), https://www.governor.ny.gov/sites/default/files/atoms/old-files/EO147.pdf [https://perma.cc/265W-59MB].

376 *See ABLE*, *supra* note 250 (noting that there are 314 ABLE-certified agencies and that ABLE has trained over 1,900 instructors, who serve more than 158,000 officers); *Law Enforcement*, *supra* note 251 (stating that, to date, more than 150,000 police officers from the United States and eighty other countries have undergone LEAS training).

377 *See* Aronie & Lopez, *supra* note 48, at 314–15.

into policing and enforced, are not universal. ABLE Board of Advisors chair Jonathan Aronie acknowledges that some police departments are or may be uninterested.[378] Consequently, these voluntary programs, although a major step in the right direction, need to be buttressed by laws that mandate all agencies implement their principles and that officers suffer serious sanctions for noncompliance, as under the model statute.

B. Reasonableness

Mandating an ODTI may be viewed as unreasonable. First, imposing this duty could be costly for taxpayers and law enforcement agencies. Second, requiring third-party involvement in misuse-of-force incidents would be burdensome on law enforcement officers, particularly rookies, who may not have sufficient—or any—training on when or how to intervene.[379] Third, officers who may be willing and able to intervene may not have a reasonable opportunity to do so. Finally, Bad Samaritan laws impose onerous demands upon their subjects' liberty and ability.

1. Cost

ODTIs may be costly in time and money. Ideally, such duties would entail agencies (1) developing or adopting existing peer intervention training programs, (2) regularly holding such trainings, (3) monitoring their officers' use of force to determine if the force was misused and, if so, whether and to what extent any nearby officers intervened, (4) disciplining officers who failed to discharge their duty to intervene, (5) paying settlements or fines for violations of that duty, and (6) collecting, maintaining, and reporting data about interventions and noninterventions. Critics could contend that these costs would be unreasonably expensive for agencies themselves and taxpayers.

However, some of these costs are—or could be—borne by other entities. For example, ABLE offers training materials and train-the-trainer programs for free.[380] Moreover, the expense of *not* imposing this duty to intervene would likely exceed the costs of effectively man-

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378 Jonathan Aronie & Edward Yeung, *Active Bystandership Can Be Taught and Learned*, FBI L. Enf't Bull. (Dec. 8, 2020), https://leb.fbi.gov/articles/featured-articles/active-bystandership-can-be-taught-and-learned [https://perma.cc/NRA3-4E87] ("[P]olice agencies not sincerely interested in creating a culture in which active bystandership can thrive need not apply.").

379 *See* Navarrette Jr., *supra* note 34 (quoting a former police officer saying, "When you ask for intervention, you're asking a lot from cops and especially from rookies . . . . Right now, it isn't reasonable. There's nothing in place that allows that to happen.").

380 *See ABLE*, *supra* note 250.

dating and providing training on such a duty. The duty could reduce the number of cases of officers' misuse of force, preventing injury or death to some civilians. Agencies and officers would therefore save on related expenses of defending against, and paying settlements or fines for, misuse-of-force cases that could have been averted by an intervening officer. Such settlements and fines have cost millions of dollars.[381]

2. Training

Even if the majority of officers currently lack training on peer intervention, that could and should change. EPIC, ABLE, and LEAS provide such training for agencies that voluntarily adopt these programs. Laws should require all agencies to implement such training, as the model statute does.

3. Opportunity

Officers face reasonable opportunities to intervene where their colleagues' use of force is prolonged, in plain view, and blatantly excessive—all of which were features in the Chauvin case.[382] Other situations, however, may present no reasonable opportunity for such intervention.

If the misuse of force is exercised unexpectedly or quickly—as with a surprising, unwarranted gunshot or beating—then nearby officers may have no notice, time, or ability to try to prevent or stop any harm.[383] Alternatively, if the force is exercised outside the earshot or eyeshot of nearby officers—as when an object blocks the view of an officer's interaction with a suspect[384]—then nearby officers may have no reason even to know of their colleague's abuse.

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381 *See, e.g.*, *$10 Million Settlement Reached in Police Shooting of Lake Tahoe Vacationer*, GV WIRE (Dec. 2, 2020), https://gvwire.com/2020/12/02/10-million-settlement-reached-in-police-shooting-of-lake-tahoe-vacationer/ [https://perma.cc/UJX6-QFR3]; John Bowden, *Maryland County Reaches $20 Million Settlement After Police Shooting of Handcuffed Man*, THE HILL (Sept. 28, 2020, 1:10 PM), https://thehill.com/homenews/state-watch/518581-maryland-reaches-20-million-settlement-after-police-shooting-of [https://perma.cc/79V6-JK52].

382 *See supra* note 14 and accompanying text.

383 *See, e.g.*, O'Neill v. Krzeminski, 839 F.2d 9, 11–12 (2d Cir. 1988) ("The three blows were struck [by two officers against a civilian] in such rapid succession that [the third officer] had no realistic opportunity to attempt to prevent them. This was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator.").

384 *See, e.g.*, Bah v. City of New York, 319 F. Supp. 3d 698, 705–06 (S.D.N.Y. 2018) (finding that a supervising officer was not liable under a failure to intervene theory where the officer could not see the confrontation between his subordinates and a suspect).

Furthermore, officers who are off duty may not be equipped or prepared to intervene. They may not be carrying their badge, service weapon, or restraints.[385] Without those items, off-duty officers' ability to intervene may be limited and the officer misusing force may doubt their identity and react harshly to any interference. Indeed, some commentators believe that, during the Chauvin case, the officers may have used deadly force against a person appearing to be a civilian who attempted to physically intervene.[386] Moreover, off-duty officers may have consumed alcohol or other legal drugs. Off-duty officers are typically forbidden from acting in an official capacity while under the influence of alcohol.[387] Furthermore, alcohol and other drugs diminish cognitive and psychomotor skills, which could impair officers' judgment on whether to intervene and their capacity to do so. Off-duty officers may also be outside their jurisdiction. These officers may thus be unfamiliar with local laws and agency policies governing officers' use of force and any applicable ODTI, or they may be unauthorized to discharge an ODTI in the jurisdiction even if they were familiar with it.[388]

In such situations where officers have no reasonable opportunity to intervene, courts have rightly recognized that the bystander officer should not be held liable.[389] ODTIs should thus feature an explicit exemption for these circumstances, as the model statute does. In short, this duty should distinguish reasonable and unreasonable op-

385 For example, the Greeley, Colorado, police department recommends, but does not require, off-duty officers to "have immediately accessible to them a department approved firearm and handcuffs." GREELEY POLICE DEP'T, GENERAL ORDER 540.00: OFF-DUTY AUTHORITY TO ACT (2019), https://greeleypd.com/wp-content/uploads/2019/04/GO540-Off-Duty-Authority-to-Act.pdf [https://perma.cc/HK6P-TZ25].

386 *See* Charles Feldmann, Opinion, *"We Need to Call the Police on the Police": What Can Bystanders Do when Confront* [sic] *with a Case Like George Floyd's?*, DENVER POST (June 1, 2020, 8:00 AM), https://www.denverpost.com/2020/06/01/george-floyd-police-brutality-opinion/ [https://perma.cc/PZ4Y-5XNT].

387 For example, the Tempe, Arizona, police department's policies prohibit off-duty officers from taking "any police action after consuming any alcohol." TEMPE POLICE DEP'T, ORDER 11.101: POLICE ACTION WHILE OFF-DUTY (2020), https://public.powerdms.com/TempePD/tree/documents/1269497 [https://perma.cc/SBB6-FZCU].

388 For example, the Charleston, West Virginia, police department permits off-duty officers to make arrests "only if within the legal jurisdiction of this law enforcement agency." CHARLESTON POLICE DEP'T, POLICY & PROCEDURES MANUAL § 11.4 (2021), http://www.charlestonwvpolice.org/images/Policy_Procedure_Redacted2021.pdf [https://perma.cc/AV23-EDBZ].

389 *See, e.g.*, Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994) ("In order for liability to attach [to a violation of a police duty to intervene], there must have been a realistic opportunity to intervene to prevent the harm from occurring.").

portunities to intervene and hold officers liable only where they faced the former.[390]

4. Societal Role

A compelling counterargument to Bad Samaritan laws is that it is unreasonable to require people to aid others because doing so would "impinge unacceptably on individual human liberty"[391] and because members of the public are not necessarily qualified to help in crises.[392] Applying this critique of Bad Samaritan laws generally to a specific law enforcement duty to intervene, however, neglects fundamental distinctions between civilians and officers.[393] These distinctions justify the reasonableness of imposing a duty to intervene on law enforcement but not the public.

C. Appropriateness

Imposing an ODTI may be viewed as inappropriate. Skeptics could contend that such a duty is unacceptably incongruous with deference among officers, police hierarchy, and qualified immunity.

1. Deference Among Officers

Critics of an ODTI may contend that it would be inappropriate for the officer to second-guess and meddle in their colleague's use of force. Insufficient context is often cited as an appropriate justification for bystanderism generally.[394] Especially in the heat of the moment, a nearby officer may not know or be able to obtain all relevant information to assess the reasonableness of the type and amount of force or whether intervention is warranted and possible. Indeed, the U.S. Supreme Court has recognized "that police officers are often forced to make split-second judgments" about using force "in circumstances that are tense, uncertain, and rapidly evolving."[395] Advocates of this position contend that deference to the officer using force is crucial to

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390 These scenarios would not necessarily apply to an officer duty to *report* peer misconduct. For example, an off-duty officer could still be required to notify authorities of a colleague's misuse of force even if the officer were not required to have *intervened* in it.

391 Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1337.

392 *See* Mengyun Tang, *Does China Need "Good Samaritan" Laws to Save "Yue Yue,"* 47 CORNELL INT'L L.J. 205, 229 (2014) ("[P]hysicians and other qualified persons are usually best trained to give an injured person immediate and appropriate assistance.").

393 *See supra* note 173 and accompanying text.

394 For example, some bystanders to the notorious killing of Catherine "Kitty" Genovese in New York in 1964 claimed that they misinterpreted the incident as a "lovers' quarrel." *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1349.

395 Graham v. Connor, 490 U.S. 386, 397 (1989).

keeping police and the public safe.[396] Where subject to an ODTI, potential interveners would similarly need to make quick decisions under difficult, imperfect conditions. An officer's physical intervention against a colleague in such a situation could be construed, legitimately or not, as assault.[397] That so many of these situations lack clarity arguably justifies mutual deference among officers—not to mention by judges and juries to officers.[398]

In certain cases, however, officers may actually know the whole context and thus be able to make fully informed intervention decisions. ODTIs should include training on identifying misuse of force, as the model statute does, to enable officers to process that contextual information when they possess it.

Although officers may sometimes lack the full context of their colleagues' use of force, an ODTI is still appropriate. Even if nearby officers do not know what is happening at the exact moment their colleague uses force, they still may be fully aware of all prior steps leading up to that point.[399] On that basis alone, officers may be able to properly make decisions about intervening. Indeed, recognition that this broader context matters to assessing police use of force has led some commentators to propose abolishing the Supreme Court's "split-second judgment" standard, which they partially blame both for the high number of police killings in the United States and for shielding officers from liability for that violence when it is unjustified.[400]

The duty to intervene can—and should—be crafted to apply only to officers who have or should have sufficient contextual information, as the model statute is. Officers who lack such context would thus not be held liable for their bystanderism.

2. *Police Hierarchy*

Like the military, law enforcement is hierarchical, with a strict chain of command.[401] Although officer bystanderism amid colleagues'

396 *See, e.g.*, David D. Kirkpatrick, *Split-Second Decisions: How a Supreme Court Case Shaped Modern Policing*, N.Y. Times (Apr. 25, 2021), https://www.nytimes.com/2021/04/25/us/police-use-of-force.html [https://perma.cc/9S3R-LABK].

397 For example, in 2011, a New Jersey officer, Regina Tasca, was charged with assault for intervening against colleagues who tackled and punched an emotionally disturbed young man. For sources related to this incident, see *infra* note 446.

398 *See* Kirkpatrick, *supra* note 396.

399 *See supra* notes 135–36 and accompanying text.

400 *See* Kirkpatrick, *supra* note 396 (citing critiques of the split-second standard by Professors Rachel Harmon and Seth Stoughton).

401 Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 Geo. Wash. L. Rev. 712,

misuse of force often involves a superior failing to intervene in a subordinate's misconduct,[402] that is not always the situation. In the Chauvin case, the opposite occurred: three subordinate officers declined to intercede in their superior's misuse of force.[403] Mandating an ODTI would thus compel an officer to intercede in a more senior colleague's abuse, even if that superior ordered them not to. Individuals who support maintaining, or even advocate strengthening, the law enforcement chain of command[404] might argue that the junior officer's conduct would qualify as insubordination. In turn, these critics could contend, this defiance would inappropriately undermine acceptance of—and deference to—the strict organizational structure and process that are supposedly vital to policing.

However, also like the military, law enforcement should not—and does not—entail following *all* orders from superiors. Although both entities share missions to serve and protect,[405] they each must do so in compliance with the law.[406] Members of both organizations have unsuccessfully tried to defend their illegal conduct by citing their commanders' directives.[407] Defense counsel to one of the three officer bystanders in the Chauvin case publicly asserted this excuse in advance

722 (2017) ("Police departments are hierarchical, with a chain of command as in the military and a sharp division between the leadership and the rank-and-file." (footnote omitted)).

402 *See, e.g.*, United States v. Koon, 34 F.3d 1416 (9th Cir. 1994); United States v. Broussard, 882 F.3d 104 (5th Cir. 2018); United States v. Reese, 2 F.3d 870, 890 (9th Cir. 1993).

403 *See supra* note 14 and accompanying text.

404 For an example of this view, see Mark G. Stainbrook, *Strengthening the Chain of Command*, POLICE MAG. (Apr. 4, 2018), https://www.policemag.com/342453/strengthening-the-chain-of-command [https://perma.cc/H4PD-74T9].

405 Upon commissioning, all military officers swear an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic." *See Oath of Commissioned Officers*, U.S. ARMY, https://www.army.mil/values/officers.html [https://perma.cc/GV8T-92XC]. For the similar police motto, see *supra* note 43 and accompanying text.

406 The *Uniform Code of Military Justice* states that military personnel need to obey the "*lawful* command of that person's superior commissioned officer,"10 U.S.C. § 890 (emphasis added), and the *Manual for Courts-Martial* explicitly states that these individuals may defend themselves from disobeying orders if they "knew the orders to be *unlawful* or a person of ordinary sense and understanding would have known the orders to be *unlawful*," U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES, at II-129 (2019) (Rule 916(d)) (emphasis added).

407 In the military context, see, for example, the notorious case of Lieutenant William Calley, who attempted to defend his role in the 1968 My Lai Massacre by citing his superior's order. United States v. Calley, 48 C.M.R. 19, 25, 27 (1973); *see also* MICHAL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY (2002). In the police context, see, for example, *Dirks v. Grasso*, 449 Fed. App'x 589, 592 (9th Cir. 2011) (holding that officers were not entitled to qualified immunity based on argument that they were following superior's orders).

of his client's prosecution.[408] Kueng, Lane, and Thao all asserted a similar defense during their federal trial.[409]

Such an appeal to "just following orders," commonly known as "the defense of superior orders," was notoriously invoked by defendants at the 1945–1946 Nazi trials before the International Military Tribunal at Nuremberg ("IMT" or "Nuremberg Tribunal").[410] The Nuremberg Charter[411] and IMT judgment[412] both rejected this defense. The 1950 "Nuremberg Principles" that the United Nations ("UN") International Law Commission derived from the IMT's charter and judgment also explicitly rejected this defense.[413] The statutes

408 *See* Steve Karnowski, *Defense Attorney: Ex-Cop Charged in George Floyd's Death Was a Rookie Following Derek Chauvin's Orders*, ASSOCIATED PRESS (June 5, 2020), https://abc13.com/george-floyd-death-officers-police-minneapolis/6232838/ [https://perma.cc/E5TJ-6W2Z] (quoting defense attorney Earl Gray rhetorically asking, "What was my client supposed to do but follow what his training officer [Chauvin] said?").

409 *See* Holly Bailey, *Ex-Officers Sentenced for Violating George Floyd's Civil Rights*, WASH. POST (July 27, 2022, 1:26 PM), https://www.washingtonpost.com/nation/2022/07/27/george-floyd-officers-sentenced/ [https://perma.cc/7WE4-MY7R]; Steve Karnowski & Tammy Webber, *Officer Charged in Floyd Killing Says He Deferred to Chauvin*, ABC13 EYEWITNESS NEWS (Feb. 16, 2022), https://apnews.com/article/death-of-george-floyd-george-floyd-minneapolis-thomas-lane-tou-thao-228dfc9ae757354689dc67fee2098a2f [https://perma.cc/BAR8-8CJP].

410 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) [hereinafter IMT JUDGMENT] ("It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders."); *see generally* L.C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976); MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR (1999); For a description of the establishment and operation of the Nuremberg Tribunal, see ZACHARY D. KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS 65–91 (2016) [hereinafter KAUFMAN, TRANSITIONAL JUSTICE]; Zachary D. Kaufman, *The Nuremberg Tribunal v. the Tokyo Tribunal: Designs, Staffs, and Operations*, 43 J. MARSHALL L. REV. 753 (2010).

411 Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 ("The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.").

412 The IMT generally endorsed Article 8 of the Nuremberg Charter, which prohibited the defense of superior orders. *See* IMT JUDGMENT, *supra* note 410, at 466 ("The provisions of [Article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment."). Specific IMT judgments also rejected this defense. *See, e.g.*, *id.* at 291 (holding, in the judgment against Wilhelm Keitel, that "[s]uperior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification"); *id.* at 325 (holding, in the judgment against Alfred Jodl, that "[p]articipation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes").

413 Int'l Law Comm'n, Rep. Covering Its Second Session, U.N. Doc. A/1316, at 12 (1950)

of subsequent international courts—both those that the U.S. government has supported, such as the ad hoc UN International Criminal Tribunals for the former Yugoslavia ("ICTY")[414] and for Rwanda ("ICTR"),[415] and others that the U.S. government has opposed, most notably the International Criminal Court ("ICC")[416]—also explicitly reject this defense.[417]

Similarly, an ODTI should explicitly reject the defense of superior orders, as the model statute does. Improving policing—and protecting civilians, even from fellow officers—should be viewed as a higher priority than strictly maintaining police hierarchy.

3. Qualified Immunity

The controversial legal doctrine of qualified immunity—which the U.S. Supreme Court established in the 1967 case *Pierson v. Ray*[418] and refined in the 1982 case *Harlow v. Fitzgerald*[419]—protects government officials from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[420] According to the Court, the doctrine balances holding public officials accountable with shielding them from "harassment, distraction, and liability when they perform their duties reasonably."[421]

Qualified immunity inhibits accountability for officer misconduct.[422] Because a law enforcement duty to intervene would promote

("The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.").

414 *See* Statute of the International Tribunal art. 7, May 25, 1993, 32 I.L.M. 1192 (regarding "Individual criminal responsibility"). For a description of the establishment of the ICTY, see KAUFMAN, TRANSITIONAL JUSTICE, *supra* note 410, at 121–58.

415 *See* Statute of the International Tribunal for Rwanda art. 6, Nov. 8, 1994, 33 I.L.M. 1602 (regarding "Individual Criminal Responsibility"). For a description of the establishment of the ICTR, see KAUFMAN, TRANSITIONAL JUSTICE, *supra* note 410, at 159–202.

416 *See* Rome Statute of the International Criminal Court art. 33, July 17, 1998, 2187 U.N.T.S. 90 (regarding "Superior orders and prescription of law").

417 For a description and analysis of U.S. support for the ICTY and ICTR as well as opposition to the ICC, see KAUFMAN, TRANSITIONAL JUSTICE, *supra* note 410, at 121–202.

418 386 U.S. 547, 555–57 (1967).

419 457 U.S. 800, 817–18 (1982).

420 *Id.* at 818.

421 Pearson v. Callahan, 555 U.S. 223, 231 (2009); *see also* Aaron L. Nielson & Cristopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 3 (2015) ("On one hand, government officials sometimes suffer no personal liability even when they violate constitutional rights. But at the same time, the threat of punishing an officer for violating previously unknown rights could chill legitimate governmental action.").

422 *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605,

such liability in certain contexts, advocates of qualified immunity, or at least the pro-police principles undergirding the doctrine, presumably would oppose this proposal.[423] These critics could contend that qualified immunity shields officers from liability for not intervening in their colleagues' misuse of force because such a duty does not fulfill the *Harlow* requirements: ODTIs are not "clearly established" law "of which a reasonable person would have known."[424] To support their position, these opponents could emphasize that plaintiffs could not cite judicial decisions with substantially similar facts, as the Court has generally required in qualified immunity cases,[425] because ODTIs are so new that they have not yet been litigated.

Qualified immunity, however, would likely not be an effective defense raised by officers against their liability for violating the ODTI this Article proposes. First, qualified immunity is not a defense against *criminal* liability, which the model statute includes as punishment for violating the ODTI. Rather, qualified immunity is intended to protect public officials only from *civil* liability "to shield them from undue interference with their duties."[426]

Second, qualified immunity does not guard public officials from *state* causes of action unless the officials are otherwise provided immunity by state law.[427] The model statute explicitly rejects qualified im-

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613–18 (2021) (describing the evolution of qualified immunity); Marshall Heins, Note, *Absolutely Qualified: Supreme Court Transforms the Doctrine of Qualified Immunity into Absolute Immunity for Police Officers*, 8 HOUS. L. REV. ONLINE 1, 2 (2017) (arguing that in *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam), the Supreme Court "transform[ed] the doctrine of qualified immunity into absolute immunity for police officers").

423 *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) (advocating for qualified immunity on pro-police principles of fair notice); Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547 (2020) (advocating for qualified immunity under authority of the Civil Rights Act of 1866).

424 *Harlow*, 457 U.S. at 818.

425 *See* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam).

426 *See Harlow*, 457 U.S. at 806 ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for *damages*." (emphasis added)); *Mullenix*, 577 U.S. at 11 ("The doctrine of qualified immunity *shields officials from civil liability* so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (emphasis added) (quoting *Pearson*, 555 U.S. at 231)).

427 *See, e.g.*, Jenkins v. City of New York, 478 F.3d 76, 86 (2d Cir. 2007) ("'Qualified immunity' protects an official from liability under *federal* causes of action but is not generally understood to protect officials from claims based on state law."); Samuel v. Holmes, 138 F.3d 173, 179 (5th Cir. 1998) (holding that the defendants were not entitled to qualified immunity against claims brought under a state whistleblower law); Gossman v. Allen, 950 F.2d 338, 341 (6th Cir. 1991) ("Since [the plaintiff's] state law claims for damages do not invoke any federal law whatsoever, qualified immunity is not an available defense."); Andreu v. Sapp, 919 F.2d 637, 640 (11th

munity as a defense. Therefore, an officer would not be able to raise this doctrine as a defense to the ODTIs this Article proposes all states enact.

Third, even in cases involving a *federal* ODTI, which this Article also proposes, the duty to intervene likely would, or at least should, satisfy the *Harlow* requirements because qualified immunity is not intended to protect those "who knowingly violate the law."[428] That the duty is or would be duly enacted by legislatures would support an argument that it is clearly established, especially if it contained the level of specificity in the model statute. Although there may not be any existing cases on point, the Court has stated that a prior judicial decision is not always necessary to find that the law is clearly established.[429] Moreover, the Court has declared that a qualified immunity defendant's conduct is to be judged in comparison to that of "any reasonable officer."[430] For jurisdictions in which ODTIs are enacted, "any reasonable officer" would have fair notice about such a duty. Under the model statute, all officers in the statute's jurisdiction would be trained on the duty's existence as well as on when and how to discharge it. In addition, under 42 U.S.C. § 1983 and 18 U.S.C. § 242, federal courts have already found officers liable for violating civil rights through their bystanderism in the face of colleagues' misuse of force.[431] These convictions strengthen the view that such duties are, or at least could be, clearly established and that any reasonable officer would have known of them.

Of course, any role qualified immunity plays in an ODTI would be moot if, as many commentators across the ideological spectrum

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Cir. 1990) ("Qualified immunity is a defense to federal causes of action and does not protect officials from claims based upon state law.").

428 Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); *see also* United States *ex rel.* Citynet, LLC v. Gianato, 962 F.3d 154, 159–60 (4th Cir. 2020) ("[Q]ualified immunity does not protect government officials when they act to violate the law with actual knowledge, deliberate ignorance, or reckless disregard of a risk to a constitutional or statutory right.").

429 *See* Hope v. Pelzer, 536 U.S. 730, 739–45 (2002); Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020).

430 Messerschmidt v. Millender, 565 U.S. 535, 556 (2012).

431 *See supra* notes 286, 313 and accompanying text.

propose, the doctrine is abolished.[432] Despite efforts to eliminate qualified immunity, the doctrine remains widely in effect for now.[433]

D. Effectiveness

Critics of an ODTI might question the duty's effectiveness both because of skepticism surrounding Bad Samaritan laws generally and particular concerns about law enforcement culture.

1. Bad Samaritan Laws Generally

The effectiveness of Bad Samaritan laws, of which an ODTI is a subtype, is often questioned.[434] As with some other statutes,[435] these laws are seldom enforced, at least in the United States.[436] Skeptics thus contend that Bad Samaritan laws are unlikely to compel upstanderism because prosecutions of violations "are rare, convictions are even rarer, and punishment, usually as a misdemeanor, is minimal."[437] Furthermore, the very existence of Bad Samaritan laws is not

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432 *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Schwartz, *supra* note 422, at 673–77; David French, *End Qualified Immunity*, NAT'L REV. (Sept. 13, 2018, 4:13 PM), https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/ [https://perma.cc/6HWM-LSD4]; Editorial, *End the Court Doctrine That Enables Police Brutality*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html [https://perma.cc/4BBQ-XN4P]; Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure [https://perma.cc/LF2R-S8C2]; Press Release, NAACP Legal Def. & Educ. Fund, Inc., LDF Joins Cross-Ideological Coalition in Submitting an Amicus Brief in Case Challenging Qualified Immunity (Apr. 10, 2019), https://www.naacpldf.org/wp-content/uploads/Qualified-Immunity-Cato-Amicus.pdf [https://perma.cc/2UFQ-5Y35].

433 *See* Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill.*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/B69M-L9LU]; Kimberly Kindy, *Supreme Court Reaffirms Police Protection by Qualified Immunity, a Legal Doctrine Targeted in Protests*, WASH. POST (Oct. 18, 2021, 9:45 PM), https://www.washingtonpost.com/politics/supreme-court-qualified-immunity-police/2021/10/18/071d8f80-3035-11ec-9241-aad8e48f01ff_story.html [https://perma.cc/E269-JJAF].

434 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1340–41.

435 *See* Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICH. L. REV. 409, 414 (2022) (analyzing underprosecution of sexual assault cases); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719, 1722–40 (2006) (analyzing underenforcement of laws concerning "urban residents, prostitutes, undocumented workers, and victims of domestic violence"); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1291–92 (2016) (analyzing underenforcement of rape laws).

436 *See supra* note 75 and accompanying text.

437 Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1341; *see also* Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1155.

widely known,[438] undermining their *raison d'être* of punishing bystanderism and prodding upstanderism.

However, reasons that Bad Samaritan laws in general may be ineffective do not necessarily apply to a specific ODTI. First, given public outrage over officer misuse of force, including cases in which other officers are aware of and remain bystanders during the brutality,[439] prosecutions and convictions for violating an ODTI may be more likely than for violations of other types of Bad Samaritan laws.

Second, if, as in the model statute, the crime of violating an ODTI were a felony, such a law may be more effective at promoting compliance than other Bad Samaritan laws that are punished as mere misdemeanors. Investigators and prosecutors may be more willing to expend the necessary time and resources to charge violations of felonies rather than misdemeanors.[440] In addition, where suspects may be guilty of multiple felonies, investigators and prosecutors would not be concerned with legal and logistical challenges that can arise from charging suspects with both misdemeanors and felonies.[441]

Finally, government and other stakeholders can—and should—raise public awareness about Bad Samaritan laws, including ODTIs, to prod compliance and avoid defenses of no fair notice.[442] As under the model statute, the existence of ODTIs should be included in mandatory training for all officers, replicated in their agencies' policy manuals, and posted where all officers can see them.

2. Blue Wall of Silence

Because of the infamous, widespread "blue wall of silence,"[443] skeptics of an ODTI might still argue that such statutes are the least likely type of Bad Samaritan law to be effective. Two features of this code could certainly deter intervention among officers—and especially by subordinates toward superiors. One is intense group loyalty among officers, and the other is well-founded fear of physical or professional retaliation, including life-threatening reprisals.[444] Indeed, at

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438 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1341; *see also supra* note 66 and accompanying text.

439 *See supra* note 12 and accompanying text.

440 *See* Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1155–56.

441 *See id.*

442 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1404; Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1185.

443 *See supra* notes 122, 234 and accompanying text.

444 For discussion of police group loyalty and retaliation, see Chin & Wells, *supra* note 122, at 241, 252–53, 256–61.

least professional retaliation for officer peer intervention has already occurred, such as in the cases of Cariol Horne in 2006[445] and Regina Tasca in 2011.[446]

However, an ODTI could address both concerns, as the model statute does. First, the law could require law enforcement agencies to institute policies to promote a culture of officer peer intervention, thereby piercing the "blue wall of silence." These policies could focus on the self-interested benefits of such intervention, including saving colleagues' reputations, careers, and even lives.[447] Second, ODTIs could feature measures to safeguard interveners from retaliation and require agencies to institute policies to prevent and punish such misconduct. These measures would be analogous to whistleblower protections in other contexts.[448]

Moreover, the "blue wall of silence" is already yielding to the notion of an ODTI. The overwhelming majority of officers generally *favor* such a duty in principle,[449] and a growing number of agencies have already *voluntarily* imposed these obligations.[450] Many of the individuals and entities that are or could be subject to an ODTI have thus themselves assessed that the responsibility's potential benefits outweigh its possible drawbacks. Furthermore, voluntary officer peer intervention training programs have already reportedly produced pos-

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445 For discussion of retaliation to Horne's peer intervention, see *supra* note 114 and accompanying text.

446 For discussion of retaliation to Tasca's peer intervention, see, for example, *Borough of Bogota v. Tasca*, No. BER-L-9178-12, 2015 N.J. Super. Unpub. LEXIS 891, at *27–28 (Law Div. Mar. 12, 2015), *aff'd*, No. A-0438-14T3, 2015 N.J. Super. Unpub. LEXIS 965 (App. Div. Apr. 27, 2015); Paul Milo, *Bogota Reaches $2.2 M Settlement with Its First Female Cop, Report Says*, NJ.COM (Jan. 06, 2016, 11:35 PM), https://www.nj.com/bergen/2016/01/bogota_reaches_22_m_settlement_with_its_first_fema.html [https://perma.cc/6RRG-UGM5]; Kirstin Cole, *Bogota Police Officer Wins Discrimination Lawsuit After Getting Fired*, PIX11 (Mar. 13, 2015, 10:36 AM), https://pix11.com/news/local-news/bogota-police-officer-wins-discrimination-lawsuit-after-getting-fired/ [https://perma.cc/HH2D-NHJN].

447 *See, e.g.*, Aronie & Lopez, *supra* note 48, at 306; Aronie & Yeung, *supra* note 378.

448 For discussion of whistleblower protections, see, for example, Jeffrey R. Boles, Leora Eisenstadt & Jennifer M. Pacella, *Whistleblowing in the Compliance Era*, 55 GA. L. REV. 147 (2020); David Cooper, Comment, *Blowing the Whistle on Consumer Financial Abuse*, 163 U. PA. L. REV. 557 (2015); Norm Keith, Shane Todd & Carla Oliver, *An International Perspective on Whistleblowing*, CRIM. JUST., Fall 2016, at 14; Thomas J. McCormac, IV, Comment, *Circuit Split: How Far Does Whistleblower Protection Extend Under Dodd-Frank?*, 165 U. PA. L. REV. 475 (2017).

449 Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Inside America's Police Departments*, PEW RSCH. CTR. (Jan. 11, 2017), https://www.pewresearch.org/social-trends/2017/01/11/inside-americas-police-departments/ [https://perma.cc/L767-KQXA] ("A majority (84%) of police say that officers should be required to intervene when they believe another officer is about to use unnecessary force . . . .").

450 *See supra* note 376.

itive results. For example, EPIC is credited with contributing to the NOPD's reduction in police brutality and increase in both community and officer satisfaction with policing in New Orleans.[451] In addition, a study of duties to intervene in select police department policies found that nearly half of the departments with such policies reported fewer multi-officer officer-involved deaths ("OIDs") than single-officer OIDs.[452] Compared with departments without such policies, more OIDs in departments with such policies resulted in formal charges.[453] These trends indicate that "the blue wall of silence" may be weakening, if not crumbling, heralding a new law enforcement culture receptive to an ODTI.

E. Counterproductivity

Skeptics of an ODTI could argue that it would be counterproductive to holding accountable officers who misuse force, to advocating for defunding or abolishing the police, to reversing mass incarceration in the United States, to maintaining public safety, and to policing itself.

1. Accountability for Primary Actors

An ODTI could undermine efforts to hold accountable the primary actors in misuse-of-force cases: the perpetrators of unjustified police violence themselves. An officer subject to an ODTI who witnessed their colleague misuse force may exercise their right to remain silent under the Fifth Amendment rather than to answer questions during an investigation or prosecution of that colleague because such answers might incriminate the officer for violating the ODTI.[454]

However, it may not be necessary to question the witnessing officer. Sufficient evidence may be available from alternative sources—including bodycam, security camera, and mobile phone footage as well as other eyewitnesses' testimony—to prove that the colleague misused force. In that case, the witnessing officer would not need to be questioned about the underlying misuse of force, would therefore not have cause to invoke the Fifth Amendment, and could still be prosecuted for violating the ODTI.

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451 Aronie & Yeung, *supra* note 378.

452 Jones-Brown et al., *supra* note 58.

453 *Id.*

454 *See* Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452 (1987) (reviewing the history of law enforcement officers' Fifth Amendment protections from self-incrimination).

In other cases, when the witnessing officer could provide the only or most crucial evidence of the colleague's misuse of force, prosecutors could offer the officer immunity from the ODTI in exchange for their testimony. Prioritizing accountability for the more serious, underlying crime of misuse of force would be sensible as an act of prosecutorial discretion. Indeed, the existence of ODTIs could provide prosecutors with leverage to obtain an officer's cooperation in such cases that would otherwise not be forthcoming.[455]

2. Defunding or Abolishing the Police

Critics of law enforcement argue that, because of the alleged irredeemability of police and policing, police departments should be defunded in order to divert resources to social services or even abolished.[456] By subscribing to "non-reformist reform,"[457] rather than "reformist reforms,"[458] such critics prefer revolution to refinement, arguing that the latter only further legitimizes the police[459] or will inevitably fail.[460] These revolutionaries would thus view this Article's proposal of prosecuting police bystanderism or otherwise promoting

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455 For further discussion of prosecutors potentially leveraging Bad Samaritan laws, see Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1341–42, 1387–88; Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1180, 1189.

456 *See supra* note 38 and accompanying text.

457 Philosopher, economist, and journalist André Gorz coined the term "non-reformist reform" in the 1960s. ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., Bacon Press 1967) (1964). He described such reforms as promoting "what should be" by implementing "fundamental political and economic changes." *Id.* at 8. For a description of the conceptual framework of non-reformist reforms, see Akbar, *supra* note 38, at 98–106.

458 By legitimizing existing power structures, "reformist reforms" do not threaten the status quo. *See* Patrick Bond, *Reformist Reforms, Non-Reformist Reforms and Global Justice: Activist, NGO and Intellectual Challenges in the World Social Forum*, 3 SOC'YS WITHOUT BORDERS 4, 15 (2008).

459 *See, e.g.*, Akbar, *supra* note 38, at 107 ("In its bare form, defund the police is oppositional rather than conciliatory. The demand stands in stark contrast to conventional approaches to police reform that typically focus on relegitimating police in response to crisis and reinvesting in police through trainings, technologies, and policies. Defund the police challenges reforms that redress police violence as if it is a product of bad behavior or poor decisionmaking by an individual officer or insufficient institutional oversight, incentives, and training." (footnote omitted)); McLeod, *supra* note 38, at 1639–40 (contending that prosecuting, convicting, and imprisoning abusive police officers may legitimize policing practices generally); O'Rourke et al., *supra* note 38, at 1355–57 (arguing that "incremental police reforms" do not address "the political entrenchment of policing institutions").

460 *See* Eaglin, *supra* note 38, at 124–25 ("[Abolitionists] believe that after years of trying to 'reform' the police, reform efforts are doomed to fail.").

police upstanderism as counterproductive to radically reimagining and transforming policing itself.[461]

However, the likelihood of permanent police defunding or abolition is low, at least in the near term, based on current trends and polls. Agencies' budget cuts in 2020 preceded rising levels of homicides[462] and hate crimes,[463] widespread officer resignations, and political pressures that prompted *increased* police spending the following year.[464] This phenomenon was nicknamed "*re*funding the police."[465] Only fifteen percent of Americans support reducing spending on police.[466] Presidents Joe Biden and Barack Obama are among notable figures who have criticized the "defund" slogan,[467] which is often caricatured as more extreme than many of its advocates intend.[468] Sixty-seven per-

461 *See, e.g.*, Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1007 (2021) ("[P]olice prosecutions do not align with either a prison abolitionist ethic or, less radically, a desire to see the criminal legal system treat people of color fairly.").

462 Neil MacFarquhar, *Murders Spiked in 2020 in Cities Across the United States*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/09/27/us/fbi-murders-2020-cities.html [https://perma.cc/WZ3A-9CCH].

463 Nicole Sganga, *2020 Saw Highest Number of Reported Hate Crimes in Two Decades, Updated FBI Data Shows*, CBS NEWS (Oct. 25, 2021, 12:30 PM), https://www.cbsnews.com/news/hate-crimes-report-2020-fbi-highest/ [https://perma.cc/UF7K-XSYC].

464 *See, e.g.*, J. David Goodman, *A Year After "Defund," Police Departments Get Their Money Back*, N.Y. TIMES (Oct. 10, 2021), https://www.nytimes.com/2021/10/10/us/dallas-police-defund.html [https://perma.cc/GNS8-BZP9]; *Mayor Schaaf Pushes to Hire More Police in Response to Oakland Violence*, CBS BAY AREA (Nov. 29, 2021, 4:42 PM), https://sanfrancisco.cbslocal.com/2021/11/29/mayor-schaaf-pushes-to-reverse-oaklands-police-cuts-during-spike-in-violence/ [https://perma.cc/5G2K-PA99]; Liz Navratil, *Minneapolis Police Spending Rises as Defund Movement Fades*, STARTRIBUNE (Dec. 11, 2021, 3:30 PM), https://www.startribune.com/minneapolis-police-spending-rises-as-defund-movement-fades/600126143/ [https://perma.cc/YSU2-VRTP].

465 *See, e.g.*, Alex Seitz-Wald, *How Democrats Went from Defund to Refund the Police*, NBC NEWS (Feb. 6, 2022, 4:30 AM), https://www.nbcnews.com/politics/politics-news/democrats-went-defund-refund-police-rcna14796 [https://perma.cc/H7YM-2GZ7]; Fola Akinnibi, *Major U.S. Cities Look to Refund the Police One Year After Floyd*, BLOOMBERG (May 27, 2021, 6:00 AM), https://www.bloomberg.com/news/newsletters/2021-05-27/the-politics-of-policing [https://perma.cc/NZ88-NJN8].

466 *See* Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/ [https://perma.cc/3FRS-GEFP].

467 Chandelis Duster, *Obama Cautions Activists Against Using "Defund the Police" Slogan*, CNN (Dec. 2, 2020, 5:26 PM), https://www.cnn.com/2020/12/02/politics/barack-obama-defund-the-police/index.html [https://perma.cc/EB4T-K7XC]; Lisa Kim, *Biden: "The Answer Is Not to Defund the Police,"* FORBES (Feb. 9, 2022, 4:18 AM), https://www.forbes.com/sites/lisakim/2022/02/03/biden-the-answer-is-not-to-defund-the-police/ [https://perma.cc/YHH3-UMDL].

468 Rather than literally defunding the police, many proponents of the slogan mean that unarmed specialists—such as social workers, psychologists, and paramedics—should play a greater role in responding to mental health, homelessness, and certain other problems and crises.

cent of Americans, including a majority of Black Americans and Democrats, oppose abolishing or eliminating the police.[469] Even in Minneapolis, where Chauvin murdered Floyd, voters resoundingly rejected dismantling the police department.[470] These developments led one prominent supporter of "defund[ing] the police" to declare its slogan and substance "dead."[471]

Policing can and should still undergo incremental reform unless and until law enforcement is fundamentally changed or ended. And one of those reforms should be mandating police upstanderism amid their peers' misuse of force.

3. Mass Incarceration

A potential criticism of Bad Samaritan laws generally is that, if they carry jail time, enforcing these statutes would exacerbate what many scholars have identified as a societal problem of mass incarceration in the United States.[472] To address this concern, punishments for violating Bad Samaritan laws that apply regardless of profession should be restricted to noncarceral options, "such as a fine, citation, probation, or community service."[473]

Because of the special circumstances of an ODTI, however, violations of this specific subset of Bad Samaritan laws should be catego-

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See, e.g., Greg Walters, *These Cities Replaced Cops with Social Workers, Medics, and People Without Guns*, VICE (June 12, 2020, 2:48 PM), https://www.vice.com/en/article/y3zpqm/these-cities-replaced-cops-with-social-workers-medics-and-people-without-guns [https://perma.cc/N7NM-4YKH].

469 Sarah Elbeshbishi & Mabinty Quarshie, *Fewer than 1 in 5 Support "Defund the Police" Movement, USA Today/Ipsos Poll Finds*, USA TODAY (Mar. 8, 2021, 6:10 PM), https://www.usatoday.com/story/news/politics/2021/03/07/usa-today-ipsos-poll-just-18-support-defund-police-movement/4599232001/ [https://perma.cc/UUD6-NWBL]; William Saletan, Americans Don't Want to Defund the Police. Here's What They Do Want., SLATE (Oct. 17, 2021, 7:00 PM), https://slate.com/news-and-politics/2021/10/police-reform-polls-white-black-crime.html [https://perma.cc/MT25-3ULV]; *see also* Nekima Levy Armstrong, Opinion, *Black Voters Want Better Policing, Not Posturing by Progressives*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2021/11/09/opinion/minneapolis-police-defund.html [https://perma.cc/J2Y7-UC3W].

470 Mitch Smith & Tim Arango, *"We Need Policemen": Even in Liberal Cities, Voters Reject Scaled-Back Policing*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/11/03/us/police-reform-minneapolis-election.html [https://perma.cc/9V9Z-FPNX].

471 Charles M. Blow, Opinion, *"Defund the Police" Is Dead. Now What?*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/opinion/defund-the-police.html [https://perma.cc/C7AJ-WW76].

472 *See* Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1339; Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1180.

473 Kaufman, *Protectors of Predators or Prey*, *supra* note 42, at 1339; Kaufman, *Digital Age Samaritans*, *supra* note 54, at 1180, 1191.

rized as felonies, including imprisonment as a potential punishment.[474] Permitting this penalty category only for ODTIs would strictly limit the potential for additional inmates in the United States to just the tiny subset of the population that serves as officers,[475] and even then only to the tinier subset of the population that serves as officers who are physically present when their colleagues misuse force. Moreover, although concerns about mass incarceration derive in part from *over*-enforcement of criminal law generally, a central problem with police misconduct specifically is the opposite: *under*enforcement.[476]

4. Public Safety

An intervening officer could, even with good intentions of preventing or stopping a colleague's misuse of force, accidentally exacerbate harm to one or more innocent civilians, whether the subject of the colleague's misuse of force or an uninvolved third party. After all, police already unintentionally injure or even kill innocent civilians.[477] An ODTI would, by design, increase the potential for officer use of force, albeit targeting fellow officers, thereby also expanding associated accidents.

ODTIs could be crafted to mitigate such calamities. First, these laws could require training on proper intervention that limits unintended consequences. The model statute mandates instruction to officers on how to discharge their duty to intervene as effectively and safely as possible.

Second, ODTIs could include reasonable exemptions designed to mitigate harm to civilians. As the model statute does, these laws could exempt potentially intervening officers who reasonably suspect that intervening would directly result in injury or death to a civilian.

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474 *See supra* notes 172–73, 237–39, 280–84, 298 and accompanying text.

475 In 2019, the latest year for which the FBI provides data, there were 697,195 law enforcement officers in the United States. *Table 74: Full-Time Law Enforcement Employees*, FBI (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-74 [https://perma.cc/TA5A-K4G9]. Given that the total U.S. population was approximately 331,449,281, then law enforcement officers comprise 0.2% of the country's population. *See supra* note 271.

476 *See, e.g.*, Levine, *supra* note 461, at 1003–04 ("Dismay at the number of officers who are not held criminally accountable for violent acts is justifiable."). For other sources analyzing underenforcement, see *supra* note 435.

477 *See, e.g.*, Marisa Iati, Jennifer Jenkins & Sommer Brugal, *Nearly 250 Women Have Been Fatally Shot by Police Since 2015*, WASH. POST (Sept. 4, 2020), https://www.washingtonpost.com/graphics/2020/investigations/police-shootings-women/ [https://perma.cc/N3AV-K59T] (noting that, in twelve of twenty situations in which Black women were killed while police pursued someone else, police said the women killed were caught in crossfire or shot accidentally).

In addition, ODTIs could be crafted to acknowledge the reality of such accidents to people and property. The model statute immunizes officers who, in good faith, undertake interventions that inadvertently or unavoidably cause injuries, casualties, or property damage. Such immunities are common in Good Samaritan laws.[478]

5. Policing

An ODTI could negatively affect policing in at least four ways. First, with the enactment of these laws, charges (including frivolous ones) against officers could spike, taxing an already overburdened judicial system. However, an increase in such allegations would be appropriate when officers failed to discharge a lawfully mandated duty to intervene. Convictions from these prosecutions could both punish officer bystanderism and prod officer upstanderism. Frivolous allegations would presumably be dismissed, especially given the typically pro-police posture of prosecutors.[479]

Second, widespread awareness that an officer would be required, by law, to intervene in a colleague's suspected misuse of force may harm police recruitment and retention. People otherwise interested in becoming or remaining officers could be deterred for fear of personal and professional liability for future bystanderism when facing their colleagues' brutality. Indeed, amid demands for reform and greater scrutiny, staffing in agencies has already fallen in certain cities and nationwide.[480] The impact of a specific duty to intervene on officer

478 In contrast to Bad Samaritan laws, Good Samaritan laws "encourage citizens to administer care by granting statutory immunity from civil damages, thus removing fear of liability." Holly R. Farris, *Reading Between the Lines: The South Dakota Supreme Court's Interpretation of S.D.C.L. Section 20-9-4.1 in* Gronseth v. Chester Rural Fire Protection District & Chester Fire Department, 56 S.D. L. Rev. 122, 129 (2011). Unlike Bad Samaritan laws, which exist in twenty-nine U.S. states, *supra* note 70 and accompanying text, Good Samaritan laws exist in all fifty states. *See* Jayanth Adusumalli, Khalid Benkhadra & Mohammad H. Murad, *Good Samaritan Laws and Graduate Medical Education: A Tristate Survey*, 2 Mayo Clinic Proc.: Innovations, Quality & Outcomes 336, 336 (2018).

479 *See generally* Romero, *supra* note 370, at 1103 (documenting, expressing concern about, and proposing measures to mitigate "overly cozy relationships between police and prosecutors").

480 *See* Neil MacFarquhar, *Why Police Have Been Quitting in Droves in the Last Year*, N.Y. Times (July 14, 2021), https://www.nytimes.com/2021/06/24/us/police-resignations-protests-asheville.html [https://perma.cc/23C6-G7KV] ("A survey of almost 200 police departments indicated that retirements were up 45 percent and resignations rose by 18 percent in the year from April 2020 to April 2021 when compared with the previous 12 months . . . ."); Daniel Cassady, *Amid Calls for Police Reform Across the Nation, Police Struggle with Recruiting and Retention*, Forbes (July 29, 2020, 2:16 PM), https://www.forbes.com/sites/danielcassady/2020/07/29/amid-calls-for-police-reform-across-the-nation-police-struggle-with-recruiting-and-retention/ [https://perma.cc/9Q2J-L9NY]; Eric Westervelt, *Cops Say Low Morale and Department Scrutiny Are Driving*

recruitment and retention, however, may be nonexistent or even helpful. Reports of officer staffing problems do not single out duties to intervene but rather point to reform and scrutiny generally.[481] In fact, the vast majority of police *favor* mandated peer intervention in principle,[482] suggesting that at least most current officers would not resign over the duty alone. Most importantly, individuals who elected not to either join or stay in an agency because of the duty would usefully self-select out officers who are not genuinely committed to protecting the public—including from fellow officers.

Third, if an ODTI applied to all officers, certain law enforcement operations may be undermined. Specifically, if *undercover* officers were required to intervene in their colleagues' misuse of force, then they may compromise their identities, which could foil their operations. Even if the undercover officer did reveal their true role, their colleague may not believe that they are a fellow officer if they did not have credentials on their person. To avoid situations in which a valuable undercover operation may be ruined or an undercover officer without proper identification and their colleague enter their own physical conflict, ODTIs should exempt undercover officers, as the model statute does.

Finally, agencies and officers may decide to alter their approaches to confronting situations that could involve officer use of force if their colleagues were required to intervene in suspected misconduct. Critics could argue that these adjustments could adversely impact law enforcement. For instance, agencies might prefer not to assign officers partners in order to avoid situations in which officers may face a duty to intervene in their partners' misuse of force. Not having partners could make law enforcement even more dangerous for officers and

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Them Away from the Job, NAT'L PUB. RADIO (June 24, 2021, 2:53 PM), https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job [https://perma.cc/2X2S-NKJ7]; Mike Perlstein, *New Orleans Police Facing "Catastrophic" Officer Shortage*, 4WWL (July 13, 2021, 7:07 PM), https://www.wwltv.com/article/news/investigations/mike-perlstein/nopd-facing-catastrophic-staffing-shortage/289-a6547c7e-1c96-493a-b668-745567bca6d9 [https://perma.cc/5ZQL-NZ3M] (noting that, since the beginning of 2020, more officers have left the NOPD then joined it, and that one of the reasons for this trend is the view that disciplinary action for misconduct is overzealous); Stefanie Dazio, Jake Bleiberg & Kate Brumback, *Law Enforcement Struggles to Recruit Since Killing of Floyd*, AP NEWS (June 11, 2021), https://apnews.com/article/government-and-politics-george-floyd-racial-injustice-only-on-ap-coronavirus-pandemic-d434cc8023875ddb996abb7df0a7bc44 [https://perma.cc/GUK3-98CW].

481 *See supra* note 480 and accompanying text.

482 *See supra* note 449 and accompanying text.

less effective.[483] As a result, officers themselves, who generally prefer two-officer units over single-officer patrols,[484] may resist strategic staffing that solely aims to reduce potential confrontations among officers. In addition, agencies and officers may be more reluctant to use force in the first place, for fear that their colleagues would, rightly or wrongly, intervene or be liable for not doing so. Such hesitation could chill legitimate law enforcement and undermine police assistance to crime victims.[485] However, increasing officer caution about using force could helpfully reduce officer and civilian injuries and deaths, as well as bolster the perceived legitimacy of law enforcement.[486]

CONCLUSION

Derek Chauvin's murder of George Floyd is just one of the most recent examples of the heinous crime and tragedy of police brutality. J. Alexander Kueng, Thomas Lane, and Tou Thao's decision not to intervene—or, at least in the case of Lane, his decision not to intervene *effectively*—was a callous, cowardly instance of bystanderism

483 *See* JESSICA ANDERSON & KYM DOSSETOR, AUSTL. INST. OF CRIMINOLOGY, FIRST-RESPONSE POLICE OFFICERS WORKING IN SINGLE PERSON PATROLS: A LITERATURE REVIEW, at ix, 20–21 (2012), https://www.aic.gov.au/sites/default/files/2020-05/tbp049.pdf (noting that the single-person patrols have not been proven to be more effective to two-person patrols and that "working solo and at night without immediate backup could heighten the stress felt by officers"); Christina Sterbenz, *Police Around the Country Are Making a Complicated Call to Increase Officer Safety in the Wake of Dallas and Baton Rouge*, INSIDER (July 19, 2016, 7:24 PM), https://www.businessinsider.com/problems-of-police-working-in-pairs-2016-7 [https://perma.cc/GR3U-AG6T].

484 *See* Carlene Wilson & Neil Brewer, *One- and Two-Person Patrols: A Review*, 20 J. CRIM. JUST. 443, 448 (1992); Alejandro del Carmen & Lori Guevara, *Police Officers on Two-Officer Units: A Study of Attitudinal Responses Towards a Patrol Experiment*, 26 POLICING: AN INT'L J. POLICE STRATEGIES & MGMT. 144 (2003) ("[O]fficers generally agreed . . . that two-officer units should be used at night and in areas where people mistrust the police, [and] that two-officer units could observe more than a single officer and respond more quickly to calls.").

485 *See* Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Behind the Badge*, PEW RSCH. CTR. (Jan. 11, 2017), https://www.pewresearch.org/social-trends/2017/01/11/behind-the-badge/ [https://perma.cc/N82T-FZ45] (describing results of a national survey of police); Jeff Sessions, Att'y Gen., Remarks to the Chicago Crime Commission (Oct. 19, 2018) (noting that Chicago's police settlement with the ACLU, which involved officer use of force, led to fewer legal *Terry* stops and arrests and the city saw the biggest single-year increase in murders in the more than sixty years in which reliable statistics were available).

486 *See, e.g.*, U.S. DEP'T OF JUST., LAW ENFORCEMENT BEST PRACTICES: LESSONS LEARNED FROM THE FIELD 26 (2019) ("By approaching encounters with community members according to the principles of de-escalation, first responders can reduce the need for force, reduce injuries to themselves and the people with whom they interact, and enhance the legitimacy of the organization."); Tim Prenzler, Louise Porter & Geoffrey P. Alpert, *Reducing Police Use of Force: Case Studies and Prospects*, 18 AGGRESSION & VIOLENT BEHAV. 343, 349 (2013) (providing statistics supporting the connection between, on the one hand, declining officer use-of-force and excessive-use-of-force complaints and, on the other hand, decreasing injuries to the public and police).

that guaranteed Floyd would die. These three ex-officers' omissions only add to the plague of police passivity and the need for a solution that prods upstanderism. Amid their colleagues' misuse of force, officers in action must replace officers' inaction.

To help ensure that the convictions of Kueng, Lane, and Thao are not an aberration, this Article has proposed a narrow Bad Samaritan law: a model officer duty to intervene when facing their peers' misuse of force. This duty is certainly no panacea for police violence. Even if widely enacted, such a legal obligation may not be enforced or effective. Still, this legal obligation would give officers guidance on proper conduct during their colleagues' brutality, provide prosecutors a tool for holding violators accountable who are not or could not be convicted of perpetrating other crimes, alleviate dependence on law enforcement agencies to sanction their own employees, and express society's condemnation of police bystanderism amid unjustified state violence. When discharged, the duty would help protect civilians and (re)build trust between the public and police by demonstrating that the latter recognize that they are not above the law.

Given the scourge of officer misuse of force in the United States, an officer duty to intervene should be included among other reforms to law enforcement. Doing so would both help prevent the death of and promote justice for future George Floyds.

Appendix: Model Officer Duty to Intervene

The following is a model ODTI. It should be enacted in the twenty-nine U.S. states that do not currently feature this duty, and legislatures in the remaining twenty-one states should use this model statute to pass amendments to their existing laws.[487] Congress should enact a modified version of this model statute with appropriate adjustments, including for federal definitions of "law enforcement officer" and "law enforcement agency."[488]

Law Enforcement Officer Duty to Intervene

(A) Definitions: In this statute

(1) the term "law enforcement officer" means any state, county, or municipal employee or contractor, authorized by law or by a government agency, whose primary duties are maintaining order and investigating, apprehending, or detaining individuals suspected or convicted of criminal offenses. Law enforcement officers include but are not limited to police officers, sheriffs, sheriffs' deputies, state patrol officers, and corrections officers.

(2) the term "law enforcement agency" means any state, county, or municipal agency, authorized by law or by a government agency, which employs law enforcement officers. Law enforcement agencies include but are not limited to police departments and sheriffs' offices.

(3) the term "perceiving officer" means any law enforcement officer who is

(a) physically present;

(b) either observes, reasonably should have observed, or otherwise reasonably believes that another law enforcement officer is using or is attempting to use force; and

(c) knows or reasonably should know that this use of force is prohibited by local, state, or federal law or relevant law enforcement agency policy.

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487 *See supra* note 78 and accompanying text.

488 Federal agencies engaged in law enforcement actions include the Bureau of Alcohol, Tobacco, Firearms, and Explosives; Customs and Border Protection; Drug Enforcement Agency; FBI; Immigration and Customs Enforcement; U.S. Marshals Service; and U.S. Secret Service. *See Federal Crimes and Agency Contact Information*, U.S. Dep't of Just., https://www.justice.gov/usao-sdil/federal-crimes-and-agency-contact-information [https://perma.cc/3AR8-ZKDG].

(4) the term "inflicting officer" means any law enforcement officer whom
   (a) another law enforcement officer either observes, reasonably should have observed, or otherwise reasonably believes is using or is attempting to use force that
   (b) the perceiving officer knows or reasonably should know is prohibited by local, state, or federal law or relevant law enforcement agency policy.

(5) the term "special prosecutor" means a prosecutor who is appointed by the state's Attorney General and who is independent of an office that would normally exercise jurisdiction in cases arising under this statute.

(B) Intervention Requirements:

(1) Except as provided in subsection (C), every perceiving officer must reasonably attempt to prevent or stop an inflicting officer's attempted or actual misuse of force immediately or as soon as possible.

(2) Such intervention must use reasonable verbal, physical, or both measures to attempt to prevent or stop the attempted or actual misuse of force immediately or as soon as possible. Applying unreasonably insufficient measures to attempt to prevent or stop the attempted or actual misuse of force does not fulfill this intervention requirement.

(3) This intervention requirement applies regardless of the tenure, rank, or law enforcement agency assignment of either the perceiving officer or the inflicting officer.

(C) Exemptions: The following perceiving officers are exempt from the intervention requirements in subsection (B):

(1) The perceiving officer who reasonably believes that intervening would directly result in injury or death to a civilian.

(2) The perceiving officer who lacks sufficient contextual information to assess whether intervention is warranted, as would be determined by a reasonable law enforcement officer.

(3) The perceiving officer who has no reasonable opportunity to intervene.

(4) The perceiving officer who is undercover.

(D) Special Prosecution: A special prosecutor shall be appointed in cases arising under this statute. This prosecutor's jurisdiction will displace and supersede the jurisdiction of the prosecutor where the incident occurred. The special prosecutor shall have only the

powers and duties necessary to effectuate the following responsibilities:

(1) To conduct a full, reasoned, and independent investigation of suspected violations of this statute including, but not limited to,
   (a) gathering and analyzing evidence;
   (b) conducting witness interviews; and
   (c) reviewing investigative reports, scientific reports, and audio and video recordings.

(2) If warranted, to prosecute perceiving officers for suspected violation of this statute.

(3) To provide the state's Governor and Attorney General with a report on all cases where: (a) the special prosecutor declines to present evidence to a grand jury or (b) the grand jury declines to return an indictment on any charges. The report shall include, to the extent possible and lawful, an explanation of that outcome and any recommendations for systemic reform arising from the investigation.

(E) Liability:

(1) **Criminal**:

   (a) **Omission Liability**: Any perceiving officer, except those listed in subsection (C), who purposely, knowingly, or recklessly fails to intervene as required by subsection (B) shall be both
      (i) guilty of a felony punishable by a fine (of not less than $25,000), imprisonment (of not less than one year), or both and
      (ii) decertified as a law enforcement officer.

   (b) **Accomplice Liability**: Alternatively, any perceiving officer, except those listed in subsection (C), who purposely, knowingly, or recklessly fails to intervene as required by subsection (B) and who both acts with the mental state required for the misuse of force and intentionally aids the inflicting officer using that force shall be both
      (i) guilty of the same crime as if the perceiving officer who fails to intervene had themself misused that force and
      (ii) decertified as a law enforcement officer.

(2) **Civil**: Any perceiving officer, except those listed in subsection (C), who purposely, knowingly, or recklessly fails to inter-

vene as required by subsection (B) shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(F) Immunities and Indemnifications:

(1) **Available Immunity and Indemnification**: Perceiving officers who undertake, in good faith, interventions in accordance with subsection (B) are immunized and indemnified from liability for any injuries, casualties, or property damage that they inadvertently or unavoidably cause.

(2) **Unavailable Indemnification**: A perceiving officer's employer shall not indemnify the officer from liability for violating subsection (B).

(G) Unavailable Defenses: The following claims are not defenses to violations of subsection (B) or liability under subsection (E):

(1) The perceiving officer was following a superior's order not to intervene.

(2) The perceiving officer feared—reasonably or not—that intervention would physically imperil themself or the inflicting officer.

(3) Qualified or other state-provided immunity.

(H) Antiretaliation Protection

(1) **Protection**: A law enforcement agency and its members shall not discipline, discriminate, or retaliate in any way against a current or former law enforcement officer who

(a) intervened to prevent or stop a misuse of force as required under subsection (B) of this statute;

(b) initiated, participated in, or testified in, or is believed to have initiated, participated in, or testified in, any action or proceeding carrying out the purposes of this statute; or

(c) cooperated, or is believed to have cooperated, with an investigation regarding a misuse of force.

(2) **Prohibition**: Prohibited disciplinary, discriminatory, or retaliatory actions shall include but not be limited to

(a) termination or layoff,

(b) demotion of officer,

(c) denial of overtime or promotion,

(d) discipline of officer,

(e) denial of benefits,

(f) failure to hire or rehire,

(g) intimidation or harassment,

(h) threats, and
(i) reassignment.

(3) **Judicial relief**: The following judicial relief is available for current and former law enforcement officers who have suffered retaliation for undertaking, in good faith, an intervention in accordance with subsection (B):

(a) **Relief**: Any current or former law enforcement officer aggrieved by an action of the employer of the officer or by the employer's member in violation of subsections (H)(1) and (H)(2) is entitled to sue for
(i) injunctive relief,
(ii) treble actual damages,
(iii) court costs, and
(iv) reasonable attorney's fees.

(b) **Enforcement:** If the court determines that the employer or its member has violated a provision of subsections (H)(1) and (H)(2), the court shall
(i) order appropriate injunctive relief to prevent the further occurrence of any reprisal or retaliatory action against the officer and
(ii) award damages to compensate the aggrieved officer for their losses.

(c) **Retroactivity**: Any current or former law enforcement officer found to have suffered retaliation for undertaking, in good faith, an intervention in accordance with subsection (B) before the enactment of this law may have said retaliation reviewed by a court with competent jurisdiction.

(d) **Penalty**: An offense committed by any person under this subsection (H) is a felony punishable by a fine of not less than $25,000, imprisonment of not less than one year, or both.

(I) Law Enforcement Agency Requirements:

(1) **Requirements**: All law enforcement agencies must do the following:

(a) **Replicate and Post the Law Enforcement Officer Duty to Intervene**: All law enforcement agencies must replicate, verbatim, subsections (A) through (H) in their agencies' policy manual and post these subsections in one or more conspicuous locations that are visible to all officers. All law enforcement agencies should supplement those mini-

mum standards and provisions with any additional guidance and requirements that the agencies deem helpful.

(b) **Train on the Law Enforcement Officer Duty to Intervene**: All law enforcement agencies must train their new officers and, annually, their existing officers on

(i) the existence of their duty to intervene in other law enforcement officers' misuse of force;

(ii) when to intervene in other law enforcement officers' misuse of force, including

(A) other law enforcement officers' conduct that constitutes misuse of force under local, state, or federal law or relevant law enforcement agency policy and therefore warrants intervention and

(B) opportunities that are reasonable in which to intervene in other law enforcement officers' misuse of force; and

(iii) how to intervene in other law enforcement officers' misuse of force, including

(A) verbal and physical intervention measures and the circumstances that warrant employing either or both and

(B) measures to intervene effectively and as safely as possible for themselves and others, especially civilians.

(c) **Institute Policies and Procedures Related to the Law Enforcement Officer Duty to Intervene**: All law enforcement agencies must institute policies and procedures to

(i) promote a culture of law enforcement officer peer intervention;

(ii) prevent and punish retaliation for law enforcement officer peer intervention;

(iii) maintain statistics and descriptions of law enforcement officer peer interventions and lack of required interventions to measure the duty's effectiveness and to produce such statistics and descriptions when requested by government officials, journalists, academics, and other members of the public; and

(iv) report law enforcement officer peer intervention statistics to the U.S. Department of Justice.

(2) **Penalties for Noncompliance**:

(a) Any law enforcement agency that fails to fully comply with its requirements pursuant to subsection (I)(1) is subject to the suspension of its funding by its appropriating authority.

(b) Whenever the Attorney General has reasonable cause to believe that a law enforcement agency has not fully complied with its requirements pursuant to subsection (I)(1), the Attorney General may in a civil action obtain any and all appropriate relief to eliminate the noncompliance.