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IN DEFENSE OF THE “DUTY TO REPORT” CRIMES

Sungyong Kang¹

I. INTRODUCTION

“If you see something, say something.” This common phrase is found on posters all over New York City subways. The campaign, originally implemented by the New York City Metropolitan Transportation Authority, is now licensed to the U.S. Department of Homeland Security to encourage the general public to report suspicious activity to local law enforcement.² So, are members of the general public *required* to report suspicious activity to law enforcement agencies when they see it? If they don’t, will they be punished? Is there a legal duty for passersby to report suspicious activity or crime? Although the crime of misprision, under 18 U.S.C. § 4, seems to require the general public to report felonies, it only criminalizes the more affirmative act of concealment, as opposed to simple non-reporting.³ Are there circumstances, however, where one should be required to report the suspicious activity or crime under the threat of criminal liability?

Should a victim of a serious crime be criminalized for not reporting the crime? Should a victim have a duty to report the crime? Most people would probably answer negatively; the majority would say it is wrong to criminalize those who fail to report crimes, particularly the victims themselves. What about civil or administrative penalties for the victims of crimes, instead of criminal punishment? The answer would probably still be “no,” but likely less resolutely. Must a rape victim report the rape to the police? The answer would absolutely be “no.” What about a victim of larceny? What if the stolen object contained dangerous chemicals or weapons of mass destruction? What if the victim knew that the thief was part of a terrorist organization? Even for victims of the same type of crime, the answers could vary depending on specific situational factors. The same normative contextual dependence for reporting crimes by victims applies to third parties and even to offenders. Indeed, the position of a potential reporter in relation to the crime is a crucial factor in determining the immorality of not reporting or the morality of reporting.

With the division of labor and interdependency of social activities, the importance of administrative laws and agencies ensuring each profession “behave[s] ethically for common social and economic welfare” has increased.⁴ Thus, the government has introduced laws regulating serious unethical

¹ S.J.D. Fordham University School of Law, 2017.

² U.S. DEPARTMENT OF HOMELAND SECURITY HOMEPAGE, <http://www.dhs.gov/see-something-say-something/about-campaign> (last visited May 25, 2016).

³ See 18 U.S.C. § 4 (2017) (“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”); *Neal v. U.S.*, 102 F.2d 643 (8th Cir. 1939).

⁴ See John M. Pfiffner, *The Development of Administrative Regulation*, 221 THE ANNALS OF THE AM. ACAD. OF POL. SCI. 1, 2-3 (John Horlacher ed., 1942); see also WOODROW WILSON, THE NEW

behaviors in certain professions and industries. To more effectively deter crime, professional ethics require individuals to report crimes encountered in the course of one's business.

The private sector's role in society has become so essential that laws now compel a wider range of private actors to behave more proactively, under the threat of stronger penalties. Often, the private sector is better positioned to control the behavior of possible criminals, considering the crimes are occurring in modern fields, such as technology and financial services. Private industry is becoming increasingly regulated. Duties to report and, in some cases, to proactively deter crime, are now common in certain fields.⁵ Perpetrators, victims, and third-parties could all have an obligation to report crime. Moreover, failing to do so could result in a crime of omission.

Not all behavior, even marginally immoral behavior, should be regulated and criminalized. However, focus on instrumental incentives for crime deterrence has led to the neglect of traditional, culpability-based limits in criminal punishment, thereby eroding the value of fairness and proportionality.

In current legal academia, normative theory for the crime of failure to report crime, an emerging type of white collar crime,⁶ has not kept pace with modern laws and regulations.⁷ As crime deterrence continues to rely on the

FREEDOM 23-24 (Englewood Cliffs, N.J., Prentice-Hall, 1961) (1913) (illustrating when the government has a right to intervene with the private sector).

⁵ Third parties, as gatekeepers, monitor and disrupt misconduct. See Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53 (1986).

⁶ I adopt, for the purpose of this research, the following definition of white collar crime: "Any behavior that occurs in a corporate and/or individual occupational context; and, that is committed for personal and/or corporate gain; and/or, violates the trust associated with that individual's and/or corporation's position and/or status; and that is a violation of any criminal law, civil law, administrative law, rule, ruling, norm, or regulation condemning the behavior." ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME, at viii (Lawrence M. Salinger ed., SAGE Publications 1st ed., 2004).

⁷ Current scholarship has focused mainly on a specific duty to report crime, such as the crime of misprision or duty to report child abuse, elder abuse, etc. See Goldberg, *Misprision of Felony: An Old Concept in a New Context*, 52 A.B.A. J. 148 (1966); Robert E. Meale, *Misprision of Felony: A Crime Whose Time Has Come, Again*, 28 U. FLA. L. REV. 199 (1975); Howard, *Misprisions, Compoundings and Compromises*, 1959 CRIM. L. REV. 750 (1959); Jack Wenik, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L. J. 1787 (1985); Susan J. Hoffman, *Statutes Establishing a Duty To Report Crimes or Render Assistance to Strangers-Making Apathy Criminal*, 72 KY. L.J. 827 (1984); Natalie Perrin-Smith Vance, *My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes*, 36 CAL. W. L. REV. 135 (1999); Robert D. Miller and Robert Weinstock, *Conflict of interest between therapist-patient confidentiality and the duty to report sexual abuse of children*, BEHAV. SCI. LAW, 5: 161 (1987); Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L. Q. 69 (1982); Robert J. Shoop, Lynn M. Firestone, *Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law?*, 46 EDUC. L. REP. 1115 (1988). Research covering duty-to-report is limited and few papers provide guidance on how to enact duty-to-report laws. See Ayling & Grabosky, *Policing By Command: Enhancing Law Enforcement Capacity Through Coercion*, 28 LAW & POLICY 420 (2006); see also Sandra Guerra Thompson, *The White Collar Police Force "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3 (2002). However, even these papers fail to comprehensively reflect the current state of duty-to-

private sector, I expect a growing number of “duty to report” requirements in other professions and industries. Without clear principles, derived from a comprehensive study of duty to report laws and regulations, there is a substantial risk that these laws and regulations will be incoherent and imbalanced, resulting in a more unjust society.

My research aims to provide a theoretical framework to enhance our understanding of the laws on duty to report crimes. Adopting a culpability analysis, this paper identifies normative culpability factors to be considered in measuring the culpability of failing to report crime, suggests the position of the reporter in relation to the crime reported—offenders, third-parties, or victims—as a criterion for categorizing the diverse duties to report crimes, and analyzes the culpability of failing to report crimes in each category of the laws using the normative culpability factors.⁸ Further, this study will provide substantive principles for each category of duty-to-report laws which should be considered, yet remain largely unexamined. This analysis will help modify contemporary laws criminalizing the failure to report crimes that are imperative if such laws are to be morally justifiable.

Enacting laws that properly express our moral code will eventually encourage compliance and decrease enforcement costs.

II. SCOPE OF ANALYSIS

This paper examines diverse laws imposing regulatory duties on certain professions and industries to report crimes under the threat of criminal penalties. As explained in the following chapters, the culpability of not reporting crime depends significantly on the position of the reporter vis-a-vis the crime reported and allows for a meaningful categorization framework. Therefore, the analysis will focus on the following categories of duty-to-report laws in the U.S.: (1) offender reporter,⁹ 42 U.S.C. § 9603 (duty to report the release of substances from a vessel by the person in charge of vessel);¹⁰ (2) third-party reporter, 18

report by focusing mostly on duty-to-report imposed on a third party and providing unsatisfactory, one-size-fits-all guidelines.

⁸ As the necessary normative culpability factors differ depending on the proscribed behaviors, it is impossible to make a culpability analysis for a general law where proscribed behaviors could vary. In contrast, this paper makes a culpability analysis by specifically focusing on a type of administrative law – those laws which determine whether there is a duty to report crime, and the extent to which it extends. This area is general enough to be applied to many different laws requiring such duty but specific enough to be analyzed deeply.

⁹ “Offender-reporter”, as used here, means only the person, including a legal entity, with possible strict vicarious criminal liability for such entity, not the person who commits or aids and abets the underlying crime with general criminal liability. To differentiate between these two types of offenders, I use “Offender” for the former and “Primary Offender” for the latter. Also, Offender does not include a person who has no liability in relation to the crime committed within their organization. As only the person who can control and oversee the behavior of Primary Offender bears possible strict vicarious criminal liability, a person without such control or oversight will be considered a third party.

¹⁰ See 42 U.S.C. § 9603(b)(2) (2017).

U.S.C. § 2258A (duty to report child pornography by electronic communication service providers and remote computing service providers);¹¹ (3) victim reporter, 32 C.F.R. Part 236,¹² authorized under 10 U.S.C. § 391 (duty to report cyber incidents by Department of Defense contractors); The Personal Data Protection and Breach Accountability Act of 2014¹³ and Identity Theft Protection Act of North Carolina¹⁴ (duty to report data breaches by various industries). The analysis also examines 31 U.S.C. § 5318 (g),¹⁵ 31 U.S.C. § 5322¹⁶ and the corresponding regulations,¹⁷ which impose a duty to report suspicious activity by financial institutions as an offender, victim, and third party reporter. In addition, several duty-to-report laws that do not criminalize non-compliance will be examined for comparison.

This paper will not focus on laws that require the reporting of misconduct within an organization as opposed to those that require reporting to law enforcement¹⁸ or on laws that encourage but do not mandate reporting.¹⁹

III. METHODS

A. Culpability Analysis

Fairness requires proportionality.²⁰ The concepts of fairness and proportionality are central to many areas of law but particularly to the criminal law. Deprivation of liberty and social stigma are but two serious consequences of

¹¹ 18 U.S.C. § 2258A(a) (2017); 18 U.S.C. § 2258A(e) (2017).

¹² 32 C.F.R. § 236.1 (2017). This part requires all Department of Defense contractors to rapidly report cyber incidents involving covered defense information on their covered contractor information systems or cyber incidents affecting the contractor's ability to provide operationally critical support.

¹³ The Personal Data Protection and Breach Accountability Act of 2014 introduced, but not enacted, by Senator Richard Blumenthal (D – Ct), imposes criminal penalties on those who intentionally or willingly fail to report a security breach including fines and/or prison term up to five years. *See* S. 1995, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1995>.

¹⁴ N.C. GEN. STAT. §75-65 (2017). In the event a business provides notice to an affected person pursuant to this section, the business shall notify, without unreasonable delay, the Consumer Protection Division of the Attorney General's Office of the nature of the breach, the number of consumers affected by the breach, steps taken to investigate the breach, steps taken to prevent a similar breach in the future, and information regarding the timing, distribution, and content of the notice. N.C. GEN. STAT. §75-13 (2017).

¹⁵ 31 U.S.C. § 5318(g) (2017).

¹⁶ 31 U.S.C.(a)-(b) § 5322 (2017).

¹⁷ 12 C.F.R. § 21.11(c) (2017).

¹⁸ *See* Section 307 of Sarbanes-Oxley Act of 2002 (codified as amended at 15 U.S.C. § 7245 (2017)); 17 C.F.R. § 205 (2017).

¹⁹ *See* Section 922 of the Dodd-Frank Act (codified as amended at 15 U.S.C. § 78U-6 (2017)); False Claim Act (codified as amended at 31 U.S.C. §§ 3729–3733 (2017)).

²⁰ Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUSTICE 55, 68 (1992).

criminal conviction, and necessitate careful consideration of all factors before imposing such liability. The Cruel and Unusual Punishments Clause of the U.S. Constitution reflects this concept in relation to criminal punishment.²¹ Thus, only those who deserve such consequences should be subject to the criminal law. How then do we decide who those are? Serious consequences proportional to what? In *The Aims of the Criminal Law*, Hart argues that:

[I]t is necessary to be able to say in good conscience in each instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community.²²

The concept of culpability, which is “more or less synonymous with moral blameworthiness,” is required to analyze whether the law imposing a criminal penalty is just.²³

However, increased focus on instrumental incentive for crime deterrence²⁴ has led to a neglect of traditional, culpability-based limits on criminal punishment.²⁵ The value of fairness and proportionality has been eroded. Various limitations on government power imposed by the Constitution have become meaningless.²⁶

This paper does not argue that instrumentalism is intrinsically wrong, but proposes moral instrumentalism as a more viable solution. To instill these lost principles back into our criminal law, this paper adopts culpability analysis and analyzes the justifiability of criminalizing the failure to report crime.

B. Double Bases on Culpability Analysis

1. Distinctive Characteristics of Laws on “Duty to Report” Crimes

Unlike other regulatory crimes, the crime of failure-to-report resembles *mala in se* rather than *mala prohibita* allowing moral culpability analysis to be applied.

The trend of blurring the distinction between criminal law and administrative law has intensified. Traditionally, administrative law aims to

²¹U.S. CONST. amend. VIII.

²²Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 412 (1958), http://www.jstor.org/stable/pdf/1190221.pdf?_=1465607771416.

²³Mitchell N. Berman, *Introduction: Punishment and Culpability*, 9 OHIO ST. J. CRIM. 441, 441 (2012).

²⁴See generally Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457 (1897) (promoting the value of power and efficiency instead of traditional morality as bases of law).

²⁵See John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 656-57 (2013),

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7435&context=jclc>.

²⁶See *Id.*

protect the public in a prospective manner by regulating the behavior of specific subjects and by preventing potential harm.²⁷ Criminal law, on the other hand, operates retrospectively mainly by punishing morally proscribed, harmful²⁸ wrongdoings²⁹ after they occur. However, over time, criminal law and administrative law have begun to overlap: administrative law increasingly uses criminal penalties for certain regulatory violations,³⁰ and criminal law has expanded its scope to prohibit behaviors that do not cause harm³¹ or those committed without criminal mens rea.³²

²⁷ See Pfiffner, *supra* note 3, at 4 (citing Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, at 13 (1st Sess. 1941)) (“the administrative body is charged with preventing controversies from coming before it, by eliminating at the source the causes of such action.”).

²⁸ Whether the act must be both immoral and harmful for it to qualify as “crime” is a longstanding controversy. This paper sides with the argument that the criminal act should be both immoral and harmful. The question of what constitutes harm is another hotly debated issue. Does immoral behavior itself cause harm? Can risk of harm be regarded as a harm? Does harm include only harm to a person or to property, or also harm to society in general? Leaving these interesting questions aside, this paper assumes that criminal acts are those that cause actual harm to people, property, or society, not the risk of harm.

²⁹ Although the distinction between mala in se and mala prohibita is controversial, this article chooses to follow the distinction that: “Mala in se . . . are crimes consisting in conduct that is wrong independently of the criminal law—that would have been wrong even had there been no criminal law. Mala prohibita, on the other hand, consists of conduct that is not wrongful independently of the law that prohibits it: if they are wrong, their wrongfulness depends essentially on their illegality.” *Theories of Criminal Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 14, 2013), <http://plato.stanford.edu/entries/criminal-law/>.

³⁰ See generally Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS (2014), <http://ssrn.com/abstract=2520533>; John G. Malcom, *The Problem with Criminal Regulations*, THE HERITAGE FOUNDATION (Aug. 6, 2014), <http://www.heritage.org/research/reports/2014/08/criminal-law-and-the-administrative-state-the-problem-with-criminal-regulations>.

³¹ See Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1139 (1973), <http://scholarship.law.berkeley.edu/californialawreview/vol61/iss5/1> (“persons will be punished for what they say rather than for what they do”); see also generally Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL’Y 715 (2013); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2009).

³² See Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, THE HERITAGE FOUNDATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (2010), <https://www.nacdl.org/report/withoutintent/PDF/> (“This study revealed that offenses with inadequate mens rea requirements are ubiquitous at all stages of the legislative process [in the 109th Congress in 2005 and 2006]: Over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate mens rea requirements, putting the innocent at risk of criminal punishment.”); See also generally Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L.R. 1 (2007); John C. Coffee, Jr., *Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193 (1991); MENS REA, PUBLIC WELFARE OFFENSES, AND THE RESPONSIBLE CORPORATE OFFICER DOCTRINE, WASHINGTON LEGAL FOUNDATION 1-1, <http://www.wlf.org/upload/Chapter1MensRea.pdf>. This trend is not directly related to duty-to-report crimes, as such crimes criminalize a knowing or intentional failure to report crime. However, this trend allows a concept of offender-reporter in this paper to remain possible. See *supra* note 8.

This trend has caused a drawback of over-criminalization. As properly pointed out by Husak, “the proliferation of *mala prohibita* [has caused] exponential growth in the size and scope of the criminal law today.”³³ It is difficult to know the exact number of *mala prohibita* in existence,³⁴ thereby increasing the risk of punishing the innocent.³⁵

Although failure to report crime is *malum prohibitum*, it has certain characteristics, illustrated below, which place it closer to intrinsically wrongful acts on the criminal law spectrum.

One can differentiate a duty to report crime, enacted to assist law enforcement,³⁶ from other regulatory duties whose only connection to criminal law is the use of criminal penalties to further compliance.³⁷ A duty to report serves both regulatory and criminal law purposes. As with many regulatory duties, such laws require some industries and professions to act in a certain way—here, by reporting crime—in order to protect the public from harm by reducing the risk of the private sector being abused by criminals. At the same time, by requiring reporting by those in the best position to detect harmful wrongdoings, a duty to report crime leads to increased detection of wrongdoings, thus achieving retribution-rehabilitation³⁸ along with general and specific deterrence of crime.³⁹

In addition, unlike general *mala prohibita*, which is difficult to morally justify, the crime of failing to report is morally proscribed. Generally, regulatory breaches, such as signal violations, speeding, or drunk driving, are wrongful acts only because the law says so. After all, running a remote stop sign in broad daylight with no other drivers for miles around is completely blameless but for

³³ Husak, *supra* note 30, at 104.

³⁴ Malcom, *supra* note 29 (“In fact, the regulations carrying criminal penalties have grown so voluminous that nobody really knows how many there are. The total has been conservatively estimated at over 300,000, with dozens or hundreds more being promulgated every year.”).

³⁵ Walsh & Joslyn, *supra* note 31.

³⁶ Thompson, *supra* note 6, at 35 (As Sandra Guerra Thompson explains, such regulations “turn people of many professions . . . into a white collar police force.”).

³⁷ Stinneford, *supra* note 24, at 657 (Legal instrumentalism says that “punishment could be used purely as a form of regulation and that traditional culpability-based constraints on criminal punishment should no longer apply.”).

³⁸ See Leavens, *supra* note 31, at 2 (Duty-to-report laws are different from other regulatory crimes in that laws prohibiting regulatory crime or public welfare crime are enacted to protect the public, not to detect and deter a specific criminal wrongdoing through punishment or rehabilitation). See Hart, Jr., *supra* note 21, at 405 (“In traditional thought and speech, the ideas of crime and punishment have been inseparable; the consequences of conviction for crime have been described as a matter of course as ‘punishment’ . . . Today, ‘treatment’ has become a fashionable euphemism for the older, ugly word.”). Duty-to-report laws serve a purpose of criminal law: to detect and deter a specific criminal wrongdoing through punishment or rehabilitation.

³⁹ See Hart, Jr., *supra* note 21, at 401, 412-13. This paper takes “multivalued thinking” view rather than “single-valued thinking” view of criminal law. From the point of view of legislatures who “have to deal with crimes . . . in advance of their commission,” they consider not just specific deterrence but also the other aims of criminal law including general deterrence, as “variety of aims will coalesce, to the point of becoming virtually indistinguishable.”

the law prohibiting the running of any stop sign. On the contrary, intentionally failing to report crime or doing nothing, when the cost of doing something is minimal, is generally understood to be morally wrong.⁴⁰ All other things being equal, committing crime is morally wrong, and reporting crime is morally right.

Lastly, non-compliance with one's duty to report *causes harm* - the very essence of the crime⁴¹ - thereby distinguishing "criminal conduct from mere immoral behavior."⁴² Feinberg, refining Mill's harm principle,⁴³ argued that:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.⁴⁴

Only the culpable behaviors causing "social harm" should be penalized.⁴⁵ Under the premise that the crime required to be reported causes such social harm "negat[ing], endangering, or destruct[ing] . . . an individual, group, or state interest, which [is] deemed socially valuable,"⁴⁶ failure to report crime causes harm by allowing the harm to materialize or to expand.

⁴⁰ Reporting crime could be regarded as a type of aiding or rescuing endangered strangers. The moral wrongfulness of failing to report crime is similar to the moral wrongfulness of failing to aid or rescue endangered strangers. Legal theorists and practitioners have recognized aiding endangered persons as a moral good, and failing to aid as a moral bad. J. H. Scheid, *Affirmative Duty to Aid in Emergency Situations*, 3 J. MARSHALL J. OF PRAC. & PROC 1, 16 (1969) ("the Law should . . . formally acknowledge the contemporary moral consensus that we are all necessarily inter-dependent and that each member of society has a duty to aid his brother in danger."); *United States v. Knowles*, 26 F. Cas. 800 (N.D. Cal. 1846) ("It is undoubtedly the moral duty of every person to extend to others assistance when in danger."). Thus, reporting a crime is a moral good and failing to report crime is a moral bad.

⁴¹ Although the confrontation between legal liberalism and moralism, which is represented by the Hart-Devlin debate, is still alive, this paper sides with legal liberalism as it requires a more strict standard for criminalization. See generally, Joel Feinberg, *Some Unswept Debris from the Hart-Devlin Debate*, 72 SYNTHESE 249 (1987); Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927 (1999), <http://scholarship.law.wm.edu/wmlr/vol40/iss3/11>. For liberalists, criminality requires harm. Hall described harm as the "fulcrum between criminal conduct and the punitive sanction." HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 213 (2d ed. 1960). Edward Livingston argued that "[m]oral guilt must be united to injury in order to justify punishment." EDWARD LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 235 (1873).

⁴² Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 346 (1965).

⁴³ See John Stuart Mill, *On Liberty*, 25 HARV. CLASSICS, (Charles Eliot, ed., P.F. Collier & Sons, 1914), <http://www.bartleby.com/25/2/1.html>. ("That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.")

⁴⁴ JOEL FEINBERG, *HARM TO OTHERS* 26 (1987).

⁴⁵ See Eser, *supra* note 41, at 413.

⁴⁶ *Id.*

While some regard the failure to report crime as harmless,⁴⁷ this paper concludes that simply allowing the harm to occur could also satisfy the “causation of harm” element of criminalization. John Harris, in *The Marxist Conception of Violence*, defended the idea that “men are causally responsible for harm they could have prevented.”⁴⁸ Similarly, H.L.A. Hart and Tony Honore, in *Causation in the Law*, recognize deviation from the usual routine as a cause of subsequent harm which could have been prevented.⁴⁹ Dressler, while denying the justifiability of bad samaritan laws, acknowledged the justifiability of laws criminalizing the failure to rescue when a bystander *intended* to allow harm to occur.⁵⁰ After all, in this instance, there is arguably a nexus between failing to rescue and the ultimate harm.

When considering these characteristics, failing to report crime more closely resembles *mala in se*, thereby planting it closer to the jurisdiction of the criminal law than the administrative law. Though the boundary between the two is not clear, the “moral culpability test” provides a valuable tool for analyzing such regulatory duty. This test enables laws criminalizing a failure to report crime to be managed in a controlled manner, within the limit of moral culpability, thereby, avoiding over-criminalization and respecting the principles of fairness and proportionality.

This moral culpability analysis should be carried out through a balancing test. Even considering the distinctive characteristic of the criminal law, the duty to report crimes is still a type of regulatory duty governed by administrative agencies to achieve public good. In the case of *mala in se*, immoral acts cannot be justified simply by the higher good they bring. Murder of an innocent person to save the lives of several others cannot be justified except under highly limited circumstances. However, non-reporting of crime is justified if the harm from reporting exceeds the good. Thus, this analysis will estimate the moral culpability of failing to report crime by weighing the pros and cons stemming from reporting or failing to report.

With respect to corresponding penalties for non-reporting, the argument in this paper develops based on the idea that only immoral behaviors above a certain threshold require intervention by the state via criminal sanctions, while

⁴⁷ Some legal theorists are unable to justify “Bad Samaritan” laws, which impose liability on one who fails to aid, due to the lack of causation. See Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980); Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). However, even in those articles, for instance, Eric Mack limited his research to statutes “which require action of individuals who have entered into some special relations with an endangered party or who have a special ability to avert the threatening harm”; Mack, *supra*, at 230. Thus, even these legal theorists might not argue against imposing criminal liability on the failure to report crime, which is a crime of omission like failure-to-aid, and limited to specific professions or industries as the laws in this analysis.

⁴⁸ John Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192, 192 (1974).

⁴⁹ H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 48 (2d ed. 1985).

⁵⁰ See Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 980-81 (2000).

immoral behaviors under the threshold should be regulated by administrative or civil sanctions. Unlike its European counterparts, the U.S. has not recognized the principle of proportionality, by which harms and goods are balanced.⁵¹ However, the U.S. does require some balancing—namely, cost-benefit analysis—in enacting a regulation.⁵² In the same vein, Husak argued for alternatives to criminal sanctions as a means of controlling *mala prohibita*.⁵³

2. Enforcement or Enactment of Laws on “Duty to Report” Crimes

The purpose of the law is to cause people to act in a certain manner. Creating a duty to report framework reflecting society’s moral code has a more measurable effect on compliance than day-to-day enforcement.

Prosecutors tend to enforce the duty-to-report laws discussed above, but enforcement of each category of duty-to-report laws varies. The duty-to-report law involving the release of substances from a vessel under 42 U.S.C. § 9603, has been enforced in many cases.⁵⁴ Also, the law requiring the reporting of suspicious activity by financial institutions, under 31 U.S.C. § 5318 (g), has been enforced against individuals and financial institutions in many cases.⁵⁵ However, enforcement of the following laws has not been as consistent: the duty to report child pornography by electronic communication service providers and remote computing service providers, under 18 U.S.C. § 2258A; the duty to report cyber incidents by Department of Defense contractors, under 10 U.S.C. § 391 and 32

⁵¹JUD MATHEWS, RESEARCH PAPER, SEARCHING FOR PROPORTIONALITY IN U.S. ADMINISTRATIVE LAW, PENN STATE LAW RESEARCH PAPER NO. 1-2015 1, 1-2 (2015).

⁵²See MAEVE P. CAREY, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULE MAKING PROCESS, Cong. Research Serv. (2014).

⁵³ Husak, *supra* note 30, at 119.

⁵⁴ United States v. Freter, 31 F.3d 783, 784 (9th Cir. 1994); United States v. Laughlin, 10 F.3d 961, 962 (2d Cir. 1993); United States v. Carr, 880 F.2d 1550, 1550 (2d Cir. 1989); United States v. Greer, 850 F.2d 1447, 1448 (11th Cir. 1988).

⁵⁵ Historically, though, most enforcement has been through Deferred Prosecution Agreements. See Press Release, U.S. Att’y Office E.D. Pa., *Bank President Charged With Failure To Comply With Requirements Of The Bank Secrecy Act*, DEP’T OF JUST. (Sept. 11, 2013), <http://www.justice.gov/usao-edpa/pr/bank-president-charged-failure-comply-requirements-bank-secrecy-act>; Press Release, U.S. Att’y Office S.D. N.Y., *Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Filing Of Criminal Charges Against And Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff’s Multi-Billion Dollar Ponzi Scheme*, DEP’T OF JUST. (Jan. 7, 2014), <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal>; Dep’t of Justice Office of Pub. Affairs, *Commerzbank AG Admits to Sanctions and Bank Secrecy Violations, Agrees to Forfeit \$563 Million and Pay \$79 Million Fine*, DEP’T OF JUST. (March 12, 2015) <http://www.justice.gov/opa/pr/commerzbank-ag-admits-sanctions-and-bank-secrecy-violations-agrees-forfeit-563-million-and>; *Riggs Bank Enters Guilty Plea and Will Pay \$16 Million Fine for Criminal Failure to Report Numerous Suspicious Transactions*, DEP’T OF JUST. (Jan. 27, 2005), <http://www.justice.gov/archive/tax/usaopress/2005/txdv050530.html>; *Ripple Labs Inc. Resolves Criminal Investigation*, DEP’T OF JUST. (May 5, 2015), <http://www.justice.gov/opa/pr/ripple-labs-inc-resolves-criminal-investigation>.

C.F.R. part 236; and the duty to report data breaches under the Identity Theft Protection Act of North Carolina. What are the implications of this variance in government's enforcement of such laws?

To begin, the sheer number of enforcement cases does not reveal much about the lack of enforcement. Reasons other than failure by investigators and prosecutors exist for the low numbers of enforcement cases. If there is a high rate of compliance with the law in question, there would be no need for enforcement actions. Indeed, the law itself may lead to high rates of compliance. For instance, compared to the duty to report suspicious activities imposed on financial institutions who have an additional duty to investigate, the duty to report child pornography does not include an obligation to proactively investigate, which will lower the rate of detection, thereby decreasing the possibility of non-reporting. Accordingly, a perception of the enforcement *rate* would be more meaningful, but is difficult to ascertain without an accurate estimate of the total number of crimes committed. This is particularly true when one views the crime of failure-to-report as victimless.

In addition, lack of enforcement matters when it further decreases compliance with the law.⁵⁶ Even if the ratio of total enforcement to total non-compliance was available and correct, for it to influence the perception of potential reporters, one must assume the unrealistic scenario of perfect information.⁵⁷ More fundamentally, day-to-day enforcement does not affect compliance as strongly as a mandatory duty to report crime would.

One of the primary purposes of the law is to lead people to act in a certain manner, and it accomplishes this goal in different ways. As Kenworthy Bilz pointed out, "Laws express, manipulate, and enforce moral codes. Or Laws can also be described as motivated by less moral-sounding commitments (such as to maximize efficiency, allocate costs and benefits, avoid moral hazards and the like)."⁵⁸

The importance of enforcement⁵⁹ differs depending on the way the law affects behavior.⁶⁰ For instance, to be an effective law,⁶¹ a prohibition on murder,

⁵⁶ See INT'L ORG. OF SEC. COMM'N, CREDIBLE DETERRENCE IN THE ENFORCEMENT OF SECURITIES REGULATION, 6 (2015), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf> ("Deterrence is credible when would-be wrongdoers perceive that the risks of engaging in misconduct outweigh the rewards and when non-compliant attitudes and behaviors are discouraged.").

⁵⁷ As in economics or game theory, "perfect information" here refers to the situation where a person is assumed to have all relevant information with which to make a decision.

⁵⁸ Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, 50 PSYCHOLOGY OF LEARNING AND MOTIVATION 102 (D. Medin, L. Skitka, C. W. Bauman, & D. Bartels, eds., Academic Press, 2009).

⁵⁹ Whether enforcement of the law is necessary to make law "Law" is an issue that has sparked much controversy. Joshua Kleinfeld suggests taking a "more or less approach" instead of a "yes or no" approach in answering this question, and I adopt the same approach but for different reasons as illustrated in the text. See Joshua Kleinfeld, *Enforcement and the Concept of Law*, YALE L.J. ONLINE (Nov. 22 2011), <http://www.yalelawjournal.org/forum/enforcement-and-the-concept-of-law>.

which enforces a widely accepted moral code, does not require as much enforcement as a prohibition on smoking marijuana, which, depending on the individual, manipulates or expresses certain moral codes.⁶² Murder is not a morally disputed act, unlike smoking marijuana, and people will generally refrain from committing murder even without enforcement. By contrast, non-enforcement of prohibitions on smoking marijuana is likely to encourage consumption by people who regard smoking marijuana as morally acceptable. If law manipulates the moral codes by contradicting general moral norms, enforcement must be stronger. In situations where a law contradicts general moral norms, enforcement is often absent.⁶³

Understanding the moral code surrounding the duty to report crime and enacting corresponding laws is crucial, while enforcement of the laws is less important. Whereas the moral code regarding consumption of marijuana is divided, society will generally agree that crime is morally harmful. Further when reporting crime is morally beneficial and failing to report crime becomes a moral harm, the crime should be reported.⁶⁴ Duty-to-report laws do not manipulate society's moral code; they codify it. Enacting duty-to-report laws as a method of manipulating existing moral code, will eventually increase enforcement cost. Accordingly, this paper will focus its analysis on what the moral law ought to be.

IV. MORAL PRINCIPLES OF THE “DUTY TO REPORT” CRIMES

A. Theoretical Assumption for the Moral Culpability Test

This paper focuses on the normativity of law rather than the validity of law, both of which are prevalent in current studies on the nature of law.⁶⁵ Prior to

⁶⁰ Hart, denying the enforcement-centric theory, emphasized the “internal point of view” which has the “practical attitude of rule-acceptance” as an essential feature of law. Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006); see also H.L.A. HART, *THE CONCEPT OF LAW* (2nd ed. 1994).

⁶¹ Laws in conflict with social norm have been proven ineffective in many cases. See Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* 1 (NBER, Working Paper No. 20369, 2014). Additionally, one could argue that law is most effective when it reflects the moral code. Do this by showing how changing a behavior's underlying morality is the most efficient method of regulating conduct. See Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECON. AND THE LAW* (Eyal Zamir & Doron Teichman Eds., 2014).

⁶² PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* 206 (2013).

⁶³ Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* 1 (Stanford Law & Econ. Olin, Working Paper No. 466, 2016), <http://ssrn.com/abstract=2443427>.

⁶⁴ This paper assumes the “crime” to be reported is morally non-disputed, because a non-reporting of morally disputed crime such as abortion would not be regarded as a moral wrong for some people. This assumption is justified by including the good produced by reporting as a factor for the culpability test. A person witnessing a morally disputed act may not regard the act as a moral wrong, thus he would not expect any good produced by reporting which is essential in justifying duty-to-report crimes laws.

⁶⁵ See *The Nature of Law*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, Aug. 7, 2015, <http://plato.stanford.edu/entries/lawphil-nature/>.

looking at the normativity of law in the context of the duty to report crime, it is necessary to adopt a position in relation to the validity of law.

Whether citizens have a general duty to obey the law has been discussed extensively in the context of the validity of law. The argument remains split. One side argues for a general duty to obey the law;⁶⁶ the other side denies a general duty to obey and requires each specific law to be justified by its content in order to be valid.⁶⁷ This paper will not take an explicit position on this argument. However, I employ the position that unjust law is unjust, as it is helpful when strictly scrutinizing the content of laws and regulations.⁶⁸ The normative question of what the law must be in order to be just will be considered before comparing it to what the law is and suggesting modifications.

In the same vein, this study attempts to justify rather than explain, by focusing on the moral legitimacy of law.⁶⁹

This paper uses culpability factors, based on various sociological behavioral studies, to analyze the culpability of certain behavior. These factors consist of circumstantial variables which make some instances of reporting crime morally desirable,⁷⁰ and vice versa. Knowing those variables will help us recognize what the law ought to be and suggest modifications to current law to adjust the outcome of variables as a way of increasing the moral desirability of the act of reporting crime.

The principles drawn from the culpability factor analysis, in enacting or reviewing laws criminalizing non-compliance with the duty to report crime, should work as a baseline to help determine where deviations are justified.

⁶⁶ See Philip Soper, *Legal Theory and the Obligation to Obey*, 18 GA. L. REV. 891, 891 (1984); See also Walker, *Political Obligation and the Argument from Gratitude*, 17 PHIL. & PUB. AFF. 191, 196 (1988).

⁶⁷ See M. B. E. Smith, *Is There a Prima Face Obligation to Obey the Law?*, 82 YALE L. J. 950, 975 (1973); A. SIMMONS, *MORAL PRINCIPLE AND POLITICAL OBLIGATION* (1979).

⁶⁸ This paper, in this way, does not fall into either of the two different directions pointed out by Bentham that the confusion between law and morals had spread: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it."; "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597-98 (1958) (citation omitted).

⁶⁹ *The Nature of Law*, *supra* note 64.

⁷⁰ In determining morally desirable behavior, the moderate, not absolute, deontologist view of this paper suggests that constraints against harming others or breaching promise, etc., will be overridden when the overall good achieved surpasses certain threshold. See JUDITH JARVIS THOMSON, *SOME RUMINATIONS ON RIGHTS, RIGHTS, RESTITUTION, AND RISK* 49, 51-52 (William Parent ed., 1986). The moderate deontologist view is more appropriate than the absolute deontologist view for this study in that this paper provides the common moral sense of the public and refers to the sociological researches to find factors affecting people's behavior. See Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 326 (2008), <http://scholarship.law.berkeley.edu/californialawreview/vol96/iss2/1> ("This moderate deontology conforms to prevailing moral intuitions."); CONSEQUENTIALISM AND ITS CRITICS 1, 9 (Samuel Scheffler ed., 1988) ("Indeed, most would agree that [deontological constraints and options] mirror everyday moral thought much more closely than consequentialism does.").

Deviations are not inherently wrong. Rather, they can be justified by different circumstantial factors. However, recognition of this moral baseline is crucial to understand which deviations can be justified.⁷¹

Lastly, for purposes of analyzing the culpability of not reporting crime in this normative study of what the law ought to be, this paper assumes natural status without human-made laws imposing a duty to report crimes. This assumption is important, and draws from the controversial argument that there is no moral obligation to obey immoral law.⁷² By doing so, the culpability analysis here does not need to take into account the immorality of non-reporting when it disobeys immoral, man-made duty-to-report laws. In addition, assuming natural status enables general application of the norms derived from this study while preventing the culpability result from being distorted by the morality of a society previously influenced by man-made immoral laws at a particular time and place.⁷³

B. Culpability Factors Involved in the “Duty to Report” Crimes

It is difficult to deny the idea that there is a moral duty to report crime that causes harm to others when the cost of doing so is minimal.⁷⁴ Many legal theorist and practitioners have advocated for a moral duty to aid endangered persons. Doing so is a moral good, and failure to aid is a moral bad. J. H. Scheid asserted that “the Law should . . . formally acknowledge the contemporary moral consensus that we are all necessarily inter-dependent and that each member of

⁷¹ Recognition of the moral baseline and justifiable deviations will provide “a better account of how much incommensurability is consistent with a defensible moral theory, and of where we should and should not, expect to find such incommensurability” and prevents “drafters of criminal codes [from] excusing any hodgepodge of rules and doctrines as reflecting inevitable incommensurability.” KENNETH SIMONS, *TOPOGRAPHY OF MORAL AND CRIMINAL LAW NORMS*, PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 228, 241-242 (R.A. Duff & Stuart Green eds., 2011).

⁷² By dividing a political or legal duty from a moral duty, some legal theorists and philosophers have denied a moral obligation to obey unjust immoral laws. THOMAS AQUINAS, *SUMMA THEOLOGICA*, I-II, Q.96, A.4 (Fathers of the English Dominican Province, trans., Benzinger Brothers, 1947), <https://www.ccel.org/ccel/aquinas/summa/FS/FS096.html#FSQ96A6THEP1> (“[Unjust laws] do not bind in conscience, except perhaps in order to avoid scandal or disturbance”); MARTIN LUTHER KING, JR., *LETTER FROM BIRMINGHAM JAIL, WHY WE CAN’T WAIT* 77, 84 (1963) (“One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.”).

⁷³ Law influences and reflects a society’s morals. The more prevalent view concerning the relationship between law and morality is that of H.L.A. Hart, who asserted that law is a reflection of morality. See H.L.A. HART, *THE CONCEPT OF LAW* 199-200 (1961). But even Hart accepted the possibility that law could influence morality in the first instance, as well as reflect it. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 1-2 (1966). Thus, there is a risk of human-made immoral laws distorting the morality of a society in natural status.

⁷⁴ See Arthur Ripstein, *The Moral and Legal Limits of Samaritan Duties*, 19 L. & PHIL. 6 751, 752 (2000).

society has a duty to aid his brother in danger.”⁷⁵ Stephen Johnson Field, who would go on to become a U.S. Supreme Court Justice, acknowledged “the moral duty of every person to extend to others assistance when in danger.”⁷⁶ Reporting crime, as one of many ways to help a victim, while not identical, is similar to aiding the victim of a crime. Thus, this paper recognizes a moral duty to report crimes.

The immorality of each failure to report should be treated differently in the same manner that failure to report crime should be treated differently from failure to aid.⁷⁷ Helping the victim imposes a higher burden on an individual as opposed to simply reporting. Accordingly, not helping is less immoral than not reporting. The failure to report crime when it negatively impacts the reporter is less immoral than not reporting crime when it does not carry such risk.

This paper is designed to identify situations where the cost of compliance would be low enough to justify criminalizing the failure to report crime. As analyzed in the later part of this paper, omission liability is problematic as it restrains individual’s freedom in an intrusive way. Thus, it should be justified only when the cost of reporting is low enough, or, in other words, when immorality of omission is high enough.

In identifying such circumstantial factors, which I call culpability factors, this paper bases its analysis on behavioral science’s study of individual responses to another experiencing an “emergency.”⁷⁸

The main experiment referenced in this paper demonstrates the factors affecting the witness’s behavior:

When an emergency is unambiguous, involving severe negative consequences to another person with minimal negative consequences for the person (s) who help(s), and when the amount of effort required for intervention is minimal, derogation of the victim is not an appropriate response, and diffusion of responsibility is not likely to occur, individuals will intervene in an emergency situation. Even if a situation is perceived as serious and requiring intervention, any of the three latter conditions may prevent intervention.⁷⁹

The experiment mentioned above illustrates the culpability factors that must be considered when enacting laws on the duty to report crime.⁸⁰ This

⁷⁵ Scheid, *supra* note 39.

⁷⁶ U. S. v. Knowles, 26 F.Cas. 800, 801 (N.D. Cal. 1864).

⁷⁷ See Ripstein, *supra* note 73, at 753 n.2 (2000) (“The most compelling way of explaining the difference can be put in terms of Kant’s distinction between “perfect” and “imperfect” duties. Easy rescues are plausibly catalogued as requirements - ‘perfect duties’ to use Kant’s phrase - which take priority over each person’s pursuit of his or her own projects. Other moral demands of aid are ‘imperfect duties’, ones that we should fulfill somehow or other, but which do not take automatic priority over each person’s pursuit of his or her own projects.”).

⁷⁸ As reporting crime is a type of aid provided to an endangered victim, the decision of whether to report a crime proceeds through the same morality analysis as deciding whether to help a victim.

⁷⁹ Russell D Clark & Larry E. Word, *Why Don’t Bystanders Help? Because of Ambiguity?*, 24 J. PERSONALITY & SOC. PSYCHOLOGY 392, 399 (1972).

⁸⁰ The experiment on implementing a duty to rescue does not consider a possible benefit derived from an existing special relationship between a rescuer and a victim. If the rescuer is in a position

chapter works from the above experiment to select several culpability factors that affect the level of morality of reporting crimes or immorality of non-reporting.

The first factor is knowledge of the crime. The experiment above shows that bystanders tend not to aid the victim when the emergency situation is ambiguous.⁸¹ The same dynamic applies with respect to reporting crime. People are unlikely to report crime when they lack sufficient information to determine whether the scene they witnessed was a crime required to be reported or not. The morality of reporting differs depending on the knowledge of the potential reporter (e.g., knowing, suspecting, or not knowing). The non-reporting person with clear knowledge of the crime is more blameworthy, and more immoral, than the non-reporting person with insufficient information. After all, this person had to measure the risk-impact of erroneous reporting.⁸² In addition, a person who did not know of the crime cannot be blamed for non-reporting. This knowledge factor is particularly important in relation to the criminalization of non-compliance, when viewing the issue through the lens of criminal law and the assignment of culpability.

The second factor is the absence of alternative ways to expose the apparent crime being witnessed. There are two different situations: the first is when special skills are necessary to aid; the other is when they are not. Regarding the first situation, according to one experiment, individuals with specialized skills are more willing to assist a victim.⁸³ Various methods, each requiring a unique skill set, exist to aid a victim depending on the crime in question. Thus, a person with the necessary skills to aid who decides not to is more immoral than a person who does not possess the necessary skills. The second person's lack of competence justifies his failure to aid. Reporting, though, is a specific type of "aid" that, unlike conventional aiding, cannot be diversified, nor does it require a different set of competencies; reporting itself does not require any special skill. In contrast to the special skills that may be needed to aid, the duty to report crime will never be unsatisfied due to a lack of ability. Concerning the second situation,

where it is possible to take advantage of a victim, the rescuer might take into account the possible benefit to himself in deciding whether to aid the victim or not. For instance, the victim could be the rescuer's competitor for a monetary or honor prize. The same is true for a duty to report crimes. The special relationship between a reporter and a primary offender could provide a reporter an opportunity to take advantage of the crime by not reporting the crime. However, as constraints against doing harm do not apply to aggressors, this benefit gained by the immoral act of not aiding or not reporting should not be counted as a factor in this culpability test. See SHELLY KAGAN, *NORMATIVE ETHICS* 92-93 (1998) (listing the normative morality factors as good, harm, and consent etc., affecting the rightness or wrongfulness of the act).

⁸¹ Clark & Word, *supra* note 78.

⁸² Level of certainty affects the possibility of achieving good and causing harm differentiating the resulting morality level of reporting. This relationship between knowledge about the crime and immorality of non-reporting can be illustrated by the following formula: $[p(\text{Correct}) \times (\text{Good}) - p(1 - \text{correct}) \times (\text{Harm})]$. If the result is positive, then the act of reporting is moral. If the result is negative, then non-reporting is moral. Although exact quantification is not possible in this paper, this formula shows why the possibility of erroneous reporting matters.

⁸³ A. E. Kazdin, & J. H. Bryan, *Competence and Volunteering*, 7 J. EXPERIMENTAL SOC. PSYCHOLOGY 87 (1971).

another study illustrated that people tend to help others in emergency situations when they are alone more than when they are in a group.⁸⁴ In a group setting, the diffusion of responsibility causes people to wait for someone else to make the first move, thereby preventing anyone from taking action.⁸⁵ Indeed, the absence of possible alternative reporters, particularly in victimless crimes or crimes against helpless victims, renders the failure to report more immoral.

The third factor to consider is the good produced by reporting. Based on crime reporting, state authorities detect the crime reported and deter the offender from materializing on-going or future harm through retribution or rehabilitation.⁸⁶ In addition, using the reported information shared through state authorities, other private entities could detect and deter covert on-going or possible future crimes. All of these will lead to higher detection rates, resulting in general deterrence of crime. The overall quantity of good produced depends on the characteristics of crime: its type, magnitude, extensiveness, and continuity or repeatability of harm. As rightly pointed out by the experiment above, people tend to aid one another when they witness “severe negative consequences to another person”⁸⁷ in order to mitigate the harm or, in other words, achieve good. If an individual does not aid a victim at risk of death, his or her non-aiding is more immoral than non-aid of a victim at risk of minor injury. In the same vein, not reporting serious crimes is more immoral than the non-reporting of minor crimes. For example, a murder witness is more morally required to report the murder than a battery witness is to report the battery. Another study explains that people generally accept more serious punishment for not reporting serious crimes, as opposed to minor offences.⁸⁸

The fourth factor is the harm caused to the reporter by reporting the crime. People are more likely aid victims when the “negative consequences for the person (s) who help(s),” and “the amount of effort required for intervention is minimal.”⁸⁹ Similarly, people are more likely to provide information about crimes to national authorities when the cost of reporting is low. A person is not expected to report his own wrongs, to carry out costly investigations to uncover

⁸⁴ Clark & Word, *supra* note 78, at 392-93 (“Several studies have demonstrated that individuals faced with an emergency situation are more likely to render aid when alone than when in the presence of others [T]he bulk of research overwhelmingly casts doubt on the suggestion that in most situations the individual is more likely to receive help if more people are present during an emergency.” (citations omitted)).

⁸⁵ *Id.* at 393 (“Latane and Darley (1970a) . . . have identified social influence and diffusion of responsibility as two determinants of bystander intervention.” (citation omitted)).

⁸⁶ From the perspective of the moral culpability of a private individual who has to decide his behavior in a specific situation, the good produced here does not include the general deterrent effect but only the specific deterrent effect of crime reporting. The harm mitigated by general deterrence is too distant from the act of reporting to qualify as the harm caused by non-reporting. See discussion, *supra* Chapter III. 2. (a) of this paper.

⁸⁷ Clark & Word, *supra* note 78, at 399.

⁸⁸ L. Veneziano and C. Veneziano, *Should there be a duty to report crimes?*, 87PSYCHOL REP. 423 (2000).

⁸⁹ Clark & Word, *supra* note 78, at 399.

another's crime, or to report crimes which will cause serious reputational or monetary damage to himself. Accordingly, not reporting a crime that would cause serious harm to the reporter is less immoral than not reporting a crime that only incurs minor harm to the reporter.

The final factor is the harm caused by reporting to the individual being reported. Constraints against doing harm do not apply to aggressors,⁹⁰ so for this test, harm to a primary offender, such as criminal punishment caused by reporting, will generally not be regarded as harm except for the harm to the primary offender's confidentiality right. As the confidentiality right is derived from the *relationship* between the individual being reported and the reporter,⁹¹ the status of the individual being reported as a primary offender does not automatically encroach on the protected right.⁹² In addition, the erroneous reporting of an individual as a primary offender will cause serious harm to that individual.⁹³ The harms to the reported individual negatively affect the immorality of non-reporting. Although these harms are categorized as harm to the individual being reported, some of the harms can also be indirectly regarded as harms to the reporter. The individual being reported can transfer the cost of harm through law suits against the reporter for breach of confidentiality or erroneous reporting. This, in turn, will decrease the likelihood of future reporting and the immorality of non-reporting.

C. The Position of a Reporter as the Standard for Categorizing Duties

In this essay I suggest that the position of a reporter, be it an offender, a third-party, or a victim, vis-a-vis the crime being reported is the most appropriate criterion for determining whether a duty to report a crime exists. The criterion—the position of a reporter—illustrates a significant discrepancy in the results of the culpability test between duties in different categories while showing a tendency toward similar results between duties in the same category.

In considering individuals' knowledge about a particular crime, offenders and victims have clear knowledge about the crime in question, while third parties are necessarily less certain. This does not mean that an offender knows every single crime committed by a primary offender nor that a victim knows all crimes committed against him. A person with superior responsibility might fail to recognize the crime committed by its employee bribing foreign officials to increase sales, as the employee will try to hide his wrongdoings by

⁹⁰ Kagan, *supra* note 79, at 92-93.

⁹¹ Daniel J. Solove & Neil M. Richards, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. 123, 135-38 (2007).

⁹² The confidentiality right is to be preserved even for criminal suspects except under certain circumstances. The sole status of the individual being reported as a Primary Offender does not satisfy such exceptions. See, i.e. MODEL RULES OF PROF'L CONDUCT R.1.6. (2013).

⁹³ Erroneous reporting is closely related with the first factor of knowledge about the crime. See *supra* note 81.

breaching the internal compliance regulations of his employer. A victim could fail to recognize data breaches or cyber incidents, as hackers tend to hide their attacks on victim's system to maximize harm.⁹⁴ However, when they discover a lead on the crime committed, both offender and victim are able to investigate further and discover the crime as they both have access to the necessary information. In contrast, a third party, as an outsider in relation to crime, has limited access to information necessary to analyze what really happened. Thus, when other factors are controlled, non-reporting by offenders and victims is likely to be regarded as more immoral than non-reporting by third parties.

The harm to a reporter caused by reporting also varies greatly based on the position of the reporter. In the case of an offender, the harm caused by reporting is not restricted to possible civil suits brought by their victim, but also criminal penalties for the crime committed. The possible criminal repercussions are vast, ranging from social stigma to legal restrictions beyond punishment prescribed by the criminal law.⁹⁵ For a third party, the primary "harm" is the cost of gathering and analyzing information to determine whether crime is actually occurring.⁹⁶ Though a victim will generally report the crime voluntarily for remuneration and revenge, some specific victims tend not to report due to the possibility of additional harm caused by the reporting itself. For instance, rape victims may prefer to not report the rape to avoid the criminal process and its toll on victims. Institutions or corporations sometimes do not report crimes committed against them for various reasons: potential reputational harm;⁹⁷ the

⁹⁴*New Ponemon Institute Survey Reveals Time to Identify Advanced Threats is 98 Days for Financial Services Firms, 197 Days for Retail*, ARBOR NETWORKS (May 19, 2015), <https://www.arbornetworks.com/new-ponemon-institute-survey-reveals-time-to-identify-advanced-threats-is-98-days-for-financial-services-firms-197-days-for-retail>.

⁹⁵*See Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (2014), http://thf_media.s3.amazonaws.com/2014/pdf/Collateral%20Damage%20FINAL%20Report.pdf ("The collateral consequences of conviction . . . have become more severe, more public and more permanent. These consequences affect virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities."). For an entity criminal defendant, damage to its reputation works as an effective sanction by itself. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J. LAW & ECON. 757 (1993).

⁹⁶ Pecuniary harm of losing its future profits from services provided to criminals could also be considered as harm to a reporter resulting from his reporting. As was pointed out by Kraakman, an offender might be able to easily find an alternative service provider to continue its criminal activity. *See* Kraakman, *supra* note 4, at 63 ("wrongdoers can easily search for pliable gatekeepers on the market."). However, from the deontologist perspective of this paper, this loss of future profit may not be properly classified as harm to a reporter because constraints against doing harm do not apply to immoral acts like assisting offenders.

⁹⁷ *See The Value of Reputation*, THOMSON REUTERS (April 2012), <https://risk.thomsonreuters.com/sites/default/files/GRC03270.pdf> ("Investors and other providers of capital may increase the risk premium in the cost of capital they extend or choose not to do business altogether."); *see also* John E. Black Jr., *Awake at Night: Cyber breaches and the New Risk to Directors and Officers*, IRMI (Oct. 2014), <https://www.irmi.com/articles/expert->

risk of administrative penalties for failing to comply with administrative regulations, especially when such regulations are designed to prevent those companies from being victimized in the first place;⁹⁸ the risk of class action lawsuits by the original victim against secondary victim institutions;⁹⁹ and the risk of derivative suits from shareholders for mismanagement.¹⁰⁰ Unlike an offender or victim reporter, a third party may also suffer from indirect harm caused by erroneous reporting or breach of confidentiality. However, this harm will be measured as the harm caused by the reporting to the individual being reported.

The harm to the individual being reported caused by reporting, as discussed in the prior section, is the breach of the right of confidentiality and the risk of erroneous reporting. The right of confidentiality is derived from the relationship between the reporter and the individual being reported. This confidential relationship exists only with the third party reporter (not the offender or the victim)—such as a doctor, lawyer, or financial institution—to whom the individual being reported entrusted his interest. Therefore, all other things being equal, the immorality of non-reporting by some third parties is lower than that of an offender or a victim. In addition, harm caused by erroneous reporting is likely to be higher when the report comes from a third party, due to the third party's lack of first-hand knowledge about the crime compared to the offender or victim. This further lessens the immorality of non-reporting by a third party.

In contrast, there are several culpability factors where the position of the reporter does not make a significant difference in determining the level of culpability.

The existence of alternatives to expose the crime in question is not generally affected by the position of the reporter, but by the crime itself. For instance, certain victimless crimes,¹⁰¹ such as certain drug crimes, where there is no apparent harm to any identifiable individual, are hardly detected. This makes

commentary/awake-at-night-cyberbreaches-and-the-new-risk-to-directors-and-officers. (“Poor security can present other risks for a company, potentially . . . tarnishing its reputation, and undermining its relationship with customers. Lost business and damage to reputation can be significant: US companies estimated losing \$3.3 million in business on average due to data breaches in 2013.”).

⁹⁸See Black Jr., *supra* note 96. (“[F]ederal and state regulatory agencies . . . are very active in investigating data breaches of personal information.”).

⁹⁹*Id.* (“Large breaches typically are followed by class action lawsuits on behalf of persons whose personal information was compromised. Although such lawsuits have often struggled to survive dismissal . . . , class action data breach suits are expensive to defend.”).

¹⁰⁰*Id.* (“[A]s the risk of a serious and damaging cyberattack grows, so too does the risk of a lawsuit against directors and officers.”).

¹⁰¹ Whether victimless crimes should be criminalized or not is another legal philosophy involving concept of harm. Accordingly, the definition and scope of the victimless crime have also been the focus of heated debate. Instead of entering into this debate, this paper adopts, for the sake of the second factor - existence of alternative to expose crime - the definition that a victimless crime is any illegal action that is voluntarily consented between two parties and lacks crime victims or a complaining participant. See generally EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 169 (1965); CONKLIN, CRIMINOLOGY 21 (2001).

the immorality of non-reporting by a person who knows about the crime greater than in non-victimless scenarios. Crimes against helpless victims, such as children or elders, are less likely to be discovered without someone other than the victims reporting them. And, when other factors are controlled, this renders the non-reporting of crime against a helpless victim more immoral than crime against a non-helpless victim.

Furthermore, the good achievable by reporting varies by the crime being reported. The good depends not on the legal categorization of the crime, but on the particulars of each crime—such as its type, magnitude, extensiveness, and continuity or repeatability of harm—that cannot be fully reflected in the law. Several studies show that people generally believe crimes causing physical harm are more serious than crimes causing property harm.¹⁰² However, they base their analysis on legal classifications of crime, which cannot reflect the extraordinary variance between particular crimes that are not reflected in their legal classification.¹⁰³ These diverse factors can result in significant differences in individual perception of the severity of the crime in question. It is clear that murder is more serious than the embezzlement of 100 dollars, but it is less clear whether the same murder should be considered more serious than a 1 trillion dollar embezzlement scheme that caused many people to commit suicide.

This paper considers the position of a reporter in relation to the crime as a criterion for categorizing duties to report crimes. As explained above, the nature of the crime affects two morality factors while the position of the reporter affects three. However, I consider the position of a reporter as a criterion for categorizing not just because three is higher than two, but rather because unlike the three types of reporters (offenders, third parties, or victims), categories of crimes are too diverse to provide any meaningful principle or shared standard that applies to the category as a whole. Furthermore, the position of a reporter makes the laws and regulations adopted under the same category more commensurable than the legal classification of the crime, as it is impossible for legal classifications of crimes to properly distinguish between the acts within the same classification.

The following sections provide guidance to help determine whether one has a duty to report crime. These principles will be useful to policymakers when creating laws that criminalize the failure to report crime.

¹⁰² MARVIN E. WOLFGANG, ROBERT M. FIGLIO, PAUL E. TRACY, & SIMON I. SINGER, U.S. DEPT' OF JUSTICE, NCJ-96017, THE NATIONAL SURVEY OF CRIME SEVERITY, at vi (June 1985), <http://www.bjs.gov/content/pub/pdf/ns/cs.pdf>.

¹⁰³*Id.*

D. What the Law Ought to Be

1. Rewards for Voluntary Reporting or Penalties for Failing to Report

Before considering how these culpability factors apply to the various duties to report crime, we must address the question of whether reporting should be incentivized.

As Polinsky and Shavell caution, voluntary reporting carries the risk of wasting time and resources. In *Theory of Public Enforcement of Law*, they identify reasons why public enforcement is preferable to incentivized voluntary, private enforcement in supplying information and otherwise aiding in detecting violators.¹⁰⁴ Specifically, “if a reward is available to everyone, there might be wasteful effort devoted to finding violators”¹⁰⁵ While a mandatory duty to report tends to be limited in scope to specific professions or industries, a reward tends to not have such limitation. A reward could be available not only to those who directly witnessed the crime or who are in a better position to control it, but also to those who have nothing to do with it.

Even if rewards are restricted to certain categories of people, rewarding the voluntary reporting of crime seems morally inappropriate.

In the case of reporting by whistleblowers, who can be categorized as offenders themselves in certain contexts,¹⁰⁶ rather than by third parties or victims, under the Dodd-Frank Act or Qui Tam Act, offering a monetary reward is morally unjustifiable as it eventually rewards wrongdoing.¹⁰⁷

Regarding third parties in professions or industries that place them in a better position to suspect and witness crime, justifying voluntary reporting may be difficult as well. Third parties operating under a voluntary reporting regime shift harm to their clients or users with respect to their confidentiality rights merely for the monetary benefit obtainable from reporting rather than to avoid penalties for non-compliance, which exist under a duty-based reporting regime.

In the case of a victim-reporter, unlike an offender or a third party reporter, no moral objection to rewarding a victim for voluntarily reporting crime

¹⁰⁴ A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, 1 HANDBOOK OF L. AND ECON. 1, 5 (2007).

¹⁰⁵ *Id.* These wasteful efforts by private enforcement also lead to a serious problem of over-reporting or false reporting of crime which will in turn trigger waste by public enforcement to discern valuable reports from invaluable ones.

¹⁰⁶ Compliance officers could be held liable for their company’s wrongdoings caused by their negligence. However, by voluntarily reporting the wrongdoings, they are rewarded for their negligence. See *SEC Announces \$300,000 Whistleblower Award to Audit and Compliance Professional Who Reported Company’s Wrongdoing*, SEC (Aug. 29, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542799812#.VBjEr_ldWfh.

¹⁰⁷ See Steven Davidoff Solomon, *Whistle-Blower Awards Lure Wrongdoers Looking to Score*, NEW YORK TIMES (Dec. 30, 2014), <http://dealbook.nytimes.com/2014/12/30/whistle-blower-awards-lure-wrongdoers-looking-to-score/>.

exists. On the contrary, even under the mandatory reporting regime,¹⁰⁸ rewarding a victim-reporter is appropriate given the understanding that a higher level of immorality is required for the criminalization of non-reporting by a victim than by other reporters.¹⁰⁹

2. Application of the Culpability Test

The conclusions drawn by applying the culpability factor test allow for an understanding of the immorality of non-reporting or, conversely, the morality of reporting. The good caused, or harm mitigated, by reporting can be considered a positive factor in that knowledge about the crime increases the immorality of non-reporting. The existence of alternative methods to expose crime, the harm caused by reporting to reporters, and the harm caused by reporting to the individual being reported can be considered negative factors because their presence decreases the immorality of non-reporting.

Once we define morally desired or blameworthy behavior, we must determine whether such behavior should be encouraged or prohibited by law. Assuming non-reporting of crime is morally wrong, must reporting be compelled by law? Are law and morality directly parallel? Of course, there are moral acts that are illegal and immoral acts that are legal. Should the non-reporting of crime be legal even if immoral?

There are two types of immoral, legal acts. First, there are those acts which are immoral, but which are nevertheless expressly permitted under the law (e.g., slavery in colonial America). Second, there are those acts which are immoral, but are not regulated by any law (e.g., adultery). The first type is clearly

¹⁰⁸ For voluntary reporting, it is necessary to provide proper incentive to encourage reporting. In relation to victim's reporting of cyber security breaches, many commentators expose the lack of proper incentive as one of many problems with current legislation that adopts a voluntary reporting system. See Susan Cassidy & Perter Terenzio, *Competing Bills Focus on Cybersecurity Information Sharing But Final Language and Ultimate Passage Remain Unknown*, COVINGTON & BURLING LLP (July 10, 2015), <https://www.insidegovernmentcontracts.com/2015/07/competing-bills-focus-on-cybersecurity-information-sharing-but-final-language-and-ultimate-passage-remain-unknown/>. ("It would appear from the current bills that there are many benefits associated with receiving information about cyber threat indicators, and few benefits associated with providing that information."); see also N. Eric Weiss, CONG. RESEARCH SERV., R43821, *Legislation to Facilitate Cybersecurity Information Sharing: Economic Analysis 1, 1* (2015), <https://www.hsdl.org/?view&did=763646> ("One obstacle to reducing cybercrime is misaligned incentives, which reduce information sharing about cyber attacks.").

¹⁰⁹ More descriptive explanation will be provided later in this paper for why non-reporting by a victim-reporter must be more immoral than for non victim-reporters before one can justify its criminalization. This paper will also explore the relationship between providing incentives for reporting acts for which non-reporting is more immoral. Based on the "heightened level of non-reporting immorality" requirement given to a victim-reporter, I accept that the standard measures to gain crime information from a victim could be voluntary rather than mandatory, which I opposed in the case of an offender-reporter. However, again, I need to emphasize that a standard is the baseline where a discussion starts and a deviation from the standard can be justified in certain cases. Once it is justified, it can, itself, develop into another standard.

not desirable. Turning then to the second type, should the duty to report crimes be understood in the same way as adultery? Even if we consider adultery immoral, is it moral for a state to prohibit and punish this act? Similarly, even if we consider failure to report crime immoral, is it moral for the state to prohibit and punish this failure to act? For this question, we turn to the culpability test. When application of the test demonstrates immorality of non-reporting above the certain threshold, it should be regulated by the law.

Although I do not address the difficult, if not impossible, task of quantifying the immorality threshold, the test still provides relational principles applicable to our analysis. A higher degree of immorality of non-reporting or morality of reporting brings a stronger need to regulate. The severity of the penalty should be proportional to the level of immorality.

3. Highest Immorality Required for Criminalization of Non-compliance with Duty-To-Report Laws

In general, the severity of penalties should be proportional to the seriousness of the required or prohibited behavior. *Criminal punishment, as opposed to civil or administrative sanctions*, is the government's strongest arm. It should be the last resort, and used only to remedy the most serious instances of wrongdoing.

Additionally, in order for criminalization to be justified, *omission* must represent a higher level of immorality than would acts of commission.

As Leo Katz explains, regarding the deeper moral reason why acts of omission offend society less than affirmative acts: "The person who fails to prevent harm that would occur even if he didn't exist simply fails to give away something he owns. The person who brings about harm that wouldn't occur if he didn't exist takes away something owned by someone else."¹¹⁰In the same vein, Dressler illustrated that:

[A] law that requires a person to do Y (e.g., help a bystander) bars that person from doing anything other than Y. . . . [I]n a society that generally values personal autonomy, we need to be exceptionally cautious about enacting laws that *compel* us to benefit others, rather than passing laws that simply require us not to harm others.¹¹¹

Thus, the highest standard of immorality is required to *criminalize the failure* to comply with one's duty to report crime. After all, such failure is a crime of omission: professionals with a duty to report can be found guilty of a

¹¹⁰LEO KATZ, CRIMES OF OMISSION, FOUNDATIONS OF CRIMINAL LAW 162-163 (Leo Katz et al. eds., 1999).

¹¹¹ Dressler, *supra* note 49, at 986-87.

crime simply due to their failure to act as the “eyes and ears of the law enforcement.”¹¹²

The following sections examine and suggest the principles of each type of duty to report required to satisfy this highest level of immorality by increasing the level of positive factors while decreasing the level of negative factors.

As Section Three explains, this paper uses the position of the reporter as the criterion by which to categorize different types of duties to report crime. Thus, among the five culpability factors, those three factors that vary based on difference in position of the reporter will inform the analysis—namely, the knowledge about crime, the potential harm to the reporter, and the harm caused by reporting to the individual being reported.

The other two factors that vary based on the crime to be reported—the existence of alternatives to expose crime and the good caused/harm mitigated factors—will be considered when analyzing the duties to report crimes within *the same category*. Thus, while the analysis of morality of the duties to report within the same category will be similar for the three reporter-position factors, the overall analysis could differ given the two crime-based factors. For instance, criminalization of non-reporting by a third-party is generally difficult to justify due to the third-party’s lack of first-hand knowledge. However, if the crime witnessed by the third-party is *serious, and there are no alternative ways* to expose the crime, criminalization of non-compliance with the duty to report may be justified. The reverse is also true. Even if the three reporter-position factors demonstrate the high immorality of non-reporting, criminalization might not be justified when the crime in question is minor and causes little harm.

Non-reporting must rise to the highest level of immorality before one can justify its criminalization. Thus, the relevant laws should be designed in a way that foregoes criminalizing non-reporting unless it is egregiously immoral. Legislators can use the three reporter-position factors – knowledge about the crime, potential harm to the reporter, and potential harm to the individual being reported – when designing these laws to ensure that sanctions apply only to highly immoral failures to report. Otherwise, less immoral omissions based on the three reporter-position factors should go unpunished, unless their otherwise low immorality is raised to a level of high immorality by crime-based factors, such as the existence of alternatives to expose crime and the good caused/harm mitigated factors.

¹¹² Thompson, *supra* note 6, at 36.

4. Principles for Each Type of “Duty to Report”

a. “Duties to Report” Imposed on Offenders

“Offenders,” as used here, are those persons, including legal entities, with possible strict vicarious criminal liability, not the people who actually committed the crime.¹¹³ I refer to the latter category as “primary offenders.” Also, “offenders” does not include persons who have no liability in relation to the crime committed in their organization or entity being regulated, as the duty to report crime is only imposed on the people who can control and oversee the behavior of primary offenders.

In the case of an offender-reporter, strict vicarious criminal and civil liability has a serious negative effect on the overall culpability result. It makes non-reporting less immoral and makes justifying the criminalization of non-reporting more difficult. Thus, to reach the highest level of immorality of non-reporting required to mandate reporting crime, the harm to the reporter would need to be lessened via the opportunity for immunity or other mitigation.

However, immunity or other mitigation is not always available. Due process principles protect an individual offender suspect from self-incrimination,¹¹⁴ but do not apply to civil liabilities of individual or entity-offender. Furthermore immunity from civil liability cannot and should not be allowed.

Immunity from civil liability affects both the harm to a reporter and the good caused by reporting, but in the opposite direction with respect to justifying the criminalization of non-reporting. While immunity decreases harm to a reporter, the good caused by reporting will significantly decrease when an individual or entity-offender reporter gets immunity from civil liability because there is a little, if any, retributive effect; the victim does not receive enough compensation. This is because primary offenders often lack the resources to personally indemnify victims due to the sheer magnitude of harm that is possible only in an organizational setting.¹¹⁵

¹¹³ Entities cannot commit crime, but their criminal liability for the crimes of their agents is widely recognized. See, *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 493, (1909) (“[T]he liability is . . . imputed . . . because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.” (alteration in original)(citation omitted)). In addition, entities could be vicariously liable even with strict internal compliance policies. See, *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 326 (D. Conn. 2007) (“the existence of contrary company policies is not by itself a defense to criminal liability; whether Ionia had an official position on the course of conduct undertaken by its agents is merely one factor to be considered by the jury when assessing whether to impose vicarious liability.”).

¹¹⁴U.S. CONST. amend. V.

¹¹⁵See Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1349 (1982) (“the agent may not have sufficient assets to cover the judgment, in which case his liability would be limited); see also

Regarding criminal liability, Due Process guarantees that the law cannot compel a person to put himself at risk of criminal penalty. This principle is in line with the moral baseline I suggested - namely, that the law should compel reporting only when an offender-reporter does not face the risk of criminal penalties.

For instance, while 42 U.S.C. §§ 9603 (a) and (b) require “[a]ny person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance” to “immediately notify the National Response Center” and penalizes non-compliance by a fine or imprisonment. The good achieved by reporting —environmental protection— is proved to be great enough to complement the possible harm to the offender reporter.

By contrast, the deviation under 31 U.S.C. § 5318 that offers financial institutions and their employees no such protection of immunity when reporting the crime committed by their insiders, even when the reporting could trigger their vicarious criminal responsibility,¹¹⁶ may not be justified.

The law mandates financial institutions to report “any *suspicious* transaction relevant to *possible* violation of law or regulation”¹¹⁷ and criminalizes the willful violation of the duty-to-report regulation prescribed under 31 U.S.C. § 5318 by “[fine] not more than \$250,000, or [imprisonment] for not more than five years, or both.”¹¹⁸ The corresponding regulation, 12 C.F.R. 21.11, adopted under the authority of 31 U.S.C. § 5318, describes more specifically the duty to report suspicious activities by categorizing the duty into four types.

The first type of reporting obligation, discussed herein, mandates reporting:

[w]henever the national bank detects any known or suspected Federal criminal violation, or pattern of criminal violations, . . . involving a transaction or transactions conducted through the bank, where the bank believes that . . . the bank was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying one of its directors, officers, employees, agents or other institution-affiliated parties as having committed or aided in the commission of a criminal act, regardless of the amount involved in the violation.¹¹⁹

Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 694 (1997) (“A principal reason is that culpable agents frequently lack the assets to pay expected sanctions equal to the social costs of corporate wrongdoing.”).

¹¹⁶ For a financial institution to be an offender-reporter, the crime committed by its insiders should be the crime committed in their actual or apparent authority for the financial institution. *See, e.g.,* *New York Cent. & H. R. R. Co. v. United States*, 212 U.S. 481, 493 (1909).

¹¹⁷ 31 U.S.C. § 5318(g)(1) (2017).

¹¹⁸ 31 U.S.C. § 5322(a) (2017).

¹¹⁹ 12 C.F.R. § 21.11(c)(1) (2017).

The regulation does not differentiate between suspicious activities with possible criminal liability to the reporting financial institution from others and does not guarantee that, in such case, the report will not be used against the reporter in any criminal case.

This deviation from the suggested principle of criminal immunity to offender-reporters could be justified if the good caused by reporting was greater. The good caused by reporting varies according to the crime being reported, but with respect to the duty to report suspicious activity, the event required to be reported—suspicious activity—does not represent a specific crime, but a broad set of federal criminal violations. Thus, to justify criminalization of non-compliance with the duty to report suspicious activity, certain serious crimes, the detection or prevention of which would cause greater good by reporting, should be specified.

The above analysis of current law equates the criminalization of non-compliance with a duty to report crime. That is, in addition to the strict vicarious criminal liability for the underlying crime, the crime of failing to report carries with it the threat of *additional* punishments. In practice, however, an alternative exists whereby an offender reporter is rewarded for reporting by the mitigation of the strict vicarious criminal liability associated with the underlying crime. The following example illustrates this point.

DOJ issued the Organizational Sentencing Guidelines¹²⁰ providing that firms are entitled to leniency if: (i) the firm had an effective compliance program and promptly reported any detected wrongdoing; (ii) the firm self-reported the wrong; or (iii) the firm fully cooperated and accepted responsibility.¹²¹ Furthermore, prosecutor's offices have continued to refrain from indicting cooperating firms through Deferred Prosecution Agreements and Non Prosecution Agreements.¹²² While criticizing the guidelines and advocating for reform, leading scholars in corporate crime generally admit that the guidelines are consistent with their recommendation for a composite liability regime.¹²³

¹²⁰ U.S. ORGANIZATIONAL SENTENCING GUIDELINES § 4 (2014), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_4.pdf.

¹²¹ U.S. ORGANIZATIONAL SENTENCING GUIDELINES § 8C2.5(f)-(g) (2014), <http://www.ussc.gov/guidelines/2015-guidelines-manual/archive/2014-chapter-8>.

¹²² As the Gibson Dunn Chart illustrates, use of NPAs and DPAs by DOJ has drastically increased since 2003 culminating in 2015. See *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN, 23-35 (Jan. 2016), <http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>.

¹²³ See Arlen & Kraakman, *supra* note 114, at 746, 751-752 (“The basic approach of the Sentencing Guidelines - to mitigate fines for those firms that have an effective compliance program, cooperate with the government's investigation, and/or report wrongdoing - is consistent with our recommendations. The structure of the Sentencing Guidelines' composite regime, however, is not. The amount of mitigation firms receive for monitoring, investigating, and reporting is not necessarily sufficient to induce optimal policing To induce optimal policing, . . . the Commission must . . . attempt to take into account the impact of policing measures on the probability of detection.”).

This leniency increases reporting of crime by an offender, and is effective without the need to go through an arduous legislative process. However, the economic benefits realized by the DOJ guidance do not guarantee its moral justifiability.¹²⁴ From the morality perspective, leniency to an offender-reporter is a deviation from the moral baseline. When considering the culpability factors in a comprehensive examination of the duty-to-report regime, leniency to an offender-reporter does not fit into the overall picture. This incentive to offender-reporters is not available to third parties or victims because neither has any liability as a wrongdoer. It is difficult to morally reconcile the act of rewarding an offender-reporter, who could have contributed to or benefitted from the underlying crime, with the act of requiring third-parties or victims to report crime merely to avoid sanctions.

Thus, in order to align the duty to report crime and the criminalization of non-compliance with society's moral perception while treating the interest of an offender differently from the interest of a primary offender, offenders should have a mandatory duty to report crimes, but receive immunity from criminal liability for the underlying crime. However, offender-reporters should not receive immunity from any resulting civil liability. An exemplary deviation from this baseline¹²⁵ is the UK's current S7 of the Bribery Act which creates the offence of a company's failure to prevent bribery by its associated persons and the proposal to amend the law to expand the scope of the duty to prevent to include other financial crimes.¹²⁶

Recognizing this baseline is crucial for understanding how to justify deviations. Deviations are not inherently wrongful, and they can be justified by the diverse circumstantial factors and characteristics of the targeted crime which can lead to differing results based on the existence of alternatives to expose crime and good caused/harm mitigated factors. For instance, the deviation from voluntary reporting backed by reward will be justified if the good caused by the reporting is not high enough to satisfy the highest level of immorality necessary to criminalize non-reporting.

¹²⁴See Zamir & Medina, *supra* note 69, at 325 (citing Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. Legal Stud. 1037, 1037 (2000)) (noting that the justifying foundations of cost-benefit analysis are "at best suspect and at worst in ruins.").

¹²⁵A proposed amendment to S7 of the Bribery Act is to criminalize failing to prevent certain criminal acts. This effectively creates a duty to prevent crime that is stronger than the duty to report crime. Failure to prevent is less immoral than failure to report because preventing crime brings more harm to the obligee than reporting crime. Thus, when other factors are controlled, duty-to-prevent laws would generally be harder to justify than duty-to-report law.

¹²⁶See Attorney General's keynote address to the 32nd Cambridge International Symposium on Economic Crime on Tuesday 2 September 2014, GOV'T OF UK (Sept. 5 2014), www.gov.uk/government/speeches/attorney-generals-keynote-address-to-the-32nd-cambridge-international-symposium-on-economic-crime-on-tuesday-2-september-2014 (last visited May 27, 2016); see also *Proposed changes to the UK Bribery Act*, FINANCIAL WORLDWIDE, (May 2014), <http://www.financierworldwide.com/proposed-changes-to-the-uk-bribery-act/#.VseK-UITJUc> (last visited May 27, 2016).

b. “Duties to Report” Crime Imposed on Third Parties

In relation to the knowledge about the crime factor, lack of certainty or knowledge could have serious negative effects on the culpability test, resulting in low levels of culpability for non-reporting and, thus, not satisfying the highest level of culpability required for criminalization. Due to inherent vagueness or line-drawing problems of underlying statutes and regulations, the moral culpability of a non-reporter becomes clear only when quality evidence proves clear and convincing criminality of the reported behavior.¹²⁷ The more ambiguous the accident or crime, the less likely that a bystander will intervene or even report the situation.¹²⁸ As observed in *Pesce v. J. Sterling Morton High School*,¹²⁹ “a reporter may in good faith determine that reporting is not morally right, even if the flimsy evidence in his possession would be enough to trigger mandatory reporting.”¹³⁰

So, to meet the highest level of culpability necessary to criminalize non-reporting, a third party should *know* the criminality of the underlying act. Anything less is not sufficiently culpable. For instance, 18 U.S.C. § 2258A requires “actual knowledge of any facts or circumstances” involving the crime for the duty to report child pornography imposed on “an electronic communication service or a remote computing service” to be triggered and for the non-compliance with such duty to be criminalized.¹³¹

From this knowledge perspective, a third party might be less morally required to report crime than an offender or a victim, when other culpability factors are controlled. Compared to an offender or a victim, a third party tends to be in a position which does not provide certainty about the existence of the crime to be reported, even though the duty to report crime is generally imposed on

¹²⁷ In the case of duty to report crimes, one under obligation must decide whether the act witnessed constituted a crime that is mandatory to report. Vagueness of such laws makes it difficult to decide whether the act constitutes a crime or not. The lack of third-party knowledge of the acts increases the difficulty. See George C. Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885 (1964) (asserting that vagueness is an inescapable and indispensable tool, but not a deterrent, for regulating human behavior); see also ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 163-165 (2014) (explaining the vagueness and line-drawing problem in regard to the crime of omission).

¹²⁸ See Clark & Word, *supra* note 80; see also Wenik, *supra* note 6, at 1790 (observing that bystanders were less likely to help when ambiguity surrounded a worker’s accidental electrocution) (citing Clark & Word, *Where is the Apathetic Bystander? Situational Characteristics of the Emergency*, 29 J. PERSONALITY & SOC. PSYCHOLOGY 279 (1974); Shotland & Stebbins, *Bystander Response to Rape: Can a Victim Attract Help?*, 10 J. APPLIED SOC. PSYCHOL. 510, 521-22 (1980) (bystanders reluctant act after hearing simulated rape because of their uncertainty about what was happening)).

¹²⁹ *Pesce v. J. Sterling Morton High Sch.*, Dist. 201, Cook Cty., IL, 830 F.2d 789, 790 (7th Cir. 1987).

¹³⁰ Thompson, *supra* note 6, at 52.

¹³¹ 18 U.S.C. § 2258A(a), (e) (2017).

specific third parties who are generally in a better position to access the related information.

However, when other factors are not controlled, deviations from the principle are possible. Even with its lower level of knowledge, such as merely suspecting crime, a third party could be required to report the crime. Fewer alternatives to expose the crime and greater good caused by reporting, are more likely to trigger mandatory reporting by a third party, even when knowledge of the crime is not certain. In other words, these other culpability factors lower the required level of knowledge to justify a reporting requirement. For instance, under 31 U.S.C. § 5318 and its accompanying regulations, reporting is required even without complete knowledge when a third party “[detects] suspected Federal criminal violation, or pattern of criminal violations”¹³² or “suspects, or has reason to suspect [money laundering or violation of Bank Secrecy Act].”¹³³ The willful violation of the duty to report is criminalized by “[fine] not more than \$250,000, or [imprisonment] for not more than five years, or both.”¹³⁴

It is not clear, however, due to a lack of specificity regarding the types of crime to be reported, whether the lower threshold for knowledge about the crime is outweighed by either a lack of alternatives to expose the crime or by a high level of good resulting from the reporting. For the deviation to be justified, one must know what the crime being reported is in order to evaluate whether alternatives to expose it exist and how much good will result from reporting it.

With respect to the good caused by reporting, financial institutions should be able to determine the monetary loss associated with a particular crime though it may be difficult or even practically impossible to evaluate all of the consequences of a particular crime. For crimes involving very large sums of money, the good caused (or harm mitigated) by reporting is great and, thus, may outweigh the lower level of knowledge about the crime by the reporter in satisfying the highest immorality of non-reporting requirement. Although it is difficult to quantify a monetary threshold that would justify mandatory reporting, even assuming the third party’s lower level of knowledge, the interaction between these two factors is reflected in the suspicious activity report regulation, 12 C.F.R. 21.11(2)-(3). That regulation requires financial institutions to report known or *suspected* crime by varying the monetary threshold involved in suspected transaction in accordance to the level of knowledge about the crime.¹³⁵ In contrast, as discussed above, for crimes committed by an insider, the regulation, 12 C.F.R. 21.11(1), does not demand any monetary threshold to trigger the duty to report because financial institutions have constructive, if not actual, knowledge about the crime.¹³⁶

¹³²12 C.F.R. § 21.11 (c)(1)-(3) (2017).

¹³³ 12 C.F.R. § 21.11 (c)(4) (2017); 31 C.F.R. § 1020.320 (a)(2) (2017).

¹³⁴ 31 U.S.C. § 5322 (2017).

¹³⁵12 C.F.R. § 21.11(c)(2)-(3) (2017).

¹³⁶ 12 C.F.R. § 21.11(c)(1) (2017).

In addition, for certain crimes, such as victimless crimes, where there are few alternative sources to expose the crime, if any, other than a third party reporter, a lack of complete knowledge about the crime could be outweighed by the absence of alternatives. Money laundering or violation of the Bank Secrecy Act are crimes where there are no victims around to report the crime. 12 C.F.R. 21.11 (c)(4) separates such crimes from general crimes and applies lower standards in triggering the duty to report such crimes. It requires reporting when a financial institution has only a reason to suspect and establishes a lower monetary threshold than for general crimes where the financial institutions' level of knowledge is the same or higher.¹³⁷ Unlike money laundering or violation of the Bank Secrecy Act, other victimless crimes, such as certain drug crimes, are not covered by 12 C.F.R. 21.11 (c)(4). However, considering the public's general agreement as to the seriousness of those crimes together with the absence of alternative sources to expose them, it is morally justifiable to apply a similarly low standard.

Information possessed by a third party reporter often is not independently sufficient to prove the existence of a crime. It is usually necessary to gather additional information from outside sources. Often, essential outside sources—which are maintained by the government, the very entity imposing the duty to report crimes on private parties—are not available to those same private parties.

In order to justify the criminalization of third-party non-compliance with a duty to report, the government should provide all information in its possession necessary for that third-party reporter to satisfy his or her duty to report crime. Doing so will raise the third party's level of knowledge about the crime and will also lower the level of reporter harm by cutting the information gathering cost. It will also decrease harm to the individual being reported by decreasing the possibility of erroneous reporting.

In relation to the duty to report child pornography, NCMEC shares its own information with private third party reporters. Among the material shared is a list of MD5 hash values, through its Hash Value Sharing Initiative, which “represent the “worst of the worst” images of apparent child pornography” and a list of URLs for active Web pages, through its URL Initiative, “containing apparent child pornography.”¹³⁸ This sharing of information with private third party reporters was not explicitly authorized at first, but has been since 2007.¹³⁹

¹³⁷12 C.F.R. § 21.11(c)(4)(i)-(ii) (2017).

¹³⁸ THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, ANNUAL REPORT 2013 (2013), <http://www.missingkids.org/Exploitation/Industry> (last visited July. 7, 2016); *see also* 18 U.S.C. § 2258C (2017).

¹³⁹ The original U.S. Code sections which imposed a duty to report child pornography on Internet Service Providers, 42 U.S.C § 13032 and 42 U.S.C. § 5773, did not include information-sharing clauses. *See* A STAFF REPORT FOR THE USE OF THE COMM. ON ENERGY AND COMMERCE, 109TH CONG., SEXUAL EXPLOITATION OF CHILDREN OVER THE INTERNET 8 (Jan. 2007), <http://burgess.house.gov/uploadedfiles/subcommittee%20on%20oversight%20and%20investigation%20report%20on%20the%20sexual%20exploitation%20of%20children%20over%20the%20internet.doc>.

In contrast, regarding the duty of financial institutions to report suspicious activities, sharing of government information with private, third-party reporters is lacking.¹⁴⁰ Although 31 C.F.R. Part 1010.520 seems to encourage public-private information sharing,¹⁴¹ such sharing is merely subject-specific information sharing adopted only to investigate and detect the financial transactions of suspects whose alleged crimes are already under investigation by the government. The government's failure to share information with financial institutions, when it pertains to reporting suspicious activity, is problematic. The government permits some third-party reporters to choose to remain ignorant about the crime so that duty to report crimes is not triggered, as in the case of the duty to report child pornography.¹⁴² On the other hand, other third party reporters are mandated to establish investigative procedures, as in the investigative role imposed on financial institutions to report suspicious activities. It is very difficult to justify the government's failure to provide information necessary for a more effective investigation in one context (e.g. banking, where investigation is required), when, in others, the government freely shares information with entities without any such duty to investigate. Therefore, it is imperative for financial institutions to have all relevant information since the law imposes mandatory investigative duties and reporting obligations on those entities.

In addition, the sharing of government information with a third-party reporter will diminish the harm to the reporter because the reporter will face a lower cost of gathering, maintaining, and analyzing information to decide whether (1) a crime happened, and (2) it was one that triggered the duty to report.

In relation to the duty to report child pornography, even when 18 U.S.C. § 2258A(f) does not require ISPs to monitor or affirmatively seek child pornographers, representatives of many ISPs criticize reporting requirements given the high cost incurred in the course of reporting¹⁴³ and preserving¹⁴⁴ the related information.¹⁴⁵ Although some ISPs voluntarily monitor their networks in

¹⁴⁰See U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, 314(B) FACT SHEET (Oct. 2013), https://www.fincen.gov/statutes_regs/patriot/pdf/314bfactsheet.pdf.

¹⁴¹ 31 C.F.R. § 1010.520, adopted under the Section 314(a) of the PATRIOT Act, encourages regulatory and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected of engaging in terrorist acts or money laundering activities. Certain financial institutions are required to search their records to determine whether they have information concerning the particular investigation. *See Id.*

¹⁴² 18 U.S.C. § 2258A(f) (2017) (denying electronic communication service provider's proactive duty of monitoring).

¹⁴³ 18 U.S.C. § 2258A(b) (2012) (requiring the report to the CyberTipline to include the information about the involved individual, historical references, geographic location information, images of apparent child pornography, and the complete communication containing any image of apparent child pornography).

¹⁴⁴ 18 U.S.C. § 2258A(h) (2017).

¹⁴⁵See GOV'T ACCOUNTABILITY OFFICE, GAO-11-334, COMBATING CHILD PORNOGRAPHY: STEPS ARE NEEDED TO ENSURE THAT TIPS TO LAW ENFORCEMENT ARE USEFUL AND FORENSIC EXAMINATIONS ARE COST EFFECTIVE 16 (March 2011), <http://www.tcco.texas.gov/docs/Combating->

addition to mandatory reporting,¹⁴⁶ the financial burden of doing so will be so enormous that firms without strong finances will not be able to comply.¹⁴⁷

Needless to say, as financial institutions are not only mandated to report but also to investigate, they face additional compliance costs as compared to general ISPs which have a limited role of reporting. Financial institutions face serious financial burdens: to gather and maintain information by each risk indicator; to screen the transactions based on that information; and to report hits to FinCEN. For instance, M&T Bank spends approximately \$3.3 million annually on AML compliance.¹⁴⁸ The BSA/AML compliance costs for financial institutions was estimated at approximately \$7 billion a year in 2007,¹⁴⁹ and the average growth rate of AML compliance costs from 2012-2014 was 53%.¹⁵⁰

However, there are types of information that the government could supply, but currently does not supply, at zero cost to financial institutions to assist in the detection of suspicious financial transactions. One such piece of information is the list of Politically Exposed Persons (hereinafter PEPs) who tend to exhibit higher rates of corruption. One of the many investigatory functions financial institutions perform is Customer Due Diligence,¹⁵¹ and Enhanced Due Diligence is required for certain risky transactions including transactions involving PEPs.¹⁵² Though the definition and scope of PEPs differs by

Child-Pornography-2011.pdf (“According to officials from 4 of these 16 ESPs, devoting staff and resources to review and report apparent child pornography can be costly. Officials from 1 ESP reported that it cost \$500,000 to develop a system to automate reporting to NCMEC . . .”).

¹⁴⁶ For instance, Google voluntarily maintains a database of images of possible abuse, each of which has a unique digital fingerprint. This database compares it with the images sent via Gmail and reports the hits to the NCMEC Cyber Tipline. See Mark Hachman, *How Google handles child pornography in Gmail* (Aug. 5, 2014, 10:34 AM), <http://www.pcworld.com/article/2461400/how-google-handles-child-pornography-in-gmail-search.html> (last visited May 27, 2016).

¹⁴⁷ GOV'T ACCOUNTABILITY OFFICE, *supra* note 144 (“Additionally, officials from 13 of the 19 ESPs we spoke with said that establishing methods to detect apparent child pornography, while not required, can be costly to implement. For example, 4 of these ESPs said it was costly to search for key words, check their computer network for images, or provide users with a method to flag images.”).

¹⁴⁸ *Suspicious Activity and Currency Transaction Reports: Balancing Law Enforcement Utility and Regulatory Requirements: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 110th Cong. 22, 53 (2007) (testimony of Mr. Steve Bartlett, The Financial Services Roundtable), <https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37207/pdf/CHRG-110hhrg37207.pdf>.

¹⁴⁹ See *Id.* (citing Reginald J. Brown & Stephen R. Heifetz, *Vague Guidance Still Invites Defensive SARs*, AMERICAN BANKER (2006)).

¹⁵⁰ KPMG, GLOBAL ANTI-MONEY LAUNDERING SURVEY 2014 7 (2014), <https://www.kpmg.com/KY/en/IssuesAndInsights/ArticlesPublications/PublishingImages/global-anti-money-laundering-survey-v3.pdf>.

¹⁵¹ 31 U.S.C. § 5318(l)(2)(A)-(C) (2017) (requiring financial institutions to verify the identity of clients, to maintain records of such verification, and to consult lists of known or suspected terrorists or terrorist organizations provided by any government agency).

¹⁵² 31 U.S.C. § 5318(i)(2)(B)(i)-(iii) (2017) (requiring financial institutions, when opening and maintaining private banking and correspondent bank accounts involving foreign persons, to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, such account and to conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, foreign PEPs.).

jurisdiction,¹⁵³ the common denominator of the various PEP definitions is that most PEPs are public employees. Thus, the list of PEPs is the list of the government's own employees, and each government has an ability to provide such a list to financial institutions at little cost.¹⁵⁴ However, an individual financial institution is still on its own to gather information about PEPs, resulting in large, unnecessary costs.¹⁵⁵

A higher cost of reporting, in other words, magnifies harm to a third-party reporter, lowers the immorality of non-reporting, and makes it harder to justify the criminalization of non-reporting. The sharing of government information, which financial institutions would otherwise have to collect and analyze at their own cost, will decrease costs incurred by third-party reporters, thereby, eventually elevating immorality of non-reporting and justifiability of criminalization of non-reporting.

Provision of government information to a third-party reporter also lowers harm to the individual being reported and, indirectly, harm to a reporter who may

¹⁵³ The PEP has various international definitions according to the United Nations, Financial Action Task Force (hereinafter FATF), and the European Union. See THEODORE S. GREENBERG, LARISSA GRAY, ET AL., *STOLEN ASSET RECOVERY, POLITICALLY EXPOSED PERSONS: A POLICY PAPER ON STRENGTHENING PREVENTIVE MEASURES* 79-80 (2009), <http://siteresources.worldbank.org/EXTSARI/Resources/5570284-1257172052492/PEPs-ful.pdf?resourceurlname=PEPs-ful.pdf>. In February 2012, a substantive discrepancy was reconciled by including Domestic PEP into FATF Recommendations. See FATF, *INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS*, at 16 (Feb. 2012) ("Recommendation 12 – Politically exposed persons"), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. The definitional variance is even greater where the domestic definition of PEP is concerned. In the US, under 31 U.S.C. 5318, PEP is defined as "a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure." See U.S. TREASURY, BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CO., OFFICE OF THE COMPTROLLER OF THE CURRENCY, OFFICE OF THRIFT SUPERVISION, & THE U.S. DEP'T OF STATE, *GUIDANCE ON ENHANCED SCRUTINY FOR TRANSACTIONS THAT MAY INVOLVE THE PROCEEDS OF FOREIGN OFFICIAL CORRUPTION* (Jan. 2001), <https://www.treasury.gov/press-center/press-releases/Pages/guidance.aspx>.

¹⁵⁴ This paper does not propose the sharing of all governmental information regardless of its content. The content of the information shared is essential in deciding whether the sharing should be allowed under privacy law. However, this paper does not carry out the analysis of PEP information from a privacy law perspective, as that would require deeper focus on privacy law and distracts from the main idea of this paper. I believe there are types of private information which could be legitimately shared with private entities under certain procedures and restrictions with the help of technical solutions. Follow-up studies on a specific duty to report money laundering in relation to corruption will analyze this privacy issue of PEP information sharing.

¹⁵⁵ Financial institutions tend to rely on the PEP database services of commercial data providers, such as World-Check, World Compliance, and Acuity. However, Commercial Data Providers' service is expensive, and it could be a prohibitive burden on some financial institutions. See WORLD COUNCIL OF CREDIT UNION, RE: *CONSULTATIVE DOCUMENT: SOUND MANAGEMENT OF RISKS RELATED TO MONEY LAUNDERING AND FINANCING OF TERRORISM 2* (Sept. 27, 2013), https://www.woccu.org/documents/WOCCU_Basel_AML (expressing its concern with the mandatory use of vendor-created PEP lists).

face a lawsuit brought by the individual being reported based on erroneous reporting. Harm to the individual being reported based on erroneous reporting can stem from the third-party reporter's necessarily limited knowledge about the crime. By supplementing the third-party reporter's knowledge with the government information, the probability of erroneous reports will drop. This diminishes the harm to the individual being reported and heightens the immorality of non-reporting.

Apart from the sharing of government information with a third-party reporter, the harm to the individual being reported should be minimized by offering immunity from liability to a third-party reporter. For the duty to report child pornography or suspicious activities, both ISPs¹⁵⁶ and financial institutions¹⁵⁷ should both be exempted from civil claims or criminal charges for the reporting they made in good faith.

c. "Duties to Report" Crime Imposed on Victims

Considering that a victim is an individual who is harmed by crime, the prevailing literature focuses on victims' rights and protections. The duties of a victim have not been widely researched, and imposing a duty to report crime on a victim may sound absurd.¹⁵⁸

In The Moral Foundations of Criminal Law, Victor Tadros, in explaining reasons for the punishment of crime regardless of a victim's wish, justifies imposing a duty on the victim to see the offender punished when doing so incurs only limited cost to the victim.¹⁵⁹ He further measures "the strength of this duty depend[ing] on the extent of the duty to protect others from harm and also on the cost that the victim will bear if the offender is prosecuted."¹⁶⁰

The justifiability of *imposing such duty* on a victim is actually less controversial than the proportionality and justifiability of *criminal penalties* for non-compliance with such duty by a victim. As discussed above, criminalization of non-reporting can be justified only when immorality of non-reporting is severe enough to trigger the government's strongest weapon: the criminal law. Thus, higher good and lower harm to a victim are more essential for the criminalization of non-reporting than for the imposition of such duty to be justified.

Furthermore, passing muster with respect to criminalization of non-reporting is particularly difficult in the case of a *victim-reporter* compared to other reporters. Considering that criminalization inflicts additional harm on an already-injured victim, even higher immorality of non-reporting is required to justify criminalization of non-reporting by a victim-reporter.

¹⁵⁶ 18 U.S.C. § 2258B (2017).

¹⁵⁷ 31 U.S.C. § 5318 (2017).

¹⁵⁸ VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 297 (Oxford University U. Press, 2011).

¹⁵⁹ *Id.* at 298.

¹⁶⁰ *Id.*

Accordingly, laws expressly criminalizing a victim who does not report crime are rare. Only specific crimes with possible wide-spread, repeatable, serious original and secondary harm should be controlled by law in such a manner.

However, as a deviation from the above principle, financial institutions are compelled to report any known or suspected federal criminal violation, regardless of the characteristics of the crime, even when they are the victims.¹⁶¹ The only restrictions are that the aggregate violations must meet or exceed \$5,000 when a suspect can be identified,¹⁶² \$25,000 regardless of potential suspects,¹⁶³ or any amount where a suspect is an insider.¹⁶⁴ Each of these duties to report are imposed on financial institutions whether the reporter is a victim, a third party, or an offender.

This deviation can be justified if the harm to the financial institution as a victim-reporter is minimized through diverse protections such as prohibitions on publication of reported information, or exemption from civil or administrative liability caused by the reported information. However, the law does not differentiate such protection by the position of the reporter, thereby failing to reflect the varying immorality of non-reporting.

Other than the financial institution's duty to report suspicious activity, the laws imposing a duty to report on a victim and criminalizing non-compliance with that duty specifically target the serious crimes with the characteristics suggested above. Historically there was a tendency to penalize a victim's non-reporting with sanctions less severe than full criminal penalties. This lowers the required culpability of non-reporting. Nevertheless, Congress and government agencies have increasingly tried to mandate victim reporting of certain crimes under threat of criminal penalty.

Concerning reporting duties imposed on entity-victims of data breach incidents,¹⁶⁵ the Health Insurance Portability and Accountability Act of 1996, the federal law governing data breaches, penalizes health care providers for not reporting information breaches with civil, not criminal, fines.¹⁶⁶ State law varies, but, under the Identity Theft Protection Act of North Carolina, the Attorney General may bring a criminal prosecution¹⁶⁷ for violating the duty to report data

¹⁶¹ All three subsections of 21.11(c) require a financial institution, as a victim of crime, to report crime "[w]henver the national bank detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the bank . . . and where the bank believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations." See 12 C.F.R. 21.11 (c) (1), (2), (3) (2017).

¹⁶² 12 C.F.R. § 21.11 (c) (2) (2017).

¹⁶³ 12 C.F.R. § 21.11 (c) (3) (2017).

¹⁶⁴ 12 C.F.R. § 21.11 (c) (1) (2017).

¹⁶⁵ The victim, in this sense, is the entity whose customers' personal information is breached by the offender, not the individual customer of the entity who is the subject of the information.

¹⁶⁶ 42 U.S.C. §1320d-5 (a) (2017).

¹⁶⁷ N.C. GEN. STAT. §75-13 (2017) ("The Attorney General in carrying out the provisions of this Chapter shall have a right to send bills of indictment before any grand jury in any county in which

breaches.¹⁶⁸ Congress has proposed a new federal law, The Personal Data Protection and Breach Accountability Act of 2014,¹⁶⁹ expanding the scope of reporting obligations to certain interstate business entities and criminalizing intentional or willful concealment of data breaches with fines and/or imprisonment of up to five years.¹⁷⁰

With respect to cyber security, Congress has long debated whether reporting cyber incidents should be mandatory¹⁷¹ instead of voluntary.¹⁷² In the meantime, the Department of Defense (hereinafter DoD) recently reformed its information sharing program by promulgating a new regulation enjoining DoD contractors from reporting cyber incidents affecting covered contractor information systems or covered defense information residing on those systems.¹⁷³ Although the regulation does not specify penalties for non-compliance, criminal liability is possible.¹⁷⁴ In addition, the SEC's Division of Corporation Finance issued a warning that "[a]lthough no existing disclosure requirement explicitly refers to cyber security risks and cyber incidents, a number of disclosure requirements may impose an obligation on registrants to disclose such risks and incidents."¹⁷⁵ Thus, non-reporting of cyber incidents could trigger criminal prosecution against the victim as a penalty for breaching the Securities Act of

it is alleged this Chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this Chapter").

¹⁶⁸N.C. GEN. STAT. §75-65 (2017) (imposing a duty to report data breaches).

¹⁶⁹ Personal Data Protection and Breach Accountability Act of 2014, S.1995, 113th Cong. (2013-2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1995/text>.

¹⁷⁰ In contrast to the crime of misprision, which requires active concealment of a federal crime, concealing of data breaches by the entities who have a duty to report such incidents is equivalent to a failure to report data breaches.

¹⁷¹ See The Cybersecurity Act of 2010, S. 773, 111th Cong. (2010) §§ 3-4 (placing significant reporting requirements in relation to cyber security breaches on private sector entities, particularly critical infrastructure information systems); see also *The Cybersecurity Debate: Voluntary Versus Mandatory Cooperation Between the Private Sector and the Federal Government*, JONESDAY2-3, (July 2013), <http://www.jonesday.com/files/Publication/49c491ff-7f05-4932-9287-2c07a131e83d/Presentation/PublicationAttachment/216181fe-3cff-4535-9232-2c603c8bf48b/Cybersecurity%20Debate.pdf>.

¹⁷² See Protecting Cyber Networks Act (PCNA), H.R. 1560, 114th Cong. (2015), the National Cybersecurity Protection Advancement Act of 2015 (NCPAA), H.R. 1731 114th Cong. (2015), and the Cyber Security Information Act of 2015 (CISA), S. 754, 114th Cong. (2015) (all of them place rules and procedures regarding the voluntary reporting of cyber security breaches on the private sector). However, this legislation "does not prevent agencies, such as DOD and the Intelligence Community from imposing separate reporting requirements on a regulatory and contractual basis." See Cassidy & Terenzio, *supra* note 107.

¹⁷³ See 10 U.S.C. §391 (2017); 32 C.F.R. §236 (2017).

¹⁷⁴ Chris Page, an attorney with Kaufman & Canoles specializing in Government Contracts, argues that "[t]he scope of responsibility and potential liability is uncertain, but could include criminal or civil action, negative past performance ratings, reduced profits or award fees, or termination of contract." *Sera-Brynn and Kaufman & Canoles discuss DFARS and cybersecurity safeguards for government contractors*, SERA-BRYNN (Nov. 16, 2015), <https://sera-brynn.com/sera-brynn-and-kaufman-canoles-discuss-dfars-and-cybersecurity-safeguards-for-government-contractors/>.

¹⁷⁵ DIV. OF CORP. FIN., SEC, CF DISCLOSURE GUIDANCE: TOPIC NO. 2 (October 13, 2011), <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>.

1933.¹⁷⁶ Besides the US, the European Union adopted the Network and Information Security Directive which compels victims to report cyber incidents,¹⁷⁷ and its E-privacy Directive puts those who fail to report data breaches to national authorities at risk of criminal sanction.¹⁷⁸

Considering this recent shift to mandatory reporting duties, it is important to identify relevant moral principles and consider how they are or are not reflected by current laws.

When considering a victim-reporter, the culpability factors “clear knowledge about the crime” and “no harm to the individual being reported” both raise the immorality of non-reporting issue. In addition, unlike a third-party reporter, reporting of crime by a victim generally does not entail any information-gathering cost,¹⁷⁹ thereby increasing the immorality of non-reporting.

However, crime reporting by a victim does involve a particular risk of harm to the reporter mainly caused by the publication of the crime reported. Harms to reporters include: the risk of reputational damage, which can affect business outcomes;¹⁸⁰ the risk of penalties for not complying fully with administrative requirements;¹⁸¹ the risk of shareholder suits for mismanagement

¹⁷⁶ See Securities Act of 1933 § 24, 15 U.S.C. § 77x (2012) (“Any person who willfully . . . omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than \$10,000 or imprisoned not more than five years, or both.”).

¹⁷⁷ See Art. 14 of the Directive 2016/1148, of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, 2016 O.J. (L 194) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.194.01.0001.01.ENG&toc=OJ:L:2016:194:TOC.

¹⁷⁸ See Art. 15a. of the Directive 2002/58/EC, of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, 2002 O.J. (L 201) 37, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0058:20091219:EN:HTML>.

¹⁷⁹ When the harm caused by crime manifests, a victim could detect crime without any cost. However, depending on the type of crime, the time gap between its commission and the manifestation its of harm differs. For instance, crimes such as cyber-incidents or data breaches have a longer time gap. Those criminals use highly complicated, covert tactics to cause more harm over an undetected period. Thus, for a victim to detect crime earlier and to minimize the harm, a victim must expend resources to gather and analyze appropriate information. However, even in this situation, the cost of reporting should still be lower for a victim-reporter than a third-party reporter because victims often have more intimate knowledge of the crime.

¹⁸⁰ See Emily R. Caron, *Target Data Breach and NIST Cybersecurity Framework Raise Tough Insurance Questions*, LATHROP & GAGE LLP 1-2, (Feb. 18, 2014), https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/2014/Media_Privacy_Beyond.pdf.

(“Analysts estimate that Target’s profit per share slumped 47 percent in the three months through January, the biggest quarterly decline since 2006. Earnings for the financial year slid 32 percent, making this the worst annual performance since at least 1987.”); see also *supra* note 96.

¹⁸¹ *Cyber Security Task Force: Public-Private Information Sharing*, BIPARTISAN POLICY CENTER, July 2012, at 15, <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/Public-Private%20Information%20Sharing.pdf>. (“Some companies are reluctant to disclose information about data breaches to the federal government for fear of FTC enforcement action. . . . An FTC enforcement action following a security breach is very costly for companies. From beginning to

or by the persons whose information was compromised;¹⁸² and the risk of abuse of publicized information by would-be intruders.¹⁸³

Thus, to minimize these harms and to satisfy the highest immorality requirement, guiding principles require that the crime reported by a victim should not be publicized.

However, deviations are permitted when there are no other means to expose the crime or when the good caused by reporting the crime (or the harm mitigated by reporting) together outweigh the harm to a reporter. That is, crimes reported by victims should be publicized only in exceptional circumstances. Furthermore, victim-reported crimes should only be published to a limited extent, scope, and purpose, and should be buttressed by penalties for abuse of released information.

For instance, in the case of DoD contractors' duty to report cyber incidents, the regulation obliges government to "protect against the unauthorized use or release of information obtained from the contractor (or derived from information obtained from the contractor) under this part that includes contractor attributional/proprietary information"¹⁸⁴ and "[i]n making an authorized release of such information, . . . [to] implement appropriate procedures to minimize the contractor attributional/proprietary information . . . [and] to include *only that information that is necessary* for the authorized purpose(s) for which the information is being released."¹⁸⁵ In addition, the law "*prohibits* the dissemination *outside the DoD* of information obtained or derived through such procedures that is not created by or for the Department *except with the approval* of the contractor providing such information."¹⁸⁶ Even for requests made under the Freedom of Information Act, sensitive, nonpublic information will be protected by asserting applicable exemptions.¹⁸⁷ Furthermore, the regulation allows information disclosure outside DoD only to specific entities or for specific

end, the investigation and enforcement action can take over two years and cost millions of dollars in legal and consulting fees. Further, the FTC often imposes obligations on the company that last decades into the future."); *see also supra* note 97.

¹⁸² *See Caron, supra* note 179, at 1. The Target case has spawned nearly 70 class action lawsuits. *See id.*; *see also supra* notes 98 and 99.

¹⁸³ *See Music Grp. Macao Commercial Offshore Ltd. v. Foote*, No. 14-CV-03078-JSC, 2015 WL 3993147, at *5 (N.D. Cal. June 30, 2015) ("Westbrook identifies categories of information that an individual may use to perpetrate a cyber attack, including: (1) identification of a particular vulnerability in a company's systems or software; (2) knowledge of the software or vendor of security software used; and (3) "social engineering"—i.e., gaining the trust of a company insider to, in turn, gain access to the company's software.").

¹⁸⁴ 32 C.F.R. § 236.2 (2017). (Attributional/proprietary information is "information that identifies the contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the contractor(s) (e.g., program description, facility locations), personally identifiable information, as well as trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company.").

¹⁸⁵ 32 C.F.R. § 236.4 (l) (2017).

¹⁸⁶ National Defense Authorization of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 941(C)(3), 126 Stat. 1632, 1890 (2013).

¹⁸⁷ 32 C.F.R. § 236.4 (p) (2017).

purposes.¹⁸⁸ When information is disclosed to a support service contractor, strict use and non-disclosure rules apply with possible criminal and civil penalties for breaches.¹⁸⁹

Such protections are designed to boost crime reporting by victims regardless of whether the reporting is mandatory or voluntary.¹⁹⁰ However, for the duties to report under threat of criminal sanctions, protections against publication should be mandatory and underpinned by serious penalties against unauthorized publication in order to minimize harm to the victim-reporter. Only then can one satisfy the highest immorality requirement. In contrast, for voluntary reporting, those protections should be encouraged or required but with less severe consequences for unauthorized publication if the reporting was anonymous and voluntary. After all, this type of report carries the reporter's implied consent.

However, unlike the duty to report cyber incidents, laws regulating the duty to report data breaches do not provide such protections even when non-compliance with the duty is criminalized.¹⁹¹ Though it does not reflect the principle I suggested, one can justify this deviation from non-protection when reporting achieves more social good than harm, and when such non-protection does not cause additional harm to the reporter.

Retributive and deterrent good caused by reporting are higher in data breach reporting than in cyber incident reporting, assuming the same attack is used against an institution. Originally, cyber incidents only harm the interest of the entity-victim against whom a cyber attack is committed. In contrast, a data breach harms the entity whose system is breached and individual customers whose data is compromised. In addition, reporting cyber incidents might deter similar subsequent attacks against other entities. Dissimilarly, though, reporting data breaches will discourage both subsequent attacks and the abuse of compromised personal information.

In addition, protections from publication of the data breaches reported to government authorities will not decrease harm to the reporter. With respect to a victim-reporter, more so than for a third party or offender reporter, harm to the reporter is based on the publication of the crime reported. Therefore, the absence of alternative means to expose the crime affects the weight of the harm to the reporter factor. When alternative means to expose crime exist, the crime will be publicized by that alternative sources even if the government does not. Furthermore, to maximize deterrence (i.e., good caused by reporting), entity-

¹⁸⁸ See 32 C.F.R. § 236.4 (m) (1)-(4) (2017).

¹⁸⁹ 32 C.F.R. § 236.4 (m) (5) (2017).

¹⁹⁰ See 6 U.S.C. § 133 (a)(1)(A) (2017) (exempting from disclosure under FOIA “critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems . . .”); see also 32 C.F.R. § 236.6 (2017) (protecting “the [c]onfidentiality of information that is exchanged under the DoD–DIB CS information sharing program . . . to the maximum extent authorized by law, regulation, and policy.”).

¹⁹¹ N.C. GEN. STAT. §75-65 (e1) (2017).

victims must provide direct notice to individual customers whose information has been breached. Laws requiring entity victims to report data breaches to government authorities also dictate such notice to individual customers.¹⁹² This, in turn, intensifies the futility of protection from publication by the government.

Also, to minimize the harm to the reporter, victim-reporters should not face liability stemming from the release of the reported information. A victim reporter should have immunity from enforcement actions by other government agencies prompted by the reporting of information.

According to a DoD regulation, “information obtained from the contractor (or derived from information obtained from the contractor) under this part that is created by or for DoD (including the [cyber incident reporting]) is authorized to be used and released outside of DoD . . . for any other lawful government purpose or activity.”¹⁹³ However, if “any other lawful government purpose or activity” includes enforcement actions initiated by the reported information (even those initiated by other government agencies), it will cause serious harm to the reporter, thereby lowering the immorality of non-reporting. Regarding data breach reporting, while the Identity Theft Protection Act of North Carolina criminalizes non-compliance with the duty to report, it does not provide immunity from administrative liabilities. This harm is an actual risk for a victim reporter, as the cyber incident or data breach reported by a victim proves the victim’s inadequate security system, thereby triggering the FTC’s enforcement actions based on unfair practices under Section 5 of the FTC.¹⁹⁴

However, deviation from the principle of exemption from administrative liabilities should be permitted when reporting is in society’s best interest. Because more good comes from data breach reporting than from cyber incident reporting, this deviation generally will be more difficult to justify for cyber incident reporting duty than for data breach reporting duty.

In addition, it is vital to immunize victim-reporters from civil suits triggered by the release of information derived from the victim’s report. Proposed cyber security laws designed to encourage voluntary cyber incident reporting all provide immunity from such civil actions.¹⁹⁵ However, the DoD regulation

¹⁹² See *Security Breach Notification Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 24, 2017), <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>. (“Forty-seven states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have enacted legislation requiring private, governmental or educational entities to notify individuals of security breaches of information involving personally identifiable information.”); See also *Data Breach Charts*, BAKER HOSTETLER LLP, http://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data_Breach_Charts.pdf.

¹⁹³ 32 C.F.R. § 236.4 (n) (2017).

¹⁹⁴ See *In re ACRAnet, Inc.*, FTC File No. 092 3088, February 3, 2011, <http://www.ftc.gov/os/caselist/0923088/index.shtm>; *In re BJ’s Wholesale Club, Inc.* FTC File No. 042 3160, June 16, 2005, www.ftc.gov/opa/2005/06/bjswholesale.htm.

¹⁹⁵ See *Protecting Cyber Networks Act (PCNA)*, H.R. 1560, 114th Cong. (2015), *National Cybersecurity Protection Advancement Act of 2015 (NCPAA)*, H.R. 1731 114th Cong. (2015); see

mandating crime reporting provides no such protection. Although the DoD regulation does not specify a penalty for non-compliance, protection of a victim reporter is encouraged in order to minimize the harm to the reporter. Stronger penalties for non-reporting necessitate immunity from civil liability. If DoD regulations *criminalize* non-compliance with the duty to report crime, exemption from civil liability will be necessary—not simply encouraged—to justify such criminalization. Concerning data breach reporting, under the Identity Theft Protection Act of North Carolina, an individual customer injured as a result of a violation of the act has a right to take private action.¹⁹⁶ In light of secondary victims of data breaches whose information is misappropriated, as analyzed above, the good caused by reporting data breaches is stronger than good caused by reporting cyber incidents. This benefit could outweigh the harm to a reporter caused by civil liability and, accordingly, justifies deviation from the principle of civil liability exemption.

V. CONCLUSION

The aim of this paper is to suggest a theoretical framework to comprehend and refine the current state of laws that create a duty to report crime and carry criminal penalties for failing to report. For those laws to be justified under the culpability analysis of this paper, the failure being criminalized must satisfy the highest culpability. Thus, this study identifies circumstantial factors (i.e., culpability factors) governing the culpability of non-reporting. The reporter's position with respect to the crime reported—offenders, third parties, or victims—significantly varies the culpability of non-reporting. By categorizing duties to report based on these positions, I propose substantive principles and corresponding modifications to each category of laws to enhance their justifiability. Deviations from the suggested principles can be justified for certain reporting duties, but only if it properly reflects a different level of culpability.

also Cyber Security Information Act of 2015 (CISA), S. 754, 114th Cong. (2015) (Essentially protecting entities from liability if they have acted in good faith compliance with the law).

¹⁹⁶ N.C. GEN. STAT. § 75-65 (i) (2017).