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## ARTICLES

### A RADICAL COMMUNITY OF AID: A REJOINDER TO OPPONENTS OF AFFIRMATIVE DUTIES TO HELP STRANGERS

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#### INTRODUCTION

The use of law to coerce strangers to help one another always has been suspect in American legal thought.<sup>1</sup> Laws that attempt to balance autonomy and a minimally acceptable level of neighborliness<sup>2</sup> by imposing af-

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1. One explanation that has been advanced for the American rejection of affirmative legal duties to assist strangers is that it is rooted in the "extreme individualism typical of Anglo-Saxon legal thought." Jonathan M. Purver, Annotation, *Duty of One Other than Carrier or Employer to Render Assistance to One for Whose Initial Injury He is Not Liable*, 33 A.L.R. 3D 301, 303 (1970), cited in MARY ANN GLENDON, RIGHTS TALK 82 (1991). Professor Glendon responds that this view is "plainly mistaken." *Id.* "[T]here is nothing especially individualistic or Anglo-Saxon about the *origins*" of the presumption against the legal imposition of affirmative duties. *Id.* Rather, "[a]ffirmative legal duties to come to the aid of another were unknown, not only in early English law, but to most other primitive legal systems." *Id.*

2. This Article uses interchangeably the terms "humanitarian," "communal solidarity," "brotherhood," "neighborly," "decent," and "empathic" to refer to the part of social life that requires, or should require, members of society to consider the interests of others.

firmative duties to help others are unpopular because they interfere with personal autonomy and the American "obsession with privacy."<sup>3</sup> Even the most well-intentioned balance seems to prefer soulless individualism to creeping involuntary servitude and "unforeseen partnership."<sup>4</sup> Our freedom to ignore those in need of immediate aid, however, may be a sign that we are "*too free* to consult the general good,"<sup>5</sup> or at least too free to acquiesce in our neighbors' misery.<sup>6</sup>

This "crescendo of self-centeredness"<sup>7</sup> downplays the cramped view of communal obligations that the rejection of a duty to aid others implies. By elevating rights over responsibilities, critics have argued,<sup>8</sup> the law discourages the positive acts of communal solidarity that are part and parcel of citizenship.<sup>9</sup> Adherents of the view that good citizenship entails

3. Numerous commentators have noted the close relationship between privacy and emotional isolation. See, e.g., Charles O. Gregory, *The Good Samaritan and the Bad*, in *THE GOOD SAMARITAN AND THE LAW* 23, 33-34 (James M. Ratcliffe ed., 1966) [hereinafter *THE GOOD SAMARITAN*] (citing Margaret Mead, *Our Right to Privacy*, REDBOOK, Apr. 1965, at 15) (noting an obsession with privacy that results in mass anonymity, a lack of caring, and the disappearance of neighborliness); Joseph Gusfield, *Social Sources of Levites and Samaritans*, in *THE GOOD SAMARITAN*, *supra* at 183, 191 ("Indifference is the other side of privacy."); *id.* at 196 ("Perhaps some of our legal tenderness toward nonfeasance is the obverse of our very virtuous concern for the privacy of individuals."); Alan Barth, *The Vanishing Samaritan*, in *THE GOOD SAMARITAN*, *supra* at 159, 166 ("[I]t is a stubborn American demand for privacy that keeps us isolated from each other—encapsulated, if you like—in the very midst of our crowded metropolitan centers.").

4. Joseph Conrad's Marlow, referring to his alliance with Kurtz, described how strange it was that he "accepted this unforeseen partnership, this choice of nightmares forced upon me." JOSEPH CONRAD, *HEART OF DARKNESS* 69 (Robert Kimbrough ed., rev. ed. 1971).

5. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 56 (1969). In early American political thought, the welfare of the people was identical to the public good. In a free government, therefore, there could be no fear "that the people might be *too free* to consult the general good." *Id.*

6. One observer, a psychiatrist, describes the psychic maneuvers people must perform to avoid confronting a "Hegelian dilemma of thesis—neighborly love—and anti-thesis—acquiescence in his misery—without the confluence of psychic synthesis—a man who can stand being himself." Lawrence Z. Freedman, M.D., *No Response to the Cry for Help*, in *THE GOOD SAMARITAN*, *supra* note 3, at 171, 178.

7. ROBERT WUTHNOW, *ACTS OF COMPASSION: CARING FOR OTHERS AND HELPING OURSELVES* 18 (1991). Wuthnow characterizes the "me generation" of the 1970s as the search for self-identity, inner peace, and security; the 1980s as the "decade of greed," carrying the slogan "Whoever dies with the most toys wins"; and the 1990s as the "decade of freedom [to buy and sell]," an international vindication of the American way of life. *Id.*

8. GLENDON, *supra* note 1, at 76.

9. See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 44 (1990). Shklar notes that "passive injustice" is often as pernicious as the acts of the "normally unjust man." *Id.* at 41. Passive injustice is evident not only in spectacular examples, like Kitty Genovese's neighbors' indifference to her

communal obligations include Cicero,<sup>10</sup> Plato,<sup>11</sup> Mill,<sup>12</sup> Bentham,<sup>13</sup> Darwin,<sup>14</sup> and Kant.<sup>15</sup> Together they intimate that Jesus' admonition in

murder, *see infra* note 94, but also in "small daily injustices, even for such harmless motives as not wanting to make a fuss, to be a busybody, or to disturb the peace." SHKLAR, *supra* at 43.

It may be naive to expect a sense of communal solidarity in a capitalist society, where moral relations and moral restraint are absent. This is largely because of the lack of sympathetic identification and mutual aid that rests on a perception of common humanity, otherwise known as "reciprocity." *See generally* WILLEM BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* (1916), *cited in* *CRIMINAL LAW AND ITS PROCESSES* 146 (Sanford H. Kadish & Stephen J. Schulhofer eds., 5th ed. 1989).

10. *See* SHKLAR, *supra* note 9, at 40-41 (citing CICERO, *THE OFFICES*, bk. 1, chs. 7, 9 & 11, bk. 2, ch. 7 (Walter Miller trans., 1921) ("Who does not prevent or oppose wrong when he can, is just as guilty of wrong as if he deserted his country.")).

11. 2 PLATO, *LAWS*, bk. 9, at 880B-881D (R.G. Bury trans., 1984) (contending that the law should penalize bystanders to violent assaults who fail to aid the victim).

12. JOHN STUART MILL, *ON LIBERTY* 12 (David Spitz ed., 1975) ("There are . . . many positive acts for the benefit of others, which he may rightfully be compelled to perform . . . such as saving a fellow creature's life.").

13. Jeremy Bentham, *Specimen of a Penal Code*, in *I WORKS* 164 (photo. reprint 1962) (J. Bowring ed., 1843) (proposing more duties of beneficence than the common law then recognized).

14. Darwin was "almost certain" that, because "man is a social animal," he would "inherit a tendency to be faithful to his comrades" and "be willing to defend, in concert with others, his fellow men; and would be ready to aid them in any way, which did not too greatly interfere with his own welfare or his own strong desires." CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* 480-81 (1859).

15. *See* IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS: TEXT AND CRITICAL ESSAYS* 55 (Robert P. Wolff ed. & Lewis W. Beck trans., 1969) ("For the ends of any person, who is an end in himself, must as far as possible also be my end, if that conception of an end in itself is to have its full effect on me."). Earlier in the same work, Kant observes:

[W]ith regard to meritorious duty to others, the natural end which all men have is their own happiness. Humanity might indeed exist if no one contributed to the happiness of others, provided he did not intentionally detract from it; but this harmony with humanity as an end in itself is only negative rather than positive if everyone does not also endeavor, so far as he can, to further the ends of others.

*Id.* at 48-49.

For a thorough critique of the Kantian perspective on the duty to aid strangers, see Barbara Herman, *Mutual Aid and Respect for Persons*, 94 *ETHICS* 577 (1984); *id.* at 600-03 (specifically interpreting the another's-end-as-my-end language); *see also* James D. Wallace, *The Duty to Help People in Distress*, 29.2 *ANALYSIS* 33 (1968); MARCUS G. SINGER, *GENERALIZATION IN ETHICS* 269-70 (1961) (explaining that everyone in need of help desires the aid of others because no one could favor not being helped if in need).

Kant applies to the rescue dilemma his well-known categorical imperative that persons act "only according to that maxim by which you can at the same time will that it should become a universal law." *See* KANT, *supra* at 44. Kant writes that anyone who wills that no one need contribute to the welfare or "assistance in time of need of another," possesses a will in "conflict with itself, since instances can often arise in which he would need the love and sympathy of others." *Id.* at 47.

The English utilitarian Henry Sidgwick found Kant's logic flawed:

[E]ven granting that every one, in the actual moment of distress, must necessarily wish for the assistance of others; still a strong man, after balancing the chances of life, may easily think that he and [others like him] have more to gain, on the whole, by the general adoption of the egoistic maxim; benevolence [is] likely to bring them more trouble than profit.

the Good Samaritan parable,<sup>16</sup> to go and do as the Samaritan did,<sup>17</sup> should be perceived as duty, not charity. Because community membership inevitably involves dependency and vulnerability, these exceptional voices suggest that "the claim of each of us on the resources of the others is equal," even if we are not equally dependent in matters of strength, wealth or usefulness.<sup>18</sup>

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HENRY SIDGWICK, *THE METHODS OF ETHICS* 389 (photo. reprint 1981) (7th ed. 1907); see also Wallace, *supra* at 37-38 (arguing that a person's duty to help others in distress is not dependent on whether one is willing to agree that everyone may refuse to help him when he is in danger).

16. The parable of the Good Samaritan was Jesus' answer to a lawyer's question, "Who is my neighbor?," asked for purposes of clarifying the scope of the new commandment, "love thy neighbor as thyself." *Luke* 10:25-37. In the parable, Jesus described the reactions of three men upon finding a victim who had been beaten, robbed, stripped, and left for dead by the side of the road. After a priest and a Levite—a man from one of the quasi-priestly castes—walked by and refused to offer the victim assistance, a lowly Samaritan bound the victim's wounds, took him to an inn, prepaid his bill, and offered him aid and succor. *Id.*; see JOEL FEINBERG, *HARM TO OTHERS* 126 (1984) (comparing the omissions of a "bad samaritan" with the acts of the Good Samaritan of the parable); see also Herbert Fingarette, *Some Moral Aspects of Good Samaritanism*, in *THE GOOD SAMARITAN*, *supra* note 3, at 213, 217-18 (explaining that the people of Samaria—Samaritans—were "despised and hated by the Jews of the time as being uncouth, unclean, immoral, and heretical").

Joel Feinberg suggests that the biblical Samaritan's conduct was "splendid" rather than merely "good." FEINBERG, *supra* at 133. Cf. WUTHNOW, *supra* note 7, at 175 (discussing biblical interpreter's view that the Samaritan's compassion is "unexpected, costly, and totally without explanation") (citing KENNETH E. BAILEY, *THROUGH PEASANT EYES* 56 (1980)). This would be particularly true today. See Norval Morris, *Compensation and the Good Samaritan*, in *THE GOOD SAMARITAN*, *supra* note 3, at 135 ("To pick up the injured man, to put him in your Detroit donkey, and to take him to a hotel and pay for his board, committing him to the care of the hotel proprietor, is, in our complex social organization, an exercise in the wildest imaginings.").

That the victim's assailants caused the victim's harm is undisputed, as is the assertion that the priest and the Levite acted reprehensibly. The debatable question is whether the priest and the Levite's failure to aid the victim should be "illegal"; that is, whether "[m]erely being a human being is enough to ground a duty." FEINBERG, *supra* at 140. One commentator has noted that according to the *Book of Leviticus*, which set forth the applicable religious law followed by the priest and the Levite, their actions were perfectly proper. Freedman, *supra* note 6, at 180. Another has noted that "the Christian commandment has never been the law." THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 157 (1983). While "love thy neighbor" is considered a commandment according to *Matthew* 22:34 and *Mark* 12:28, *Luke* 10:25 suggests that it is not a commandment, but instead a moral ideal that leads to perfection or eternal life. See Antony M. Honoré, *Law, Morals and Rescue*, in *THE GOOD SAMARITAN*, *supra* note 3, at 225, 229-30.

For a discussion of the role of the Good Samaritan parable in both formal and informal American education, see WUTHNOW, *supra* note 7, at 10, 157-87.

17. W.H. Auden believes that "[y]ou cannot tell people what to do, you can only tell them parables." W.H. Auden, *Art and Psychology*, in *THE ARTS TO-DAY* 18 (Geoffrey Grigson ed., 1935).

18. Herman, *supra* note 15, at 591-92. Professor Herman states:

If it turns out that I am often in a convenient position to help, then I must. I do exactly what I ought to do, and so no special moral merit is earned. I am no more virtuous than someone genuinely prepared to help whose encounters with those needing help are less

Contemporary sociologist Robert Wuthnow adds to this dialogue his studies, which challenge the assumption that individualism and altruism are antagonistic.<sup>19</sup> Much volunteer work, for example, "require[s] only a level of giving that does not conflict with our needs and interests as individuals."<sup>20</sup> Helping others in need thus can "provide us with the immediate gratification of emotional fulfillment," and supply "images of intimacy, warmth, personal freedom, and the nurturing womb of small communities."<sup>21</sup> Wuthnow's studies support his conclusion that those who claim to be most intensely committed to self-realization and material pleasure are also most likely to value helping others.<sup>22</sup>

Despite the arguments of many influential critics, the American reluctance to impose a legal duty to help others "shows remarkable staying power."<sup>23</sup> Apparently fed up with a view so pessimistic and unsatisfying from an imperiled's standpoint (if not from that of a disinterested bystander), Vermont,<sup>24</sup> Rhode Island,<sup>25</sup> and Wisconsin<sup>26</sup> have adopted

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frequent . . . If it is someone's misfortune to need help frequently (suppose through bad fault and the like), he does not use up his stock of mutual aid and has a claim on the help of others that is undiminished by his past withdrawals.

*Id.* at 596-97. Professor Herman admits that this proposition "is complicated when the needy person requires constant help from the same source." *Id.* at 597 n.31.

19. See WUTHNOW, *supra* note 7, at 20-23. One of Wuthnow's surveys on values in American culture demonstrates that those who highly valued "being able to do what you want" showed a higher level of altruistic values than those who responded that "being able to do what you want" was not very important to them. *Id.* at 22.

20. *Id.* at 281.

21. *Id.*

22. *Id.* at 22.

23. GLENDON, *supra* note 1, at 81.

24. The Vermont statute, enacted in 1967, states:

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

VT. STAT. ANN. tit. 12, § 519(a) (1973).

Although this provision is located in a title of the Vermont statutes which relates to court procedure, § 519(c) imposes a possible fine of \$100 for willful violations of § 519(a). For this reason, one commentator has concluded that it is a criminal statute. See Lon T. McClintock, Note, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 VT. L. REV. 143, 167-70 (1982). Vermont might have an incentive to construe the statute as a civil statute to avoid the customary protections due a criminal defendant. However, Vermont Supreme Court precedent, the absence of administrative action in enforcing the statute, and the legislative history all indicate that the law is criminal, not civil. *Id.* But see Letter from Mark S. Ryan, Deputy State's Attorney, Franklin County, Vt., to author (Nov. 20, 1991) (on file with author) (concluding that because § 519(b) protects good Samaritans from exposure to civil liability, its purpose is primarily civil).

25. The Rhode Island statute, enacted in 1984, provides:

Any person at the scene of an emergency who knows that another person is exposed to or

criminal statutes that impose an affirmative duty to help those in grave danger. Minnesota<sup>27</sup> has imposed civil liability for failure to rescue under identical circumstances. Modeling their legislation on European precursors,<sup>28</sup> this minority of states imposes liability for knowingly fail-

has suffered grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars (\$500), or both.

R.I. GEN. LAWS § 11-56-1 (Supp. 1991).

Rhode Island enacted another statute that applies only to sexual assaults:

Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault in [sic] taking place in his/her presence shall immediately notify the state police or the police department of the city or town in which said assault or attempted assault is taking place of said crime.

R.I. GEN. LAWS § 11-37-3.1 (1990).

26. The Wisconsin statute, enacted in 1983, provides, in pertinent part:

Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

....

A person need not comply with this subsection if . . .

1. Compliance would place him or her in danger.
2. Compliance would interfere with duties the person owes to others[, or]
3. [A]ssistance is being summoned or provided by others.

WIS. STAT. ANN. §§ 940.34(2)(a),(d) (West Supp. 1991).

27. The Minnesota statute states:

Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanor.

MINN. STAT. ANN. § 604.05.1 (West 1988).

Minnesota also imposes a civil duty to assist disabled persons, which requires, *inter alia*, that anyone "who finds a disabled person shall make a reasonable effort to notify a law enforcement officer," see MINN. STAT. ANN. § 145.855 (West 1989), and to assist shooting victims, see MINN. STAT. ANN. § 609.662 (West Supp. 1992).

28. Belgium, Czechoslovakia, Denmark, France, Germany, Holland, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Rumania, Russia, Switzerland, and Turkey impose criminal penalties for failure to engage in "easy rescue." See Alexander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN*, *supra* note 3, at 91 & n.3; John P. Dawson, *Rewards for the Rescue of Human Life?*, in *THE GOOD SAMARITAN*, *supra* note 3, at 63, 70-71 (canvassing European legislation); Teresita Rodriguez, Note, *I am My Brother's Keeper: A Trend Towards Imposing a General Duty upon a Bystander to Assist a Person in Danger*, 26 B.C. L. REV. 497, 498 n.19, 519-22 (1985); Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 633 (1952) (American, French, and Soviet law); Recent Cases, *French Statute Imposing Criminal Liability for Voluntary Failure to Assist Persons in Peril Applied to Physicians*, 63 HARV. L. REV. 886-88 (1950); see also André Tunc, *The Volunteer and the Good Samaritan*, in *THE GOOD SAMARITAN*, *supra* note 3, at 43, 46-62 (focusing primarily on the French experience). Among these countries, the Netherlands first incorporated the duty to rescue into legislation in 1866. *Id.* at 46.

ing to undertake "easy rescue." Florida,<sup>29</sup> Massachusetts,<sup>30</sup> Ohio,<sup>31</sup> Rhode Island,<sup>32</sup> Washington,<sup>33</sup> and Wisconsin<sup>34</sup> have established slightly

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Portugal imposes civil liability on any person who fails to perform easy rescue of the victim of a third-party attack. Rudzinski, *supra* at 111-12. Czechoslovakia imposes a broader civil liability that reaches both a failure to notify authorities of danger to health or property and a failure to intervene actively if necessary to prevent that danger if it is possible without serious danger to the rescuer or persons close to the victim. *Id.*

European rescue laws are stricter than their American counterparts. In France, for example, the failure to render easy aid to a stranger can lead to the imposition of a maximum of five years incarceration plus a fine of up to 50,000 francs. Article 63 of the Criminal Code, introduced by decree of June 25, 1945, cited in Dawson, *supra* at 71 n.15. See also Rudzinski, *supra* at 110 n.56 (citing a French case in which a father-in-law received a three-year sentence for walking away from his son-in-law who had fallen through ice into a deep canal).

It is debatable whether broader imposition of liability indicates a society with more or less altruism. On one hand, greater liability indicates society's heightened preference for altruism, but it also expresses skepticism about the existence of altruism. After all, an altruistic culture would not need a law that coerces altruism. According to Professor Landes and Judge Posner, broad liability discourages altruism, even though society's intent is to encourage it. William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 125-26 (1978).

29. FLA. STAT. ANN. § 794.027 (West 1992) (mandating punishment of people who observe the crime of sexual battery, if they are aware that the crime has been committed, can seek assistance from a law enforcement officer, and fail to seek such assistance despite the lack of any threat of physical violence).

30. The Massachusetts law provides:

Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

MASS. ANN. LAWS ch. 268, § 40 (Law Co-op. 1992).

31. OHIO REV. CODE ANN. § 2921.22(A) (Anderson Supp. 1991) ("[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.").

32. Rhode Island classifies the failure to render easy aid as a petty misdemeanor. Violators are "subject to imprisonment for a term not exceeding six (6) months or by [sic] a fine of not more than five hundred dollars (\$500), or both." R.I. GEN. LAWS § 11-56-1 (Supp. 1991). For failure to report the crimes of "sexual assault, murder, manslaughter or armed robbery," Rhode Island also imposes a maximum jail sentence of six months, but sets the fine at a minimum of \$500 and a maximum of \$1000. R.I. GEN. LAWS § 11-1-5.1 (Supp. 1991). A separate provision addresses the failure to report first-degree sexual assault or attempts to commit the same. See R.I. GEN. LAWS § 11-37-3.1 (Supp. 1991). Failure to report is a misdemeanor punishable by imprisonment for not more than one year and/or a fine of not more than \$500. R.I. GEN. LAWS § 11-37-3.3 (Supp. 1991).

33. In Washington, it is a gross misdemeanor punishable by up to one year in prison and a \$5000 fine if the offender who witnessed the actual commission of or preparation for a felony involving violence or threat of violence fails to make a report to authorities. WASH. REV. CODE ANN. §§ 9.69.100, 9.92.020 (West 1988).

34. See *supra* note 26.

more stringent criminal penalties<sup>35</sup> for the failure to report the commission of a serious crime.<sup>36</sup> Although the laws are rarely invoked,<sup>37</sup> they not only encourage a climate of increased personal security,<sup>38</sup> but they also betray a view of community, solidarity, and humanity that is worth aspiring toward and expressing by law.<sup>39</sup>

This Article criticizes the common notion that affirmative duties are intolerable because they threaten autonomy. It concludes that our dedication to autonomy is less vigilant, and restrictions of it are less threatening than most observers suggest. Part One sets forth and criticizes the law of criminal omissions, and considers why bystanders often "omit"; that is, fail to intervene on behalf of strangers. Viewing the problem through a well-publicized barroom rape, Part Two presents the minority states' provisions. Part Two also discusses the results of my letter survey of supervising prosecutors in the jurisdictions that have duty-to-aid and duty-to-rescue laws<sup>40</sup> and analyzes the few cases which have been litigated under these statutes. Part Three attempts to demonstrate that the prevailing law of omissions no longer achieves a desirable balance between the two coveted values of autonomy and security by discussing: (1) the need to supplement overburdened professional rescue mecha-

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35. See *infra* chart and accompanying text at 23.

36. In 1983, Pennsylvania proposed a much harsher penalty than any state has yet enacted, proposing to make the failure to report a first-degree or second-degree felony a third-degree felony carrying a maximum of seven years imprisonment. See Susan J. Hoffman, Note, *Statutes Establishing a Duty to Report Crimes or Render Assistance to Strangers: Making Apathy Criminal*, 72 KY. L.J. 827, 839 nn. 78-79, 846 n.124 (1983-1984). One state, Colorado, expressly requires the reporting of crimes, but it attaches no legal consequences for failure to report. COLO. REV. STAT. ANN. § 18-8-115 (West 1990) ("It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities."). See *infra* text accompanying note 108 (chart illustrating various affirmative duties and attendant penalties for noncompliance); *infra* notes 140-52 and accompanying text (discussing the crime of misprision of felony, on which the Florida, Massachusetts, Ohio, Pennsylvania, Rhode Island, and Wisconsin proposals were modeled).

37. In written response to a questionnaire that I sent to 387 prosecutors in the eight states that impose duties to render easy aid or duties to report serious crimes, see *supra* notes 24-33 and accompanying text, none of the 139 prosecutors who responded could recall filing a complaint under the relevant statute. Letters on file with author.

38. See Anthony D. D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U. L. REV. 798, 805 (1975) (arguing that duty-to-rescue laws "need not rest upon moral considerations," rather, they may arise out of self-interest or "pure Hobbesian expediency").

39. See SIR JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 159-60 (R.J. White ed., 1967) ("Law cannot be better than the nation in which it exists, though it may and can protect an acknowledged moral standard, and may gradually be increased in strictness as the standard rises.").

40. See *supra* notes 24-36 and accompanying text.



nisms (police, fire, and ambulance services) by imposing duties on citizens to alert rescuers to danger; (2) the way in which increased private threats to persons and their property have compromised settled notions of freewheeling autonomy; and (3) the extent to which existing laws and standards in a variety of public and private settings impose substantial affirmative duties on strangers. Although expanded duties will not be easy to enforce, and their deterrent effect is unproven, this Article submits that more than a conclusory reference to "autonomy" should be required to invalidate positive duties and the normative choices they represent.

## I. THE LAW OF CRIMINAL OMISSIONS

### A. Strangers and "Special Relationships"

There are two theories of criminal omissions in American law. Under the first, the criminal law punishes only those who, at the time of the omission, were under a legal duty to act.<sup>41</sup> Legal duty is defined by tort<sup>42</sup> or contract<sup>43</sup> law, by statute,<sup>44</sup> or by virtue of a special relationship, such

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41. See, e.g., MODEL PENAL CODE § 2.01(3) (Official Draft 1985) ("Liability for the commission of an offense may not be based on an omission unaccompanied by action unless . . . a duty to perform the omitted act is otherwise imposed by law."); see generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.3, at 202-12 (2d ed. 1986).

42. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373-85 (5th ed. 1984 & Supp. 1988); RESTATEMENT (SECOND) OF TORTS § 314 (2d ed. 1965) (even those who are under duty to act for protection of others must or should be aware of the need for their intervention before liability attaches); *id.* § 314A (special relationship exists between common carrier and its passengers; innkeeper and guests; possessor of land and invitees; and those who undertake to help another thus depriving others from doing same); *id.* § 314B (master-servant relationship gives rise to duty to protect employee); *id.* § 315 (duty to protect against acts of third parties when special relationship between third party and actor or between actor and person injured by third party); *id.* § 316 (duty of parent to control minor child); *id.* § 317 (duty of master to control conduct of servant); *id.* § 318 (duty of possessor of land or chattels to control conduct of licensee); *id.* § 319 (duty of those in charge of person having dangerous propensities); *id.* § 320 (duty of person having custody of another to control conduct of third persons); *id.* § 321 (duty to act when prior conduct of actor is found to be dangerous to another); *id.* § 322 (duty to aid another harmed by actor's conduct); *id.* § 323 (negligent performance of undertaking to render services, whether gratuitously or for consideration); *id.* § 324 (duty of one who takes charge of another who is helpless).

43. See Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 557-58 & nn.35-36 (1988); Paul H. Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101, 115 (1984). See also *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962) (holding that trial court committed plain error when it failed to instruct the jury to decide whether long-term babysitter had contract-based legal duty to care for infant).

44. For a discussion of liability based on public-welfare statutes, see Rodriguez, *supra* note 28, at 507-11. Typical statutes imposing criminal liability for nonaction include: 50 U.S.C. app. § 462

as marriage or a parent-child relationship. Special relationships, the argument goes, should alert both the potential rescuer and the imperiled to the imperiled's right to be rescued by that rescuer.<sup>45</sup> As Mary Ann Glendon notes, however, "the law's idea of special relationship is not the one that might occur to a person in the street if she were asked what persons she is legally obliged to aid."<sup>46</sup> Service, employment, or economically-oriented relationships are "special," while "one's nephew, one's neighbor (and the neighbor's baby) are 'strangers.'"<sup>47</sup> If a relationship fits within this strained notion of "special," the ommitter may be criminally liable for the full extent of the harm,<sup>48</sup> provided that the prosecution can prove

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(1988) (failure to comply with the provisions of the Military Selective Service Act); I.R.C. § 7203 (1988) (failure to file tax return, supply required information, or pay tax); TENN. CODE ANN. § 39-15-101 (1991) (nonsupport of minor child or disabled spouse or child); CAL. HEALTH & SAFETY CODE §§ 3110, 3125, 3354 (West 1990) (failure to report communicable diseases); CAL. VEH. CODE §§ 20,001-20,004 (West 1971 & Supp. 1992) (hit-and-run/failure to stop at scene of accident).

Texas criminal law, which does not recognize common-law duties, carries the insistence on statutory duty to its extreme. In *Billingslea v. State*, for example, a Texas court upheld the reversal of the conviction of a man whose severe neglect of his 94-year-old mother led to her death. 780 S.W.2d 271 (Tex. Crim. App. 1989) (en banc). He was indicted under a statute that purported to criminalize omissions causing serious injury to elderly individuals. However, the court held that statute could not be the basis of a conviction because it did not allege a statutory duty to care for her.

Noting the Texas legislature's failure to enact a statutory provision imposing a duty on specific persons to care for the elderly, one commentator correctly predicted the invalidation of the criminal omissions statute:

If no one is under a statutory duty to act toward an elderly person, then how can a court choose to prosecute [a son] for the death of [his mother] instead of prosecuting [her] neighbor, or [her] sister, or . . . the Governor? In a jurisdiction like Texas which does not allow common law duties to form the basis for criminal actions, the duty to care for [her] must therefore rest either on all persons alive at her death or on no one, since the duty has not been statutorily assigned to any particular person.

Deborah A. Goodall, *Penal Code Section 22.04: A Duty to Care for the Elderly*, 35 BAYLOR L. REV. 589, 602 (1983), cited in *Billingslea*, 780 S.W.2d at 276.

45. Parent-child, husband-wife, and master-servant relationships, for example, give rise to legal duties to render aid. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK OF CRIMINAL LAW § 26, at 184 (1972). Criminal punishment for all those who breach existing civil duties would, of course, be "preposterous." See Leavens, *supra* note 43, at 552-57, 554 n.17 (discussing attempts to distinguish the scope of civil and criminal liability for omissions).

46. GLENDON, *supra* note 1, at 81.

47. *Id.* at 81, 102.

48. Involuntary manslaughter is the traditional charge when nonaction results in death. See Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 620-21 (1958) (explaining that nineteenth-century England imposed manslaughter liability on neglectful parents whose children died as a result of such neglect). A recent decision of the California Court of Appeal affirmed a woman's conviction for involuntary manslaughter after she met a man in a bar, drove him to her home aware that he was extremely drunk, allowed him to use her bathroom to inject narcotics, then dragged him outside unconscious where he eventually died. The court found that a special relationship arose when "she took him from a public place where others might have taken care to prevent him from injuring

that the omission caused<sup>49</sup> the imperiled's harm.

The second theory, popular among academics<sup>50</sup> but not among legislatures, permits the imperiled to demand the aid of any rescuer who is capable of rendering aid at that moment without incurring risk. This theory requires no prior relationship beyond the parties' common humanity. Those who espouse this view have suggested a number of ways for the law to impose this duty, including criminalization, civil regimes composed of tort and restitutionary remedies, and incentive-based rather than deterrence-based schemes.<sup>51</sup>

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himself, to a private place—her home—where she alone could provide such care.” *People v. Oliver*, 258 Cal. Rptr. 138, 144 (Cal. Ct. App. 1989); see also *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971) (holding that parents were guilty of manslaughter for failing to attend to infected tooth that resulted in their 17-month-old child's death). For instances in which courts have held omissions liable for second-degree murder, see *People v. Burden*, 140 Cal. Rptr. 282 (Cal. Ct. App. 1977) (affirming conviction); *Biddle v. Commonwealth*, 141 S.E.2d 710 (Va. 1965) (reversing conviction). See also LAFAVE & SCOTT, *supra* note 41, § 7.3, at 617 (“[I]f *A* fails to warn or rescue *B*, to whom he owes a duty, desiring to cause him serious bodily injury, or . . . knowing that such an injury is substantially sure to follow, and death to *B* results, *A* is guilty of the murder of *B*.”).

49. For discussions of how omissions to act satisfy the causation requirement in criminal law, see John Kleinig, *Criminal Liability for Failures to Act*, 49 LAW & CONTEMP. PROBS. 161, 174-78 (1986); Christopher H. Schroeder, *Two Methods for Evaluating Duty to Rescue Proposals*, 49 LAW & CONTEMP. PROBS. 181 (1986) (responding to Professor Kleinig); Leavens, *supra* note 43, at 562-83, 590-91; Robinson, *supra* note 43, at 108-11.

50. *E.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 250-51 (1980) (proposing judicially created tort duty of easy rescue from dangerous situations when it can be performed at no significant cost to rescuer); A.D. Woolzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983) (proposing criminal sanctions for failure to assist others who are in danger).

51. While many commentators have proposed the imposition of criminal or civil sanctions on persons who fail to act to aid strangers, a few writers have noted the dearth of incentives to act. See, e.g., Ross A. Albert, Note, *Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85 (1986) (a thoughtful piece canvassing the law of restitution and arguing that successful, nonnegligent rescuers should have a right to compensation from the rescuee for injuries sustained in the rescue). But see D'Amato, *supra* note 38 (suggesting that the problem of nonfeasance should be approached from the perspective of the “Bad Samaritan,” but concluding that failure to rescue is a public wrong, not a private choice, and thus criminal sanctions are more appropriate than tort remedies).

While punishment expresses social condemnation of unacceptable conduct, incentives may work as effectively in altering conduct. For instance, extant systems of public recognition and reward for supererogatory behavior such as the Points of Light Foundation, a government non-profit organization which promotes volunteerism, may have such an effect. See Points of Light Foundation Act, 42 U.S.C. §§ 12661-12664 (Supp. 1990); Exec. Order 12,691, 3 C.F.R. 237 (1990) (establishing the President's Advisory Committee on the Points of Light Initiative Foundation); Mission Statement: Open Letter from the Board of Directors, The Points of Light Foundation; President's Advisory Committee on the Points of Light Initiative Foundation, “Report to the President” (1989).

The Points of Light Foundation has local analogues. For example, the City of Midland, Texas presents the Midland Community Spirit Award to communities that have shown exceptional spirit in sacrificing on behalf of others. Letter from Rick Menchaca, Assistant to City Manager, City of

With the exception of the eight states mentioned above, no state has enacted the minority view into law. In most states, would-be rescuers' duties to strangers are considered self-created or imperfect. Consequently, under the majority view, a rescuer may be morally obligated to aid strangers, but the imperiled has no correlative entitlement to that

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Midland, Texas, to author (Sept. 23, 1991) (on file with author). Police departments may reward individuals who act to prevent crime. See, e.g., Tony Perry, *Protector of Nun Against Robber is Latest Citizen Hero*, L.A. TIMES, Sept. 30, 1991, at B1 (31-year-old man was recommended for a citizen's commendation from the San Diego Police Department after he intervened on behalf of a 74-year-old nun who was struggling with a homeless man trying to steal her purse).

Private philanthropists frequently seek to reward individual acts of heroism. One of the most famous is Andrew Carnegie, who established the Carnegie Hero Fund Commission in 1904, two months after an engineer and a miner lost their lives trying to rescue 176 victims in a mine disaster near Pittsburgh. THE CARNEGIE TRUSTS AND INSTITUTIONS 19 (Sara L. Engelhardt ed., 1981). The bravery of the engineer and miner involved such compassion that Carnegie established the Carnegie Hero Fund Commission (the "Fund"). The Fund was supported by "five million dollars of first collateral five per cent bonds of the United States Steel Corporation," and was intended to apply "[w]henver heroism is displayed by man or woman in saving human life," provided that the heroism occur somewhere in or near the waters of the United States, Canada, or Newfoundland. Andrew Carnegie, *Deed of Trust, Carnegie Hero Fund Commission*, in THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, A MANUAL OF THE PUBLIC BENEFACTIONS OF ANDREW CARNEGIE 115-17 (1919). The Fund provided death or disability benefits to the dependents of heroes who, "following peaceful vocations," are injured or die "in heroic effort to save human life." *Id.* at 115. The trust restricted the recipients' use of the grants and conditioned the continuation of benefits on the recipients' ability to "remain respectable, well-behaved members of the community." *Id.* Community members who were not respectable, well-behaved citizens before committing their heroic acts were to be given a "pardon and a fresh start." *Id.*

The trust not only provided that the hero or the hero's survivors would receive a commemorative medal, but that the Commission also could award "a sum of money," even if the hero was not injured. *Id.* These monetary awards, which are known as "Betterment Benefits," should not be confused with death and disablement benefits, which are paid only when the hero sustains death or injury. The seven types of Betterment Benefits include: business establishment benefits, educational expense awards, health restoration awards, home purchase awards, indebtedness liquidation, living expenses or pensions, and "miscellaneous aids." *Method of Distribution of Pecuniary Awards, id.* at 120-22.

The Commission carefully distributes and maintains post-distribution control over the awards. See *id.* As of 1990, the Commission had reviewed 65,479 rescue acts, presented the Carnegie Medal for Heroism to 7511 persons (approximately 20% posthumously), and awarded grants totaling nearly \$19 million. CARNEGIE HERO FUND COMMISSION, 1990 ANNUAL REPORT 46 (1990). "No bogus heroes," cautioned Carnegie from the start; recipients "[m]ust be [the] real thing." JOSEPH F. WALL, *ANDREW CARNEGIE* 896 (1970). Accordingly, "[o]ne who causes peril . . . can be no hero"; "[n]o matter that he tries later to attempt a rescue, even if at the loss of his own life." JACK MARKOWITZ, *A WALK ON THE CRUST OF HELL* 32 (1973). Determining who acted heroically, who simply lent a helping hand, who acted without awareness of danger, and who was acting to undo a danger that he felt responsible for creating or exacerbating is no easy task. In fact, the process of rewarding some heroes and not others—leading not only to an uneven division of praise but of hard cash as well—can yield a post-rescue divisiveness and bitterness at odds with the communal solidarity that public recognition seeks to promote. *Id.* at 31-32.

aid,<sup>52</sup> absent a relationship of special legal status.

### B. *A Critique of the Majority Approach*

The majority view of duties among strangers is bleak. A passerby need not "warn a blind man of an open manhole, . . . lift the head of a sleeping drunk out of a puddle of water, . . . throw a rope from a bridge to a drowning swimmer, [or] rescue or even report the discovery of a small child wandering lost in a wood."<sup>53</sup> The harshness of the law reflects that even if in a moral sense all men are brothers,<sup>54</sup> they are not their brothers' keepers.<sup>55</sup> Thus moral philosophy and theology,<sup>56</sup> not law, govern beneficence among strangers.<sup>57</sup> The problem is purely one of individual

52. Mill describes duties of "perfect obligation" as:

[T]hose duties in virtue of which a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality.

JOHN STUART MILL, *UTILITARIANISM* 61 (Everyman's Library, E.P. Dutton, 1951) (1863). Whether or not the duty is perfect, the overwhelming majority view has long been that acts that are socially or morally reprehensible are not necessarily criminal. SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 10 (1883) (watching another die when one can easily help makes the omitter a "shameful coward," not a killer).

53. FEINBERG, *supra* note 16, at 127. "Of course, these are extreme cases and are not likely to happen." Gregory, *supra* note 3, at 24.

54. "[A]ll men are brothers, even as a metaphor, is probably an exaggeration," Feinberg concedes. But he also notes that "[i]t is now generally believed that no two human beings are so widely separated by interest and circumstance that there are no moral relations between them." See FEINBERG, *supra* note 16, at 140.

55. The phrase "my brother's keeper" comes from the biblical story of Cain and Abel. See *Genesis* 4:9. For an insightful discussion of the meaning of Cain's murder of Abel, see ELIE WIESEL, *MESSENGERS OF GOD: BIBLICAL PORTRAITS AND LEGENDS* 37-68 (1976).

56. See WUTHNOW, *supra* note 7, at 50-51 (quoting *James* 3:17) ("If anyone has the world's goods and sees his brother in need, yet closes his heart against him, how does God's love abide in him?"). Wuthnow devotes a significant portion of his book to the role of religious faith in acts of compassion. See *id.* at 121-87. See also Lord Thomas Macauley, *Notes on the Indian Penal Code*, in 7 *WORKS* 497 (1897) ("[T]he penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good."), cited in FEINBERG, *supra* note 16, at 135.

57. See James B. Ames, *Law & Morals*, 22 *HARV. L. REV.* 97, 112 (1908), reprinted in *THE GOOD SAMARITAN*, *supra* note 3, at 19 ("The law does not compel active benevolence between man and man.").

Joel Feinberg disagrees with the classic argument that there is no duty to render aid because such a duty would be equivalent to an obligation to confer a benefit on the other. Because a rescuer's actions merely restore the status quo, Professor Feinberg argues, the net benefit to the imperiled is zero. The victim does not seek a benefit; rather, she has a right to claim the rescuer's assistance. FEINBERG, *supra* note 16, at 130-31.

Professor Feinberg's observation may explain why bystanders often fail to intervene in emergen-

empathy,<sup>58</sup> not one of social or legislative importance.<sup>59</sup>

Several writers have suggested ways to bring brotherhood to law.<sup>60</sup> Most suggestions resemble the Vermont statute, substantially duplicated by Minnesota and Rhode Island, which penalizes omitters who knowingly fail to undertake easy rescues.<sup>61</sup> An easy rescue is one which involves no danger to the rescuer and does not interfere with important duties that the rescuer owes to others.<sup>62</sup> Through these laws, "[c]ommon humanity . . . forges between us a link, but a weak one," given that the rescuer may opt out at the first sign of danger.<sup>63</sup> Realistically, the law cannot require much more, since each of us should be permitted to remain a live coward rather than a dead public servant.<sup>64</sup> For Professor

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cies: absent a net gain to the imperiled, the rescuer, who may risk danger or opportunity cost by engaging in rescue, lacks incentive to intervene. Two psychologists describe the low incentives of would-be rescuers as follows:

Even if an emergency is successfully dealt with, rarely is anybody better off afterwards than before. Consequently, there are few positive rewards for successful action in an emergency. These high costs and low rewards put pressure on individuals to ignore a potential emergency, to distort their perceptions of it, or to underestimate their responsibility for coping with it.

BIBB LATANÉ & JOHN M. DARLEY, *THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?* 29-30 (1970).

58. Recently, legal scholars have begun to incorporate the psychological concept of "empathy." See, e.g., Lynne Henderson, *The Dialogue of Heart and Head*, 10 *CARDOZO L. REV.* 123 (1988). Toni M. Massaro describes Professor Henderson's view of "empathy" as "the capacity to perceive others as having one's own goals, interests and affects"; "imaginative experience of the situation of another"; and "the distress response that accompanies this experiencing—which may (but not must) lead to action to ease the pain of another." Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 *MICH. L. REV.* 2099, 2101-02 (1989) (citing Lynne Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574, 1579-82 (1987)).

59. See Morris, *supra* note 16, at 135 (arguing that good samaritanism has "important societal and legislative aspects").

60. E.g., FEINBERG, *supra* note 16 at 126-86 (discussing "bad samaritan" statutes); Dawson, *supra* note 28, at 63 (discussing modern European law, with an emphasis on German law).

61. See *supra* notes 24, 25 and 27.

62. See, e.g., *WIS. STAT. ANN.* § 940.34 (West Supp. 1991); *supra* note 26.

63. Honoré, *supra* note 16, at 231.

64. Fear of retaliation from the person imposing the danger on the imperiled is one reason bystanders may freeze when danger arises. See Gregory, *supra* note 3, at 35; Barth, *supra* note 3, at 162 ("Cowardice, I think, is much more common—much more human—than callousness."). But see U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* tbl. 3.9 (1989) (reporting that fear of reprisal was the reason for failure to report in only 1.3% of crimes against the person).

The reasons that defendants offer for their nonaction are important. Judith Shklar notes that if citizens who fail to aid victims "have any reason to be afraid to act, the burden of guilt falls on their neighbors and the police." SHKLAR, *supra* note 9, at 42. Cf. *Schuster v. New York*, 154 N.E.2d 534 (1958) (action for wrongful death alleging that the police breached a duty to exercise reasonable care

Joel Feinberg—an advocate of affirmative duties—the individualist's objection to state-mandated rescue is well-taken:

Think of how easy it would be, in the absence of unpredictable duties to aid strangers, for us to pursue single-mindedly some purely personal objectives in life while keeping our moral slates clean. Once we renounce the right . . . to assault, beat, rob, steal, defraud, rape, or kill other human beings, then the rest would be rather easy. There would be some relatively predictable affirmative duties like tax and rent payments, but once these had been allowed for, one could then live one's whole life "minding one's business" exclusively . . . without ever stumbling into distracting duties or punitive liabilities. One could pay the claims of citizenship and community membership their due, avoid the entanglements of "special relationships," honor the requirements of minimally decent morality, and then go one's own way, painting pictures, writing poems, collecting string, or doing one's thing, whatever that should be. With bad samaritan statutes, however, one would never know when some new and unanticipated obligation might devolve on one.<sup>65</sup>

Despite this "unduly narrow view of the moral life,"<sup>66</sup> there is more than a trace of truth in the assertion that it is easier to obey negative prohibitions than to become roving distributors of positive good.<sup>67</sup>

### C. *Why Bystanders Fail To Intervene*

Why those who see others in danger so often do nothing is unclear.<sup>68</sup> In the case of witnesses to crimes, danger—real or imagined—and fear of retaliation account for some failures to intervene or notify authorities.<sup>69</sup> In addition, because emergencies are, for most of us, exotic, a bystander's lack of opportunity for planning and rehearsal and the difficulty of quickly selecting the appropriate type of intervention might make her

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for the protection of a citizen who was shot and killed in retaliation for supplying information leading to the arrest of a dangerous fugitive).

65. FEINBERG, *supra* note 16, at 164.

66. *Id.* at 165.

67. *Id.* at 170.

68. LATANÉ & DARLEY, *supra* note 57, at 1-6. Despite myriad evidence that our society has generally become less compassionate, *id.* at 1-2, Professor Wuthnow's surveys indicate that Americans perceive themselves as quite inclined toward helping behavior. For instance, 60% of those surveyed reported that they had stopped to help someone with car trouble; 30% stopped to assist within the past year. Half of those surveyed had given money to a panhandler; 23% within the last year. Finally, approximately 15% claimed that they saved someone's life; 4% of those within the past year. WUTHNOW, *supra* note 7, at 8.

69. See *supra* note 64.

assistance less likely.<sup>70</sup>

Some commentators, however, do not place the blame on individuals, but on urban conditions. Our "Cold Society" is a "fragmented," dispassionate "megalopolis" of crumbling morality, of "apathy" and "indifference," where "*homo urbanis*," charged by "T.V. sadism," "fear of police" and "unconscious sadistic impulses," ignores the suffering of others.<sup>71</sup> Despite the deterioration of urban life, American cities remain densely populated because "few of us are attracted to the stifling small-town images of community we find championed in social-science textbooks."<sup>72</sup>

The presence of other bystanders may reduce each potential rescuer's individual sense of responsibility to the imperiled,<sup>73</sup> and increase the probability of free-riding.<sup>74</sup> Each is lulled into a state of "pluralistic ignorance," which induces multiple bystanders to interpret others' nonaction as a sign of no danger.<sup>75</sup> Despite the apparent incentive that risk-sharing would provide to potential co-intervenors, because of social inhi-

70. LATANÉ & DARLEY, *supra* note 57, at 1-5; see also Gusfield, *supra* note 3, at 197 ("The city is a plurality of circles of involvement surrounded by areas of 'no-man's land.' The urbanite does not venture into new involvements without strong inducements and pressures.").

Prosecutors in rural, more traditional communities within states that impose positive duties among strangers support this appraisal. More than one such prosecutor with whom I corresponded claimed that in their jurisdictions "the population . . . tends to be more than willing to assist others at times of distress." Letter from Patrick A. Oman, County Attorney, Mower County, Minn., to the author (Nov. 15, 1991) (on file with author) (recounting that snowmobilers rescued him from a snowdrift during the peak of a blizzard); Letter from James C. Babler, District Attorney, Barron County, Wis., to the author (Nov. 11, 1991) (on file with author) (asserting that "in a rural county with small communities, [presumably] all of our citizens would report [a serious] crime, without [a law] on the books"); Letter from Susan A. Davis, State's Attorney, Essex County, Vt., to the author (Nov. 13, 1991) (on file with author) (describing area as "largely populated by moose and farms," where "[v]olunteer firemen and part-time deputies usually handle [emergencies] and usually know or are related to the victims"; but the community has "a less friendly attitude toward strangers").

71. WUTHNOW, *supra* note 7, at 28.

72. LATANÉ & DARLEY, *supra* note 57, at 30.

73. Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1788-90 (1985) ("The presence of several or more bystanders diffuses individual responsibility and blame for not helping among the group, thereby serving both to reduce and to delay intervention, at times resulting in inaction by all.").

74. When other witnesses are present, the tendency to rely on them to act may discourage the intervention even of those who favor an affirmative duty to rescue, but who hesitate to intervene when they suspect that others will not. In this sense, amateur rescue is similar to a public good—underproduced by the private sector and plagued with nonpaying beneficiaries. State intervention—the enactment and enforcement of a mandatory duty to rescue—would address the free-riding problem with the threat of criminal sanctions. Telephone Interview with Professor Jeffrey Harrison, University of Florida College of Law (May 22, 1992).

75. LATANÉ & DARLEY, *supra* note 57, at 41.



bitions that arise in groups, people are more prone to respond to another's distress when alone than when accompanied by other witnesses.<sup>76</sup>

Bystanders thus face a "choice of nightmares":<sup>77</sup> fail to intervene and experience the empathic distress of watching another human being suffer, the guilt of failing to live up to a minimal threshold of decency, and the shame of having that failure witnessed by others; or, intervene and risk retaliation by an assailant, the ridicule and derision of nonintervening bystanders, and the threat of being mistaken for the cause of the harm. Moreover, the victim may spurn, attack, or become completely dependent on the rescuer, while the legal system may enlist the rescuer as a witness subject to innumerable encounters with police, lawyers, and judges.<sup>78</sup> The nightmare then may be most easily resolved by convincing oneself that the victim is not imperiled.<sup>79</sup>

Contradictory norms further complicate the bystander-imperiled episode and tend to produce inaction. Specifically, the controlling norm to "mind one's own business"<sup>80</sup> clashes with the equally dominant norm to "do unto others."<sup>81</sup> Even "do unto others" carries social baggage. Citizens may actively censor themselves to avoid the pejorative labels "bleed-

76. *Id.* at 69-70. Of course, solitary bystanders sometimes refuse to rescue. For example, the protagonist of Albert Camus' *The Fall* is haunted by his failure to save another from death. The failure is revealed as a covert betrayal of others and, ultimately, of his own self.

I heard the sound—which, despite the distance, seemed dreadfully loud in the midnight silence—of a body striking the water. I stopped short, but without turning around. Almost at once I heard a cry, repeated several times, which was going downstream; then it suddenly ceased . . . I wanted to run and yet didn't stir. I was trembling . . . I have forgotten what I thought then. "Too late, too far . . ." or something of the sort. I was still listening as I stood motionless. Then, slowly under the rain, I went away. I informed no one.

ALBERT CAMUS, *THE FALL* 70 (Justin O'Brien trans., 1956).

77. CONRAD, *supra* note 4, at 63.

Whether saving another is an opportunity or a burden is subject to debate. Latané and Darley assert:

[T]he bystander to an emergency is offered the chance to step up on stage, a chance that should be every actor's dream. But in this case, it is every actor's nightmare. He hasn't rehearsed the part very well and he must play it when the curtain is already up. The greater the number of other people present, the more possibility there is of losing face.

LATANÉ & DARLEY, *supra* note 57, at 40.

78. LATANÉ & DARLEY, *supra* note 57, at 79-80.

79. *Id.*

80. Despite its countless references to compassion, in some passages the Bible seems to concur with the atomistic view of human relations:

He that passeth by, and meddleth with strife belonging not to him, is like one that taketh a dog by the ears.

*Proverbs* 26:17. See also LATANÉ & DARLEY, *supra* note 57, at 20.

81. *Matthew* 7:12.

ing heart," "do-gooder," and "goody two-shoes," perhaps because compassion and altruism are often explained as no more than masks for self-interest.<sup>82</sup>

A duty to report clashes with settled concepts such as loyalty and privacy when, based on relational affinity among family, friends, or ethnic or other groups, one has agreed not to disclose an incriminating fact.<sup>83</sup> For example, in *Roberts v. United States*,<sup>84</sup> a drug defendant appealed his sentence, which the lower court had increased when he failed to name his suppliers. Affirming his sentence, the Supreme Court condemned his contumacy as "antisocial conduct."<sup>85</sup> In dissent, Justice Marshall strongly disagreed with the majority's conclusion that the defendant had a duty to become an informer, explaining:

American society has always approved those who own up to their wrongdoing and vow to do better, just as it has admired those who come to the aid of the victims of criminal conduct. But our admiration of those who inform on others has never been as unambiguous as the majority suggests. The countervailing social values of loyalty and personal privacy have prevented us from imposing on the citizenry at large a duty to join in the business of crime detection. If the Court's view of social mores were accurate, it would be hard to understand how terms such as "stool pigeon," "snitch," "squealer," and "tattletale" have come to be the common description of those who engage in such behavior.<sup>86</sup>

In its use of terms such as "stool pigeon" and "snitch," Justice Marshall's comment seems most apt when applied to an "informer," defined as "someone who betrays a comrade, i.e., a fellow member of a movement, a colleague, or a friend, to the authorities."<sup>87</sup> His statement has

82. WUTHNOW, *supra* note 7, at 77.

83. Some states exempt privileged relationships from the reach of their statutes. *E.g.*, OHIO REV. CODE ANN. § 2921.22(F) (Anderson Supp. 1991) (specifically mentioning the attorney-client, doctor-patient, psychologist-client, priest-penitent, and husband-wife privileges).

84. 445 U.S. 552 (1980).

85. *Id.* at 559.

86. *Id.* at 569-70 (Marshall, J., dissenting). The Court rejected Roberts' claim that the sentencing judge erred in considering his failure to cooperate with officials investigating a criminal conspiracy in which he confessed participation. *Id.* at 558. The Court concluded that Roberts' self-incrimination concerns and fear of retaliation from confederates should have been raised at the sentencing hearing because the Fifth Amendment is not self-executing. In his dissent, Justice Marshall suggested that the Court's holding would discourage prosecutors from plea bargaining fairly and from exchanging immunity for cooperation. *Id.* at 568-69. In addition, he disagreed with the practice of imposing a positive duty to name suppliers and cooperate with investigations only upon those persons "about to be sentenced for a crime." *Id.* at 571.

87. Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 527 (quoting Victor Navasky, NAMING NAMES xviii (1980)). See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL

less force, however, for a victim<sup>88</sup> or stranger who witnesses a crime. Even the relationships among doctors,<sup>89</sup> lawyers,<sup>90</sup> or police officers,<sup>91</sup> which are guided by institutionally imposed affirmative reporting requirements, also carry informal pressures to refuse to testify against a fellow member. The duty among strangers, however, involves no affin-

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PROCEDURE § 3.3, at 142 (2d ed. 1992) ("The term 'informant' . . . describe[s] an individual who learns of criminal conduct by being part of the criminal milieu; it does not refer to the average citizen who by happenstance finds himself in the position of a victim of or a witness to a crime.").

88. When the witness to a crime is also the victim, of course, the obstacles to reporting are different. For a thoughtful discussion of victims' moral and legal role in reporting crime, see Lynch, *supra* note 87, at 523-27.

89. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS, *Preamble* at II (1980) ("A physician shall . . . strive to expose those physicians deficient in character or competence, or who engage in fraud or deception."). See generally Christopher S. Morer, Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 VA. L. REV. 1115 (1988) (discussing "self-policing" in the medical profession).

90. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980) (a lawyer who has "unprivileged knowledge" that another lawyer has committed an ethical violation "shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation"); *id.* EC 1-4 ("A lawyer should reveal voluntarily to officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1991) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct" should inform the disciplinary authorities only if the violation "raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.").

91. Police departments tend not to create such obligations. Even when they do they usually leave such policies unwritten. See CLIFFORD D. SHEARING, ORGANIZATIONAL POLICE DEVIANCE: ITS STRUCTURE AND CONTROL 97 (1981) ("Police organizations are faced with the dilemma that the rules by which the job gets done are rarely articulated clearly and still more rarely written down as policies."). Even written policies are difficult to interpret precisely. *Id.* at 97-98 (an officer is "guilty of 'neglect of duty' if he 'without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force'").

A San Diego Police Department official stated that an affirmative duty exists to report the misconduct of fellow officers; however, this duty is not precisely expressed in any written regulations and violations are addressed on a case-by-case basis. Telephone Interviews with Sergeant Robert Kanaski, Office of Public Affairs, San Diego Police Department (May 29, 1992 & June 10, 1992) (stating that any duty that exists stems from the requirement that officers display good "moral conduct" and avoid "abuse of position"; but, regarding specific articulation of duty to report other officers' wrongdoing, departmental regulations lack specific guidelines).

Immediately after the Rodney King verdict in April 1992, the California Senate introduced a bill to amend CAL. PENAL CODE § 149, which punishes public officers who, without lawful necessity, assault or beat anyone. The Watson Archie-Hudson Officer Reporting Act proposed to amend § 149 by adding a provision that would punish any peace officer who "personally witnesses conduct that he or she has reasonable cause to believe" violates § 149, and "willfully fails to file a report" with "his or her employing agency without unnecessary delay." The offense would constitute "criminal neglect of a statutory duty." Amended California Senate Bill § 1261, 1991-92 Regular Session (1992). The bill failed to pass the California Assembly on August 31, 1992. See California Bill Tracking 1992, available in LEXIS, Legis Library, Catrek file.

ity-based obstacles, not even those endemic to the criminal milieu, such as the honor that is said to exist among thieves.

## II. THE MINORITY APPROACH

"Who were you begging for help?" the prosecutor asked.

"Anybody," the witness said.<sup>92</sup>

Trial testimony of rape victim, whose attack became the subject of the movie "The Accused."<sup>93</sup>

Using the well-known example of the gang rape of a woman in front of a barroom full of patrons in New Bedford, Massachusetts,<sup>94</sup> this section:

92. Joyce Wadler, *Woman Leaves Seclusion to Tell Court of Assault, Cheering in Big Dan's Bar*, WASH. POST, Feb. 25, 1984, at A3.

93. THE ACCUSED (Paramount 1988).

94. The New Bedford rape is not the only case of its kind, just the most publicized. See Austin Wehrwein, *Samaritan Law Poses Difficulties*, NAT'L L.J., Aug. 22, 1983, at 5 ("[A] 14-year-old St. Louis girl was raped . . . while bystanders did nothing for 40 minutes until an 11-year-old boy called police."); Doreen E. Iudica, *Student Accused of Rape at URI; Victim: 5 Others Watched, Laughed*, BOSTON GLOBE, Nov. 2, 1990, at 21 (discussing case of a woman allegedly raped in University of Rhode Island fraternity house while five men in the room watched and laughed, after which she fought off two or three more who also tried to attack her).

Perhaps the best-known case of bystander indifference occurred in 1964 in a middle-class neighborhood in Queens, New York, when a woman was murdered after a series of assaults by a man who twice returned to the scene when he realized that no one answered his victim's cries for help. Thirty-eight witnesses listened or watched through their windows while Kitty Genovese's assailant brutally attacked her with a knife for over 30 minutes outside her apartment. No one called the police until after the incident when the victim already lay dead on the pavement.

[It] "may have been the first startling, terrifying example of just how isolated the street has become." It brought home—home to the middle-class community of Kew Gardens, Queens—the depths of urban anomie and rekindled a primal fear that the big city is a place in which you are likely to be abandoned in your hour of need.

Sam Roberts, *When Crimes Become Symbols*, N.Y. TIMES, May 7, 1989, § 4, at 1; see also A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964) (shocking account of Genovese's murder). The silent, passive witnesses were scared, lacked faith in police, and did not want to get involved. But a year later they insisted that they had done the right thing. See *Murder Street a Year Later: Would Residents Aid Kitty Genovese?*, N.Y. TIMES, Mar. 12, 1965, at 33, 37.

Unlike Ms. Genovese's murder, which occurred in a densely populated city, the New Bedford victim's attack occurred in a town of only 98,000; thus it is wrong to attribute it solely to urban alienation. Further, her attackers were unarmed and stood close to the passive witnesses. Finally, some of the witnesses made their acquiescence clear by cheering, which is sufficient to support a charge of accomplice liability under Massachusetts law. See *Commonwealth v. Cook*, 411 N.E.2d 1326, 1330 (Mass. App. Ct. 1980) ("Accomplice liability is based on the defendant's desire to make the crime succeed, and is usually established by proof that the defendant was present at the scene, that he assented to the crime occurring, and that he put himself in a position where he could render aid to the perpetrator if it should become necessary."); MASS. ANN. LAWS ch. 274, § 2 (Law. Co-op. 1992) (aider or accessory is liable to same extent as principal). The bystanders' behavior in the New

(1) discusses how the minority states' rescue and reporting provisions might be applied to the patrons' nonfeasance; (2) considers the views of supervising prosecutors whom I surveyed in states that follow the minority rule of criminal omissions;<sup>95</sup> and (3) analyzes the few litigated cases on point. I conclude that prosecuting those who fail to render easy aid or to report serious crimes properly expresses public condemnation of those who fall below baseline decency.<sup>96</sup>

#### A. A Contemporary Illustration: "The Accused"

In 1983, six patrons of "Big Dan's," a New Bedford, Massachusetts bar, raped and sodomized a twenty-two-year-old mother of two<sup>97</sup> while other patrons cheered.<sup>98</sup> The setting was a working-class tavern in a largely Portuguese, economically depressed waterfront town of 98,000.<sup>99</sup> The victim initially entered the bar to buy cigarettes, ordered a "highball," and talked briefly both with a woman she recognized and with her future assailants. She was then "'dragged literally kicking and screaming' across the floor," and "'thrown' onto the pool table, where one assailant tried to pull her jeans off."<sup>100</sup> After two of the attackers tried unsuccessfully to force the victim to perform fellatio, two others raped her.<sup>101</sup> "I could hear yelling, laughing, down near the end of the bar," she said. "My head was hanging off the edge of the pool table . . . . I was screaming, pleading, begging . . . . One man held my head and pulled my hair. The more I screamed, the harder he pulled . . . ." <sup>102</sup> Finally, "clothed only in a shirt and one shoe, the victim escaped and ran into the street where she flagged down a passing truck."<sup>103</sup>

In forty-three states,<sup>104</sup> the nonfeasant witnesses committed no crime,

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Bedford attack was thus even more suitable for criminal punishment than was the neighbors' indifference to Ms. Genovese's murder.

95. See *supra* notes 24-27, 29-33, 50-51 and accompanying text.

96. See GLENDON, *supra* note 1, at 85 (noting the dearth of theorists who advocate the introduction of a duty to rescue into the criminal law, and concluding that "American law could set its sights a little higher here without violating any canons of prudence").

97. In the movie THE ACCUSED, the victim's name was "Sarah Tobias." See *supra* note 93. Her real name, however, has been withheld from the press.

98. Wadler, *supra* note 92, at A3.

99. Dudley Clendinen, *Barroom Rape Shames Town of Proud Heritage*, N.Y. TIMES, Mar. 17, 1983, at A16.

100. Wadler, *supra* note 92, at A3.

101. *Commonwealth v. Vieira*, 519 N.E.2d 1320, 1321 (Mass. 1988).

102. Wadler, *supra* note 92, at A3.

103. *Vieira*, 519 N.E.2d at 1321.

104. As discussed above, the seven exceptions are the "easy rescue" states—Vermont, Rhode

although those who cheered on the assailants may have committed acts subjecting them to accomplice liability.<sup>105</sup> No special relationship existed between the victim and the witnesses, with the possible exception of the bartender, who testified at trial but was not indicted.<sup>106</sup> In these states, inaction in such a situation remains a matter of the passive witnesses' private morality, not law. In the substantial majority of states where the law is content to punish only active assailants, "rape is . . . a [lawful] spectator sport."<sup>107</sup>

### B. *The Pedigree and Application of the Minority Provisions*

A minority of jurisdictions have enacted two types of laws to deter such behavior by bystanders: easy-rescue and duty-to-report laws. Easy-rescue laws require actual intervention; duty-to-report laws require only that witnesses contact authorities when they have witnessed certain crimes. Below is a chart summarizing the various rescue and reporting statutes and their penalties:<sup>108</sup>

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Island, and, if a crime has been committed, Wisconsin—whose statutes recognize that contacting authorities could in such instances satisfy the statutory duty; and the duty-to-report states—Florida, Ohio, Rhode Island, Massachusetts, Washington, and Wisconsin. In an eighth state, Minnesota, failure to conduct "easy rescue" is considered noncriminal. *See supra* notes 24-36 and accompanying text.

105. *See supra* note 94. Typically, aiding and abetting is a form of accomplice liability that requires that a principal in the second degree or accessory before the fact, with the intent that the principal in the first degree commit the offense, encourage or assist the principal in the first degree in the commission of an offense. *See, e.g.*, MASS. ANN. LAWS ch. 274, § 2 (Law. Co-op. 1992).

106. Bartender Carlos Machado's awareness of the potential for trouble arose early in the unfolding events. Mr. Machado did not deny that the men forcibly raped the woman. Instead, he testified: "I had a bad impression of the girl . . . She was laughing and talking with the boys, and I wanted to call the police and get her out." When a defense attorney asked him why, Mr. Machado replied, "A group of guys around a girl in such a tight crowd." "That was so unusual that you thought she should be ejected?" asked the defense attorney. "Yes," he replied. *Bartender Testifying in Rape Case Says He Sensed Trouble at Tavern*, N.Y. TIMES, Mar. 3, 1984, at 10.

107. *See Clendinen, supra* note 99, at A16.

108. *See supra* notes 24-34 and accompanying text.

In addition to imposing penalties for failure to aid victims or report crimes, some states also offer rescuers immunity from civil liability for ordinary negligence. *See* VT. STAT. ANN. tit. 12, § 519(b) (1973); MINN. STAT. ANN. § 604.05.2 (West Supp. 1992); WIS. STAT. ANN. § 940.34 (3) (West Supp. 1991); MASS. ANN. LAWS ch. 258A, § 9 (Law. Co-op. 1992).

## DUTY TO AID

	Minnesota	Rhode Island	Vermont	Wisconsin
Statute	604.05	11-56-1	tit. 12, § 519	940.34
Penalty	609.02(4a)	11-56-1	tit. 12, § 519(c)	939.51(3)(c)
Class	petty misd. civil	petty misd. criminal	— criminal <sup>109</sup>	Cl. C misd. criminal
Fine	≤ \$200	≤ \$500	≤ \$100	≤ \$500
Jail	—	≤ 6 months	—	≤ 30 days

## DUTY TO REPORT

	Florida	Massachusetts	Ohio	Rhode Island	Washington	Wisconsin
Statute	ch. 794.027	ch. 268, § 40	2921.22	11-1-5.1 <sup>110</sup>	9.69.100	940.34
Penalty	ch. 775.082, .083	ch. 268, § 40	2929.21	11-1-5.1	9.92.020	939.51(3)(c)
Class	1st criminal misd.	— criminal	4th misd. criminal	misd. criminal	gross misd. criminal	Cl. C misd. criminal
Fine	≤ \$1000	≤ \$500-2500	≤ \$250	≤ \$500- \$1,000	≤ \$5000	≤ \$500
Jail	≤ 1 year	—	≤ 30 days	≤ 6 months	≤ 1 year	≤ 30 days

Had the New Bedford rape occurred in the easy-rescue states or in those states that require witnesses to report serious crimes, all of the witnesses who were aware of the danger<sup>111</sup> and failed to call for help could be prosecuted and ordered to pay a small fine.<sup>112</sup> Florida, Ohio, Rhode

109. See *supra* note 24.

110. Rhode Island law contains a separate provision that addresses the failure to report first-degree sexual assault. See *supra* note 32.

111. See Wehrwein, *supra* note 94, at 5 ("Among the difficulties a prosecutor would face would be proving that a bystander had knowledge of another person's peril, that the danger was indeed serious, and that the bystander knew this was so."). The difficulty of proving these facts, however, poses no problems with which the criminal law is unfamiliar; questionable proof of "knowledge" is routinely presented in criminal trials, and "serious danger" commonly arises when a defendant claims to have justifiably harmed or killed another. If, as in the New Bedford rape, group rescue is involved, sorting out duties admittedly becomes difficult and administratively expensive. See Landes & Posner, *supra* note 28, at 96-97.

112. A glance at other offenses similarly punished in the minority jurisdictions reveals a high tolerance (or low level of condemnation) for this strain of deviance. In Minnesota, for example, trivial violations such as crosscountry skiing without a valid pass, MINN. STAT. ANN. § 85.45 (West Supp. 1992), owning a dog that kills or pursues a big-game animal, MINN. STAT. ANN. § 97A.321 (West 1987), transporting firewood in an unsafe manner, MINN. STAT. ANN. § 169.81.5a (West Supp. 1992), or failing to return a library book on time, MINN. STAT. ANN. § 609.541 (West 1988),

Island, Washington, or Wisconsin could impose a jail sentence.<sup>113</sup> In 1983, the year of the New Bedford attack, however, the bystanders would have escaped punishment altogether because most of the states that now recognize a duty either to engage in easy rescue or to report serious crimes did so shortly after, if not in response to, the New Bedford rape.<sup>114</sup>

### C. Defining "Easy Rescue"

None of the easy-rescue states would require individual bystanders in the New Bedford rape context to do anything more than make a phone call. Despite the ease with which a collective effort might have stopped the attack, no law so requires, if only because the duty to rescue "stops at the brink of danger."<sup>115</sup> Thus, a bystander's duty does not include the

all bear the same civil, petty-misdemeanor classification as the failure to render easy aid, MINN. STAT. ANN. § 604.05 (West 1988).

113. As in Minnesota, other pertinent state legislatures have matched the punishment for non-feasance with what seem to be much less serious harms. *E.g.*, OHIO REV. CODE ANN. § 4736.15 (Anderson 1991) (in Ohio, someone other than a registered sanitarian using the abbreviation "R.S." after her name commits fourth-degree misdemeanor); WIS. STAT. ANN. § 944.23 (1990) (in Wisconsin, someone who makes an indecent drawing or writing in public commits a class "C" misdemeanor).

114. Laws enacted prior to 1983: MINN. STAT. ANN. § 604.05 (enacted 1971); VT. STAT. ANN. tit. 12, § 519 (enacted 1967); OHIO REV. CODE ANN. § 2921.22(A) (enacted 1974); WASH. REV. CODE ANN. § 9.69.100 (enacted 1970). *See supra* chart and accompanying text at 23. The remaining laws cited on the chart were enacted in 1983 and 1984.

115. Honoré, *supra* note 16, at 231. In an effort to identify the traits common to rescuers, one researcher studied American immigrants who had helped rescue Jewish victims of Nazism during World War II. Three attributes tended to describe the rescuers: "(1) a spirit of adventurousness; (2) intense identification with one or both parents as a model of moral conduct; and (3) a sense of being 'socially marginal,' of not quite belonging in their own society and class." MARKOWITZ, *supra* note 51, at 195-96 (discussing results of study of 27 immigrants conducted by the University of Southern California's Dr. Perry London).

On the other hand, Thomas Arbuthnot, President of the Carnegie Hero Fund for many years, concludes that there are no traits that separate heroes from the rest. In response to the question "Of what are heroes made?" he answers:

An individual stands apart in one heroic, sometimes sublime act of self-forgetting, then melts back into the common composition of humanity. The commission is forced to the conclusion that it is not the individual altogether but the inspired moment that accounts for the deed . . . . Perhaps all of us are eligible for acts of heroism if the spark comes at the right time to set aglow the impulse. Heroism is not made; some tragedy finds it out. Like gold, it is uncovered.

*Id.* at 200.

Professor Wuthnow suggests that compassionate or helping behavior involves a "maze of motives: a need for self-esteem, approval, status, power; the desire to feel useful, find intimacy, pay back some debt." RAM DASS & PAUL GORMAN, HOW CAN I HELP? 10 (1987), *cited in* WUTHNOW, *supra* note 7, at 61.



heroism of invulnerability and infantile omnipotence. Instead, it contemplates something milder—meaningful involvement in the form of telephoning police or serving as a witness at trial.<sup>116</sup>

This raises the question of precisely what easy-rescue legislation means when it requires that a bystander provide “reasonable assistance” to someone in grave physical danger only if the witness can do so “without danger or peril to self or others.”<sup>117</sup> In Europe, “the degree of risk necessary to relieve the potential rescuer of any duty ranges from an extreme of only danger to the rescuer’s life, to serious danger to him or others, to the other extreme” of any risk whatsoever, including risk to the rescuer’s property.<sup>118</sup> Thus, European laws make a more explicit calculus of costs to the rescuer versus benefit to the imperiled than do American laws. For example, the Vermont statute is written at a higher level of abstraction, referring only to general terms such as “danger,” “peril,” and “interference with duties owed to third parties.”<sup>119</sup>

The precise scope of omissions law is uncertain due to lack of enforcement. My research disclosed no appellate decisions upholding the conviction of a defendant prosecuted under a contemporary easy-rescue statute. Notwithstanding the dearth of litigation, commentators have suggested that when rescue is easy and the threatened harm severe, the imperiled should be able to demand the bystander’s labor as a matter of right.<sup>120</sup> Requiring easy rescue is consistent with an expansive concept of

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116. VT. STAT. ANN. tit. 12, § 519(a) (1973).

117. *Id.* For an interesting analysis of drafting problems (including the vagueness or fair-warning problem) endemic to this type of legislation, see Hoffman, *supra* note 36 (discussing statutory provisions of Massachusetts, Minnesota, Ohio, Rhode Island, and Vermont).

118. See Hoffman, *supra* note 36, at 854-55; see also *supra* note 28 (authority cited therein). Broader imposition of liability in Europe (excluding England) is softened by limiting liability to those omissions where the cost of rescue is trivial; when the cost of rescue would exceed its benefits, no liability arises. See Landes & Posner, *supra* note 28, at 126.

119. The meaning of “interference with important duties owed to others” seems to refer to pre-existing obligations; e.g., even a strong swimmer need not enter a lake to save a drowning swimmer if it would put her infant child on the beach at risk while she attempts to save the drowning victim.

120. Jeremy Bentham phrases the proposition as follows: “[The] obligation is stronger, in proportion as the danger is the greater for the one, and the trouble of preserving him the less for the other.” Bentham, *supra* note 13, at 164 (proposing more “duties of beneficence” than the common law then recognized). Prosecutors practicing in states that impose positive duties on strangers agree. One states that “[i]t seems unfair . . . to place an onlooker in the position of either risking criminal prosecution or serious physical harm in deciding whether to come to the aid of a third party.” Letter from Donald R. Klosterbuer, County Attorney, Rock County, Minn., to the author (Nov. 6, 1991) (on file with author). An assistant prosecutor in Mr. Klosterbuer’s office states that the measure of objective risk to the bystander would influence his decision to prosecute. *Id.* (enclosure signed by “Terry”). *Accord*, Letter from Allen R. Brey, District Attorney, Taylor County, Wis., to author

individual liberty and privacy if required only when it can be performed without danger to the rescuer, and by one close enough temporally and spatially to be held accountable for nonperformance.<sup>121</sup> By requiring the distribution of positive good only when the “rescuer can bring about a very substantial transfer at a trivial cost to himself,”<sup>122</sup> no *substantial* interest of the rescuer will suffer.<sup>123</sup> In short, a slight personal intrusion that confers a significant social benefit is justifiable and should be enforced.<sup>124</sup>

Because expansive territory lies between moral athleticism<sup>125</sup> and min-

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(Nov. 12, 1991) (on file with author) (presence of weapons); Letter from C. William Foust, District Attorney, Dane County, Wis., to author (Nov. 13, 1991) (on file with author) (threats made by the principal actor(s)); Letter from Darwin L. Zweig, District Attorney, Clark County, Wis., to author (Nov. 6, 1991) (on file with author) (possibility of retaliation); Letter from J. Dennis Thornton, District Attorney, West Bend County, Wis. to author (Nov. 4, 1991) (on file with author) (observing that “fear of physical harm, reprisal etc. . . . would be a defense” under Wisconsin law, but that the “moral duty” codified in the law is much stronger when the peril is created by human agency than by negligence or misadventure).

121. This is the kernel of Professor Feinberg’s concept of the “portable neighborhood.” “When it comes to *aiding the imperiled*, all people who happen to find themselves in a position to help—all who have by chance wandered into the vicinity, or ‘portable neighborhood,’ of the imperiled party—are his ‘neighbors.’” he argues. FEINBERG, *supra* note 16, at 133; *see also* Schroeder, *supra* note 49, at 194-95 (spatial boundaries of the duty to help others are defined by the idea of “neighborhood,” while idea of “peril” implies temporal limit). It is the portable neighborhood concept that distinguishes for example, the failure to pull a drowning infant from a nearby pool and the failure to send aid to starving children in Africa. *Id.* Either act may be just as certain to save life, yet only the person who fails to save someone close to her in time and space could fairly be held criminally liable for the omission. The duty of each American is no different than any other member of the world; also, the class of potential beneficiaries is too large for any one member of that class to claim rescue as an entitlement. These hurdles illustrate why “charity” is an “imperfect duty” in Mills’ conception of the term. *See supra* note 52. With starving Africans, there also is the problem that rescue would merely forestall the inevitable—that the person soon will starve anyway, despite the efforts of those who contribute to the fund. *See also* William M. Rudolph, *The Duty To Act: A Proposed Rule, in THE GOOD SAMARITAN, supra* note 3, at 243, 272-74 (discussing diffuse responsibility and arguing for a “duty to contribute” that would arise “whenever the law finds that all members of a group are equally responsible for a certain duty”).

122. Landes & Posner, *supra* note 28, at 96.

123. FEINBERG, *supra* note 16, at 168.

124. *See* Herman, *supra* note 15, at 601.

[I]f someone needs help changing a tire, a helpful person, in the absence of pressing demands of his own, will help. There is no moral requirement that he do so . . . . If, however, the person who needs this help is in great distress (someone on the way to the hospital, an elderly person who cannot tolerate exposure to bad weather, etc.), it is no longer an act of kindness but a duty to help. When, if help is not given, a life will be in jeopardy or gravely diminished, then changing a tire is someone’s true need.

*Id.*

125. Honoré, *supra* note 16, at 231.

imally decent Samaritanism,<sup>126</sup> and because any intervention involves at least some risk (if only in the form of opportunity cost), the proof process would be a difficult one. Well aware of this, Professor Feinberg recommends that judges submit to juries the issue of the reasonableness of the potential danger, expense, or inconvenience of rescuing another. However, he also suggests that courts should decide the question in favor of the defendant as a matter of law unless the defendant clearly could have acted without unreasonable cost, risk, or inconvenience.<sup>127</sup> The properly instructed jury then could determine how, for example, the witnesses to the New Bedford rape might have discharged their duty based upon their findings of the bystanders' level of danger, experience, or inconvenience. To be sure, "[t]here can be no simple rule that will guarantee correct judgments,"<sup>128</sup> but Feinberg's proposal would ensure that "decent but unheroic [S]amaritans" would not be unjustly convicted.<sup>129</sup> Although prosecutorial discretion, directed verdicts, jury nullification, and appellate review may be unsatisfying safeguards to defendants whose guilt or innocence may be a close call, such is the business of criminal law.

Anyone who would commit rape or any other serious violent crime might also injure an intermeddler. Accordingly, cowardice may not

126. FEINBERG, *supra* note 16, at 133.

127. *Id.* at 156-57. In "special relationship" cases, courts appear willing to withdraw the issue of the reasonableness of rescue efforts from the jury only when it is clear that the defendant could not have acted without unreasonable cost, risk, or inconvenience. For example, in a case involving a mother's nonfeasance during an assault on her child, the North Carolina Supreme Court wrote:

[P]arents . . . have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.

In some cases, depending upon the size and vitality of the parties involved, it might be reasonable to expect a parent to physically intervene and restrain the person attempting to injure the child. In other circumstances, it will be reasonable for a parent to go for help or to merely verbally protest an attack upon the child. What is reasonable in any given case will be a question for a jury after proper instructions from the trial court.

*State v. Walden*, 293 S.E.2d 780, 786 (N.C. 1982). The court expressly stated, however, that parents do not have to "place themselves in danger of death or great bodily harm in coming to the aid of their children," thereby implying a legal limitation on the scope of the duty. *Id.* at 786. The North Carolina court's standard is ambitious, but much more palatable when imposed on parents than on strangers. See also *Gertken v. Farmers Elevator*, 411 N.W.2d 550, 554 (Minn. Ct. App. 1987) (refusing to reverse trial court's finding that, as a matter of law, the defendant in a wrongful death case did not negligently fail to render reasonable assistance to an auto accident victim, when he summoned assistance for the driver whose body remained inside car, but failed to discover plaintiff's decedent, who drowned after she was thrown from the vehicle into a water-filled ditch).

128. Herman, *supra* note 15, at 599. After endorsing Kant's admonition that we make others' ends our own, Herman concludes that "each person must judge when" "the cost [of help] undermines our lives," thus framing the matter as one of casuistry, not law. *Id.* See FEINBERG, *supra* note 16, at 154-55 (citing *Notes on the Indian Penal Code*, *supra* note 56, at 496-97).

129. FEINBERG, *supra* note 16, at 157.

mean callousness. As the familiar incident involving Bernhard Goetz<sup>130</sup> illustrated, victims and witnesses of crime may over-react or under-react because detection of the level of danger that a criminal presents is an imprecise endeavor.<sup>131</sup>

A villain represents a danger not only to the victim, but to anybody who is rash enough to interfere with him. A single individual may be reluctant to tangle with a villain. If it comes to physical violence, his odds are at best equal. At worst, the villain will be armed and vicious. Undeterred from crime, he may be undeterred from violence as well. Despite the potential benefit to the victim, intervention may be too much to require when a criminal actor poses an immediate, quickly unfolding danger.<sup>132</sup>

Sometimes the risks of intervening are subtle or long-range, since the bystander lucky enough to avoid physical contact with the villain still may face future dangers, such as retribution from the villain or her friends, or the threat of being subpoenaed to testify in court.<sup>133</sup> Nonetheless, fear of inchoate retaliation and entanglement with the legal system should be viewed as reasonable risks of danger.<sup>134</sup> A credible threat of retaliation may raise a reasonable doubt of guilt even when supported only by the defendant's uncorroborated claim that the perpetrator threatened her. But mere reluctance to serve as a witness at trial should be insufficient to justify a defendant's failure to report,<sup>135</sup> or the courts'

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130. Bernhard Goetz, an ostensibly ordinary subway rider, boarded a subway train in Manhattan and sat down on a bench near the rear section of the car where four youths sat. When two of the youths approached Goetz and demanded that he give them five dollars, Goetz stood up, pulled out an unlicensed .38 caliber pistol and "fired five rounds, striking each of the four, unarmed youths." *People v. Goetz*, 497 N.E.2d 41, 44 (N.Y. 1985).

131. See, e.g., Douglas Martin, *Kitty Genovese: Would New York Still Turn Away?*, N.Y. TIMES, Mar. 11, 1989, § 1, at 29 (considering whether New Yorkers would still ignore Kitty Genovese); see *supra* note 94 (discussing Genovese incident); Clyde Haberman, *Japanese Ponder the Puzzle of the Bad Samaritans*, N.Y. TIMES, Jan. 31, 1985, at A2 (discussing Japanese reactions to instances of public indifference to strangers in distress); Robert D. McFadden, *Cries for Help Ignored in 15-Minute Fatal Attack*, N.Y. TIMES, Dec. 2, 1984, § 1, at 45 (residents of Brooklyn housing project ignored screams of young woman for 15 or 20 minutes when she was beaten in the courtyard then dragged into a lobby and shot to death by two young assailants since such noisy disputes were common in the area).

132. LATANÉ & DARLEY, *supra* note 57, at 69.

133. *Id.*

134. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 64 tbl. 3.9 (fear of physical reprisal was an insignificant reason for failure to report crimes).

135. One prosecutor suggests that the law should defer to a bystander's subjective perception of the risk of actual intervention. She seems less persuaded, however, that subjective perception should be relevant in evaluating a bystander's failure to call for help. She traces this failure to a general disinclination toward involvement in the criminal justice system. Letter from Susan K. Lynch, District Attorney, Portage County, Wis., to the author (Nov. 25, 1991) (on file with author). See also

subpoena power would have little force.<sup>136</sup>

Under easy-rescue laws, as potential danger increases, whether from an apparently dangerous third party or from natural sources, inaction becomes more defensible. In some instances, the bystander can discharge her duty by notifying professional rescuers. In those cases, easy-rescue requirements would merge with the duty-to-report laws discussed below. Although such a merger may appear to ignore that reporting is different from rescuing, both actions are types of helping behavior. While both the victim and the state would prefer a pre-harm rescue to a post-harm report, society still derives a substantial benefit from notification. The victim benefits if professional rescuers arrive before a second or third attack takes place;<sup>137</sup> but if rescuers arrive too late to prevent additional attacks, the victim may get revenge or vindication through the criminal process. Potential victims, in turn, also benefit from the deterrent effect on potential criminals that follows a successful prosecution.<sup>138</sup> Moreover, given that criminal prosecutions are brought on behalf of the people, the fact that reporting may help the state more than the victim is not, without more, objectionable.

Because law cannot demand acts of heroism, laws criminalizing failures to rescue will be effective only at the boundaries, as in the case of the passerby who failed to warn the blind man that he was about to step into a manhole.<sup>139</sup> The duty to rescue will most often require prompt reporting; thus, the two different types of laws would have substantially the same application and effect. This approach to the duty-to-rescue statutes

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letter from Kenneth L. Kutz, District Attorney, Burnett County, Wis., to the author (Nov. 20, 1991) (on file with author) (District Attorney would file charges against witnesses who failed to contact police, and when considering the failure to actually intervene, the D.A. would consider the size and sex of the parties and the potential threat of injury to the intervenor). A Minnesota prosecutor mentions the bystander's concern for her well-being and the level of danger to which the imperiled is exposed as factors in the decision to prosecute. Letter from Thomas D. Hayes, County Attorney, Sherburne County, Minn., to the author (Nov. 7, 1991) (on file with author).

136. On the effectiveness of subpoenas in obtaining grand jury testimony, see generally YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 637 (7th ed. 1990) ("The grand jury may utilize the subpoena ad testificandum to obtain testimony . . . [and is] supported by the court's authority to hold in contempt any person who willfully refuses, without legal justification, to comply with a subpoena's directive."); see also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment does not afford a reporter the privilege to decline to aid grand jury's investigation); 28 U.S.C. § 1826 (1988) (witness who refuses to testify before federal grand jury may be summarily confined).

137. See *supra* note 94.

138. See *infra* notes 257-67 and accompanying text.

139. See *supra* text accompanying note 53.

would achieve the proper balance between a community of aid and one which respects the autonomy and well-being of bystanders.

#### D. *Duty-to-Report Laws: Resurrecting Misprision of Felony*

Some of the minority jurisdictions limit mandatory intervention to the duty of one who has witnessed a certain crime to call the police or other rescue authorities.<sup>140</sup> These reporting statutes are contemporary versions of the dormant offense of misprision of felony.<sup>141</sup> Misprision of felony is "the concealment of a felony of which a man knows, but never assented to."<sup>142</sup> The common-law elements of the offense are: (1) knowledge of the felony; (2) a reasonable opportunity to disclose the felony without harm; and (3) failure to report the felony.<sup>143</sup> Misprision of felony has been described as anachronistic,<sup>144</sup> strikingly close to accessorial liability in form,<sup>145</sup> and threatening to the Fifth Amendment guarantee against self-incrimination. It is therefore not surprising that it is in virtual desuetude.

Whether misprision of felony was ever incorporated into the American

140. See *supra* chart at 23.

141. According to Blackstone, "misprision" stems from the French word *mespris*, which means "neglect" or "contempt." 4 WILLIAM BLACKSTONE, COMMENTARIES \*119.

142. 4 BLACKSTONE, \*121 ("[F]or, if he assented, this makes him either principal, or accessory.").

143. LAFAVE & SCOTT, *supra* note 41, § 6.9, at 600 n.53, 601. Scholarly journals contain some impressive historical accounts of the action, see e.g., C.K. Allen, Note, *Misprision*, 78 L.Q. REV. 40 (1962); Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, 2 WAYNE L. REV. 367 (1965); C. Howard, *Misprisions, Compoundings and Compromises*, 1959 CRIM. L. REV. 750; as do cases, e.g., *Sykes v. Director of Public Prosecutions*, [1961] 3 W.L.R. 371; and practitioners' journals, e.g., George Goldberg, *Misprision of Felony: An Old Concept in a New Context*, 52 A.B.A. J. 148 (1966).

144. Misprision received textual recognition in the leading British treatises. See II SIR FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF THE ENGLISH LAW 506-07 (2d ed. 1898); 4 BLACKSTONE, *supra* note 141, at \*119-21; SIR MATTHEW HALE, I THE HISTORY OF THE PLEAS OF THE CROWN 374 (photo. reprint 1971) (1736); 3 SIR EDWARD COKE, INSTITUTES 139 (E. & R. Brooke 1797) (1628); 8 SIR WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 322-23 (1925). However, it commanded little respect. Over a century ago, Sir James Fitzjames Stephen called misprision a "practically obsolete offence" in his HISTORY OF THE CRIMINAL LAW OF ENGLAND, 3 STEPHEN, *supra* note 52, at 238.

145. Compare 18 U.S.C. § 3 (1988) (an accessory after the fact is one who, "knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment") with 18 U.S.C. § 4 (1988) (one has committed misprision of felony if she, "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").

common law is doubtful.<sup>146</sup> Its unpopularity is traceable in part to Chief Justice John Marshall, who wrote: "It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man."<sup>147</sup> Marshall's statement has been influential in discrediting the law of misprision; courts and commentators habitually refer to it as such.<sup>148</sup> But the statement originated as a mere throw-away line in a pre-Bankruptcy Code civil case involving William Marbury (of *Marbury v. Madison*<sup>149</sup> fame), his son John, and John's brother-in-law, William Fitzhugh. Fitzhugh was a chronic debtor for whom William acted as trustee in favor of a group of defrauded creditors, perhaps in the hope that they would be less likely to pursue criminal proceedings against Fitzhugh. A second group of creditors, who obtained a judgment against Fitzhugh after (at John's urging) he had conveyed his property to William as trustee, unsuccessfully sought to set aside the conveyance as an illegal preference.<sup>150</sup> The case had nothing at all to do with the law of misprision. In fact, the "punishment" to which Chief Justice Marshall referred was the setting aside of a deed, not a criminal sanction. To require Marbury to report his son-in-law instead of advance him money to undo the harm caused by the latter's forgeries

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146. LAFAVE & SCOTT, *supra* note 41, § 6.9, at 600.

147. *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 555, 575-76 (1822) (dictum). For an argument in favor of "the revival or rebirth of misprision of felony," see Louis Waller, *Rescue and the Common Law: England and Australia*, in THE GOOD SAMARITAN, *supra* note 3, at 141, 148-52. For a discussion offering reasons for citizens' failure to cooperate with investigations of crimes against third parties, see Herman Goldstein, *Citizen Cooperation: The Perspective of the Police*, in THE GOOD SAMARITAN, *supra* note 3, at 199.

148. *E.g.*, *Pope v. State*, 396 A.2d 1054, 1074 (Md. 1979); *Holland v. State*, 302 So. 2d 806, 809 (Fla. Dist. Ct. App. 1974); LAFAVE & SCOTT, *supra* note 41, § 6.9, at 600-01; ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 574 (3d ed. 1982); Frankel, *supra* note 143, at 417 n.167.

149. 5 U.S. (1 Cranch) 137 (1803).

150. After uttering his famous statement, Chief Justice Marshall remanded the case for retrial on the issue of whether Marbury and the defrauded creditors had entered an agreement, express or implied, to exchange favored treatment for suppressed prosecution. After the trial court concluded that no such agreement existed, the disfavored creditors took another appeal to the Supreme Court. The Court ordered yet another trial because of evidentiary error. *Brooks v. Marbury*, 24 U.S. (11 Wheat.) 78 (1826). The author thanks Professor F. Phillip Manns, Jr. for his help in interpreting the *Brooks* litigation.

The case featured other notables including Francis Scott Key (author of the "Star Spangled Banner"), who joined the Attorney General (in the latter's private-lawyer capacity) as William Marbury's co-counsel. See EDWARD S. DELAPLAINE, FRANCIS SCOTT KEY: LIFE AND TIMES 44-45 (1937). Key was a member of the Supreme Court Bar, where he argued often during the period that the *Brooks* case was decided. *Id.* at 210-15, 405-07.

would be "too harsh for man." That, however, is a far cry from a requirement that someone report the commission of a felony by a stranger. Nonetheless, no state court since 1878 has upheld a conviction for misprision of felony.<sup>151</sup> Federal misprision actions are slightly more common, most likely because they are more difficult to prove and thus appear less harsh than do existing state misprision laws. The federal statute requires active concealment of the felony, not just a failure to report.<sup>152</sup>

Unlike their easy-rescue counterparts, prosecutors have employed duty-to-report statutes in a few cases,<sup>153</sup> usually when the conviction of the defendant for the unreported crime itself either would be too difficult<sup>154</sup> to obtain or too harsh<sup>155</sup> if obtained. In other words, prosecutors have utilized duty-to-report statutes when proof of the defendant's in-

151. See Frankel, *supra* note 143, at 417 n.170 (1965) (finding only one American state-court conviction for misprision of felony, *State v. Hann*, 40 N.J.L. 228 (N.J. Sup. Ct. 1878)).

152. See 18 U.S.C. § 4 (1988). The concealment requirement is "necessary to rescue the act from an intolerable oppressiveness, and to eliminate a serious question of constitutional power." *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934).

Courts have found concealment in the following cases: *United States v. Davila*, 698 F.2d 715 (5th Cir. 1983) (serving as stakeholder in conspiracy to suborn perjury); *United States v. Gravitt*, 590 F.2d 123 (5th Cir. 1979) (attempt to conceal crime); *United States v. Stuard*, 566 F.2d 1 (6th Cir. 1977) (attempt to divert officers' attention from friend's theft of 987 cases of whiskey); *United States v. Hodges*, 566 F.2d 674 (9th Cir. 1977) (untruthful statements to authorities); *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969) (defendant and husband purchased land with proceeds from bank robbery in which husband participated); *Lancey v. United States*, 356 F.2d 407 (9th Cir.) (harboring a criminal), *cert. denied*, 385 U.S. 922 (1966); *United States v. Thornton*, 178 F. Supp. 42, 43 (E.D.N.Y. 1959) (taking "active steps to rent [a hotel] room and share it" with known fugitive). *But see United States v. Johnson*, 546 F.2d 1225 (5th Cir. 1977) (failure to come forward and report knowledge of conversations relating to illegal exports of arms and ammunitions by others is not "concealment" within meaning of statute).

The federal law requires that one with knowledge report "as soon as may be." In *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), defendant made no disclosures until federal officers who were investigating the crime frightened him into doing so. He did not disclose to authorities "as soon as may be," but instead he "threw dust in their eyes" when they interviewed him. *Id.* at 149.

The reporting requirement naturally has raised some self-incrimination questions. See, e.g., *United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979) (police officers were protected by Fifth Amendment guarantee in their refusal to report felony narcotics sale linked to their own bribery, theft, conspiracy, and racketeering); *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976) (privilege applies if reporting would lead to prosecution for possession of stolen goods); *United States v. King*, 402 F.2d 694 (9th Cir. 1968) (privilege applies if reporting would lead to prosecution for accomplice liability); *United States v. Trigilio*, 255 F.2d 385 (2d Cir. 1958) (federal grand jury witness could claim privilege against self-incrimination for fear he might be charged with violating misprision of felony statute).

153. See, e.g., *In re Stichtenoth*, 425 N.E.2d 957 (Ohio Ct. App. 1980) (reporting statute does not require that report be to police, nor that the reporting witness speak to police when questioned).

154. In a 1987 unreported decision, the Ohio Court of Appeals upheld the conviction of a dentist for failing to report thefts of drugs from his office under a New Philadelphia, Ohio municipal ordi-



volvement in the underlying, unreported crime was questionable,<sup>156</sup> or when the defendant's personal history<sup>157</sup> suggested that a misdemeanor

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nance analogous to Ohio Revised Code § 2921.22. *See supra* note 31. The prosecutor's office explains:

This office had considered felony drug trafficking charges based on evidence that the defendant, a dentist, was selling drugs to various individuals under circumstances not constituting bona fide dental treatment. The defendant attributed the undocumented shortage of drugs in his office to break-ins and thefts.

There was insufficient evidence to establish the felony drug offenses and the matter was referred to the municipal prosecutor for prosecution of misdemeanor charges for failure to report the alleged break-ins.

Letter from David C. Hipp, Victim/Witness Coordinator, Tuscarawas County Prosecutor's Office, to the author (Oct. 28, 1991) (enclosing a copy of *State v. Miccichi*, No. 86AP08066, slip op. (Ohio Ct. App. July 20, 1987)) (on file with author). *See also* letter from Howard E. Hall, Prosecuting Attorney, Morrow County, Ohio, to the author (Nov. 25, 1991) (on file with author) (crime reporting statute used in cases where proof of the individual's involvement in the crime is weak).

155. *State v. S.*, No. 91-800010-2 (Wash. Super. Ct. Aug. 8, 1991). There, the prosecutor accepted a plea from a juvenile accomplice to a hate crime against a school teacher, for failure to notify authorities of the "preparations for the commission of the offense of Possession or Control of a Bomb or Similar Device and did not as soon as reasonably possible notify a public official." *See Information Charging Failure to Notify Public Official of Violent Offense* (on file with author).

156. For instance, in an Ohio case in which a defendant had knowledge of a breaking and entering of a bait shop, but might not have actually participated in the act, the trial court accepted a plea to a failure-to-report violation, which carries a significantly lesser penalty than breaking and entering. For his no-contest plea, the defendant received a suspended sentence and a fine. Letter from George P. McCarthy, Assistant Prosecuting Attorney, Meigs County, Ohio, to the author (Nov. 5, 1991) (on file with author). In a similar context, an Ohio prosecutor reduced charges against a defendant from the felony of defrauding a livery to the misdemeanor of failure to report a crime. The defendant, realizing that his travelling partner had absconded without paying the taxi driver who had driven them from Detroit to Toledo, also ran from the cab. In exchange for his no-contest plea to the failure-to-report charge, the man received a suspended 10-day jail sentence and a \$100 fine plus costs. *State v. Sundberg*, No. CR89-6594, Order (Common Pleas Court, Lucas County, Ohio, July 13, 1989); letter from James D. Turner, Assistant Prosecuting Attorney, Criminal Division Chief, Lucas County, Ohio, to the author (Oct. 14, 1991) (on file with author); telephone interview with J. Schaeffer, Public Defender, Lucas County, Ohio (Nov. 15, 1991). Another Ohio case involved a defendant who admitted that he suspected an aggravated burglar of wrongdoing when he drove the man from a store's parking lot while others chased him. The defendant-driver's questionable level of participation in the burglary led prosecutors to settle for a failure-to-report plea rather than seeking a potential 15-year imprisonment for aggravated burglary. He received a suspended 30-day jail sentence, 40 hours of community service, plus court costs. The defendant eventually served his jail term after failing to perform his community service. *State v. Kraft*, No. CR90-6772, Order (Common Pleas Court, Lucas County, Ohio, Aug. 8, 1990); telephone interview with J. Schaeffer, Public Defender, Lucas County, Ohio (Nov. 15, 1991).

157. *See* Letter from Michael Rickert, Prosecuting Attorney, Skagit County, Wash., to the author (Apr. 3, 1992) (on file with author) (discussing case in which a witness to a violent crime could have been charged under Washington's failure-to-report statute, but was not because "[t]he witness came forward during the course of the investigation and was very cooperative and agreed to testify at the time of trial of the charged defendant"). In Green County, Wisconsin, bystanders failed to break up a fight between two adult women, one of whom was cited for disorderly conduct under a municipal ordinance. Neither the referring law enforcement agencies nor the district attorney's office con-

conviction was more appropriate than a felony conviction for acting as an accomplice to the unreported crime. Despite the Fifth Amendment self-incrimination problems endemic to a law that requires witnesses to report criminal activity in which they might have had some involvement,<sup>158</sup> a small number of prosecutors have found the duty-to-report law to be a handy compromise in plea negotiations.<sup>159</sup>

Scant trial and appellate court precedents indicate that the legislative responses to the New Bedford rape have been symbolic at most.<sup>160</sup> To determine whether the lack of litigation was due to prosecutorial reluc-

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sidered prosecution because the women were friends before the incident, neither was seriously hurt, and alcohol consumption precipitated the fight. Letter from Gary L. Luhman, District Attorney, Green County, Wis., to the author (Oct. 30, 1991) (on file with author).

158. Prominent among the few cases litigated is the Ohio case in which the Ohio Court of Appeals reversed a woman's failure-to-report conviction. The court reversed on the ground that reporting her 13-year-old daughter's rape by the mother's live-in boyfriend would have subjected the mother to prosecution under the state's endangerment and welfare-fraud laws, and thus would violate her guarantee against self-incrimination. *State v. Wardlow*, 484 N.E.2d 276, 279 (Ohio Ct. App. 1985) (construing both the federal and Ohio constitutional guarantee against self-incrimination). Shortly after *Wardlow*, the Ohio Court of Appeals reached a different result in *State v. Miccichi*. There, the court held that the privilege against self-incrimination did not apply to a dentist's failure to report alleged burglaries of his office, which would have accounted for missing drugs. The court found that reporting the supposed thefts would have exculpated, not inculpated, the dentist on drug trafficking charges. *State v. Miccichi*, No. 86AP08066, slip op. (Ohio Ct. App. July 20, 1987). See *supra* note 154.

Finally, one Ohio appellate decision involved another constitutional challenge to the failure-to-report statute, but concerned double jeopardy, not self-incrimination. *In re Walker*, No. CA-7926, (Ohio Ct. App. Mar. 19, 1990). Two juveniles—Walker and Robertson—were convicted of involuntary manslaughter of a mentally ill juvenile. Walker pleaded guilty to failure-to-report charges, then claimed that the guilty plea should bar his subsequent prosecution for involuntary manslaughter. The Ohio courts rejected his appeal. When the prosecution later received guilty pleas from both defendants on the involuntary manslaughter charges, the State dropped the failure-to-report charges against both juveniles. Telephone interview with Robert D. Horowitz, Stark County Prosecuting Attorney, Canton, Ohio (Dec. 24, 1991).

159. The self-incrimination problems that would arise if the defendant contested charges on the principal offense or on the duty-to-report charge can be obviated by a plea agreement.

160. This is not to say that the symbolic value of a criminal statute has no value. See J. D. MABBOTT, PUNISHMENT, XLVIII MIND 161 (1939), quoted in *The Classic Debate*, in PHILOSOPHY OF LAW 646 n.3 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (“[Legislators’] laws would succeed even if no punishment occurred.”). In some instances, the public is less concerned with the “tangible deprivations and discomforts that go with punishment” than with “a symbolic denunciation of what he or she did.” LEO KATZ, BAD ACTS AND GUILTY MINDS 28 (1987). See also Joel Feinberg, *The Expressive Function of Punishment*, in DOING AND DESERVING 98 (1970). The criminal prosecution of Ford Motor Company for the well-publicized “Pinto” disaster exposed the company to only a small monetary sanction. Yet it excited an expensive, vigorous, and successful defense if only to avoid the symbolic taint of a criminal conviction. The same principle applied in the famous “Scopes Monkey Trial,” in which Clarence Darrow and William Jennings Bryan battled over the Christian fundamentalists’ right to restrict the teaching of scientific knowledge in Tennessee

tance to invoke these laws, I sent a letter survey presenting the facts of the New Bedford rape to the 387 prosecutors practicing in the jurisdictions with duty-to-report laws. The responses of the 157 who answered the survey indicated that despite the questionable pedigree of the contemporary, misdemeanor version of misprision of felony, it may not be prosecutorial reluctance, but instead a combination of "thankfully few incidents such as the [New Bedford] case and an inability to identify perpetrators in those reported cases where the statute does apply,"<sup>161</sup> as well as the problematical nature of coercing testimony from crucial witnesses, that accounts for the dearth of precedent on point.<sup>162</sup> Terry Gaines, First Assistant Prosecuting Attorney for Hamilton County, Ohio, which encompasses metropolitan Cincinnati, stated:

Hamilton County has always enjoyed a reputation as an area where the laws were enforced rather strictly. As a Prosecutor, I say that with some degree of pride.

. . . I was offended when I saw the movie ["The Accused"] and . . . read the newspaper accounts when the actual event occurred.

You may rest assured that in this jurisdiction, we would have sought to prosecute those onlookers who did nothing to either stop or report the offense. Unfortunately, in our jurisdiction, failure to report a felony is [only]

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public schools. There, the legal consequences of a conviction of the schoolteacher—John Thomas Scopes—was only a \$500 fine. See KATZ, *supra* at 28.

161. Letter from Jonathan G. Ellsworth, Assistant State Attorney, 16th Jud. Cir., Fla., to the author (Nov. 15, 1991) (on file with author).

162. A prosecutor in New Bedford, Massachusetts, the jurisdiction in which the rape occurred, writes, "The availability of 'objective' witnesses may be foreclosed if they are threatened with a criminal prosecution of their own." Letter from Gilbert J. Nadeau, Jr., First Assistant District Attorney for Bristol District, Mass., to the author (Nov. 13, 1991) (on file with author). Twenty-one prosecutors cited a variety of obstacles to prosecution other than reluctance of prosecutors to press charges. See, e.g., letter from Antony Gretick, Prosecuting Attorney, Bryan, Ohio, to the author (Nov. 15, 1991) ("[T]here is no 'resistance' here!") (on file with author); letter from C. Marie King, Assistant State Attorney, 6th Jud. Cir., Fla., to the author (Nov. 25, 1991) ("We would have no hesitation to prosecute," but "[e]yewitnesses to sexual batteries are rare.") (on file with author); letter from C.W. Goodwin, Chief Assistant State Attorney, 2d Jud. Cir., Fla., to the author (Dec. 6, 1991) ("We do not have any reluctance to seek convictions under this statute, but the opportunity has not arisen.") (on file with author); letter from Kitty-Ann van Doorninck, Admin. Deputy Office of the Prosecuting Attorney, Pierce County, Wash., to the author (Apr. 3, 1992) ("Our first priority would always be to obtain convictions against the violent offenders, and . . . the bystanders would be critical witnesses against the actual participants.") (on file with author); letter from Michael Rickert, Prosecuting Attorney, Skagit County, Wash., to the author (Apr. 3, 1992) ("I believe it would be unethical to hang the threat of a possible [failure to report] charge over one of the 'onlookers' in order to force his or her hand towards appropriate state testimony.") (on file with author).

a misdemeanor of the fourth degree.<sup>163</sup>

A majority of those who responded to my survey stated that their decisions to pursue convictions in settings such as the New Bedford rape were unrelated to the severity of the legislatively prescribed penalty.<sup>164</sup> Of those whose views turned on the severity of the penalty, more respondents described the misdemeanor status of the crime as too mild<sup>165</sup> rather than as too harsh.<sup>166</sup> If any prosecutorial reluctance exists, it is tactical,

163. Letter from Terry D. Gaines, First Assistant Prosecuting Attorney, Hamilton County, Ohio, to the author (Nov. 15, 1991) (on file with author).

164. See, e.g., letter from Ronald Clark, Chief Criminal Deputy, Office of the Prosecuting Attorney, King County, Wash., to the author (Mar. 31, 1992) ("Making it be a felony would not have made it more persuasive for us to prosecute. Why should it?") (on file with author). *But see* letters from Michael G. Spahr, Prosecuting Attorney, Washington County, Ohio, to the author (Nov. 5, 1991) (municipal law directors likely elect not to pursue convictions because of "low degree of the offense"); Thomas D. Hayes, County Attorney, Sherburne County, Minn., to the author (Nov. 7, 1991) (economic factors affect decisions to prosecute); Darwin L. Zweig, County Attorney, Clark County, Wis., to author (Nov. 6, 1991) (harsh penalties are in order for failure to render aid absent criminal activity, but danger of retaliation makes harsh penalty appropriate when criminal has created peril); Susan K. Lynch, District Attorney, Portage County, Wis., to the author (Nov. 25, 1991) ("[A] penalty is not the deciding factor in prosecuting, [but] it is a factor to be concerned with in prioritizing with limited personnel and resources in a prosecutor's office.") (on file with author).

165. See, e.g., letter from Jeffrey D. Thompson, County Attorney, Rice County, Minn., to the author (Nov. 4, 1991) ("[F]ailure to render assistance [should be] a felony, at least . . . where the peril is death or great bodily harm.") (on file with author); letter from David H. Bruneau, Prosecuting Attorney, Clallam County, Wash., to the author (Apr. 7, 1992) ("[F]ailure to report the commission of a violent crime occurring before one's very eyes should expose that witness to more serious penalties than a mere misdemeanor.") (on file with author); letter from Lynn C. Slaby, Prosecuting Attorney, Summit County, Ohio, to the author (Nov. 1, 1991) (on file with author); letter from James C. Babler, District Attorney, Barron County, Wis., to the author (Nov. 11, 1991) ("[T]he current penalty is much too small for the crime.") (on file with author); letter from Donald A. Poppy, District Attorney, Chilton County, Wis., to the author (Nov. 6, 1991) ("[A] more serious penalty would seem appropriate.") (on file with author); letter from Thomas L. Storm, District Attorney, Found du Lac County, Wis., to the author (Nov. 5, 1991) ("The circumstances [of "The Accused"] would . . . call for a more severe penalty than a class C misdemeanor.") (on file with author); letter from Patrick F. O'Melia, District Attorney, Oneida County, Wis., to the author (Nov. 5, 1991) ("[A] more severe penalty," "comparable to the party to a crime concept," "would make me more inclined to prosecute the case.") (on file with author); letter from Jay N. Conley, District Attorney, Onconto County, Wis., to the author (Nov. 20, 1991) (suggesting enhanced penalties provided that the statute is not unconstitutionally vague) (on file with author); letter from Patrick Schilling, District Attorney, Price County, Wis., to the author (Feb. 11, 1991) ("[I]t seems a little nit picking to prosecute the bystanders for a Class C misdemeanor . . . while I would undoubtedly be prosecuting the actual assailants for major felonies.") (on file with author).

166. See, e.g., letter from Jim Slagle, Prosecuting Attorney, Marion County, Ohio, to the author (Nov. 6, 1991) (Ohio's maximum of 30 days in jail and \$250 fine "is the appropriate classification," because "[a] significantly more severe penalty could have the affect [sic] of making me more reluctant to prosecute such a case") (on file with author); letter from Patrick A. Oman, County Attorney, Mower County, Minn., to the author (Nov. 15, 1991) ("I would not be so inclined as to make it an offense that would be punishable by imprisonment.") (on file with author).

not philosophical. Prosecutors begin by carefully considering whether any of the onlookers, through their encouragement or assistance, were accomplices to the underlying offense.<sup>167</sup> As one prosecutor observed, "seldom is there a witness to a sexual battery . . . who is [not] prosecuted as a codefendant or as an accessory[,] which are felony offenses."<sup>168</sup> Absent accomplice or conspiratorial liability, the threat of a criminal prosecution is a bargaining chip in negotiations with potential witnesses who hesitate to testify in the principal prosecution.<sup>169</sup>

This approach has its opponents, however. Some prosecutors refuse to charge the witnesses whose testimony may be crucial in the principal criminal prosecution, because it might compromise the case.<sup>170</sup> Given that "'objective'. . . witnesses could well be invaluable to the government," especially "if the underlying assault case is not strong,"<sup>171</sup> it may

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167. See, e.g., letters from C. William Foust, District Attorney, Dane County, Wis., to the author (Nov. 13, 1991) ("We would look long and hard . . . for words or acts of encouragement or participation by the bystanders.") (on file with author); Howard E. Hall, Prosecuting Attorney, Morrow County, Ohio, to the author (Nov. 25, 1991) (failure-to-report statute invoked "when . . . we discover that the evidence is not strong enough to convict of the principal offense or to convict them as an aider or abettor") (on file with author); Michael Rickert, Prosecuting Attorney, Skagit County, Wash., to the author (Apr. 3, 1992) ("Of course there are cases where the line [between an accomplice and a mere witness] begins to get very gray.") (on file with author); letter from Thomas D. Hayes, County Attorney, Sherburne County, Minn., to the author (Nov. 7, 1991) (on file with author).

168. Letter from C.W. Goodwin, Chief Assistant State Attorney, 2nd Jud. Cir., Fla., to the author (Dec. 6, 1991) (on file with author).

169. Telephone interview with Robert D. Horowitz, Prosecuting Attorney, Stark County, Ohio (Dec. 23, 1991). See also letter from Andrew Moraghan, Assistant County Attorney, Yellow Medicine County, Minn., to the author (Nov. 5, 1991) ("The witness' cooperation with the prosecution is one factor that I would rely upon in not charging the witnesses.") (on file with author). One prosecutor "possibly would wait until the rape case was completed and then issue charges against [the noncompliant witness] "if the rape conviction was successful." Letter from John A. DesJardins, District Attorney, Outagamie County, Wis., to the author (Nov. 7, 1991) (on file with author). Understandably, no prosecutor endorses the tactic of obtaining a compliant witness' testimony in the principal prosecution, and then prosecuting her for failure to report.

170. See, e.g., letter from C. William Foust, District Attorney, Dane County, Wis., to the author (Nov. 13, 1991) (recognizing "the need . . . to have the cooperative testimony of the bystanders to prove up the underlying criminal case against the principal actor(s)") (on file with author); letter from Timothy A. Oliver, Prosecuting Attorney, Warren County, Ohio, to the author (Nov. 4, 1991) (citing "practical considerations" militating against "filing charges against witnesses you may need in prosecuting the main offender") (on file with author).

171. Letter from Michael E. Rickert, Prosecuting Attorney, Skagit County, Wash., to the author (Apr. 3, 1992) ("[I]t would be unethical to hang the threat of a . . . charge over one of the 'onlookers' in order to force his or her hand towards appropriate state testimony.") (on file with author). See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1980) (prosecutor shall not institute criminal charges on less than probable cause). Prosecutors may be disciplined for threatening someone with criminal charges in order to obtain an advantage in a *civil* case, *id.* at DR 7-105, but

even be unethical<sup>172</sup> to threaten witnesses with criminal prosecution. Moreover, testimony obtained only through "grants of immunity . . . would greatly depreciate [witnesses'] credibility."<sup>173</sup>

Although no consensus exists among the prosecutors in the relevant jurisdictions, there is a market for these laws, either as a compromise charge or, for some, as leverage to be applied against recalcitrant witnesses to serious crimes. Yet some contend not only that placing such a responsibility on citizens interferes with personal autonomy, but also that it is unnecessary, given the modern, sophisticated division of labor that has removed private citizens from the business of enforcing the law.<sup>174</sup> In short, because an expanded law of omissions adds only marginally to peace and social order,<sup>175</sup> the argument goes, rescue need not be made the business of the community, but only of its authorized agents. The next section examines the competing interests of autonomy and security, and questions whether exclusive reliance on rescue specialists strikes the proper balance.

### III. THE STRUGGLE BETWEEN AUTONOMY AND SECURITY

#### A. *The Delegation of Rescue to Professionals*

Generally, the superior coordination, skills, and resources of specialized rescuers justify society's full reliance on them to undertake emergency rescue.<sup>176</sup> Indeed, if everyone engaged in the business of rescue, the ensuing chaos could be as harmful as the complete inaction of private

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the Code does not prohibit prosecutors from conditioning nonprosecution or dismissal of charges in exchange for a witness's agreement to testify at a *criminal* trial.

172. Letter from Gilbert J. Nadeau, Jr., First Assistant District Attorney, for Bristol District, Mass., to the author (Nov. 13, 1991) (on file with author).

173. Letter from John A. DesJardins, District Attorney, Outagamie County, Wis., to the author (Nov. 7, 1991) (on file with author).

174. See SIR JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 8 (2d ed. 1890) ("[I]n the earliest period of English history crimes seem to have been regarded as private wrongs, revenged rather than punished by those who were injured by them, first by private war, then by summary execution, and then [gradually] by a public administration of justice."); THEODORE F. T. PLUCKNETT, EDWARD I AND CRIMINAL LAW 49 (1960) (prior to Henry II's reign, criminal justice depended upon the individual accuser coming forward and keeping in motion complicated legal procedures at his own expense, and after the Conquest, appearing fully armed to engage in a single combat with the accused).

175. See Frankel, *supra* note 143, at 375-76.

176. Modern emergencies such as multi-car wrecks, hostage crises, and infants who have fallen into wells are better addressed by public rather than private rescue efforts. See also Wenik, *supra* note 73, at 1795 ("[T]he advent of modern police forces has greatly reduced the need for direct citizen participation in the apprehension of criminals.").

citizens.<sup>177</sup> Once we delegate the duty to rescue to specialists, people can generally carry their share of the societal burden of rescue simply by paying their taxes<sup>178</sup> and by assisting officers in keeping the peace when specifically requested.<sup>179</sup> Because police and fire services cannot detect all emergencies, legislatures in a minority of states have added the requirement that citizens must aid the imperiled or alert rescue specialists when danger is imminent.<sup>180</sup> Hue and cry usually will satisfy this requirement, but those in imminent peril sometimes cannot await assistance from the designated social institutions:

After a long tradition of discouraging self-help, the medical and therapeutic community, under the pressures of severe personnel shortages and inadequate techniques, have changed their attitudes. It is physically impossible for paid rescue personnel to reliably reach a heart attack victim in under [five] minutes. The critical period for resuscitation is [two] minutes. If the brain goes without oxygen beyond that time, its cells begin to die. The only solution is to train enough of the general population in resuscitation techniques so that the likelihood becomes good that you will have a heart attack near one of them . . . . The encouragement of self-help groups . . . is a symptom of the realization of professionals that their technology is inadequate.<sup>181</sup>

Because technology cannot timely address all emergencies, the duty to

177. FEINBERG, *supra* note 16, at 170; *see also* CAL. PENAL CODE § 402 (West Supp. 1992) (onlookers at rescue scenes who impede professionals from carrying out their jobs may be guilty of a misdemeanor).

178. FEINBERG, *supra* note 16, at 170. Since the time of the parable of the Good Samaritan, a "battery of complex social organizations" has developed, *i.e.*, police, fire, and ambulance services, public hospitals and clinics, "through which the [modern-day] Good Samaritan should often best proceed." Morris, *supra* note 16, at 135. *But see* WUTHNOW, *supra* note 7, at 114 (Our culture "believe[s] the individual is responsible for caring—not the government, not some organization, not society in the abstract, not even the family.").

179. At least 16 states have *posse comitatus* statutes that permit law enforcement officers to summon the assistance of citizens, and make it a crime for able-bodied adults to neglect or refuse to aid officers when requested to do so. *See* ALA. CODE § 13A-10-5 (1982); ARK. CODE ANN. § 12-11-104 (Michie 1987); CAL. PENAL CODE § 150 (West Supp. 1992); GA. CODE ANN. § 17-4-24 (Michie 1990); IDAHO CODE § 18-707 (1987); ILL. ANN. STAT. ch. 34 para. 3-6022 (Smith-Hurd Supp. 1991); KY. REV. STAT. ANN. § 70.060 (Michie/Bobbs-Merrill 1991); LA. REV. STAT. ANN. § 33:1436 (West 1988); MO. ANN. STAT. § 84.200 (Vernon 1971); MONT. CODE ANN. § 45-7-304 (1991); N.M. STAT. ANN. § 30-22-2 (Michie 1984); N.C. GEN. STAT. § 17-22 (1991); OR. REV. STAT. § 206.050 (1991); S.C. CODE ANN. § 23-15-70 (Law. Co-op. 1989); VT. STAT. ANN. tit. 24, §§ 300-301 (1975); WIS. STAT. ANN. § 59.24 (West 1988); *see generally* 47 AM. JUR. 1ST *Sheriffs, Police, and Constables* § 36 (1943) (discussing law enforcement's power to summon aid and the function of the *posse comitatus*).

180. *See supra* notes 24-36; *see also supra* chart at 23.

181. JANE PILIAVIN ET AL., EMERGENCY INTERVENTION 256 (1981).

rescue in rare cases should be privately shouldered, even if by put-upon passersby.<sup>182</sup> At a minimum, the law should require that citizens initiate the rescue process by alerting professional rescuers that their services are needed.<sup>183</sup>

Despite our reliance on the government to delegate rescue responsibilities, state-sponsored professional rescuers are obligated in only the flimsiest sense. Perhaps surprisingly, the government's failure to rescue is not actionable under federal constitutional<sup>184</sup> or state tort law.<sup>185</sup> There, too, the special-relationship theory presents an imposing barrier to civil litigants who claim that nonfeasant police or fire personnel harmed them.<sup>186</sup> The appellate cases on point invariably shield public actors, perhaps out of official gratitude toward those who have accepted protection of the public as their calling. In order to reach that result, courts have fashioned an even stingier view of special relationships than that which governs the conduct of private actors.

For example, the California Supreme Court, in denying recovery to a personal injury victim who was unable to pursue a civil action due to a botched police investigation, relied on the California Vehicle Code, which provides that highway patrol personnel *may*—not *must*—investi-

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182. A bystander may not only wish to remain uninvolved, but even worse, she may also harbor ill will toward the imperiled. This added fact would not affect the bystander's duty, which would arise whenever the bystander could rescue or call specialized rescuers without substantial risk.

183. Given the rarity with which police themselves witness crime, a requirement that citizens promptly alert officers is an integral part of preventing and mitigating harm. An average Los Angeles police officer, for example, witnesses a robbery only once in 14 years. *Wenik, supra* note 73, at 1790 n.23 (citing Leonard Bickman, *Bystander Intervention in a Crime*, in *VICTIMS AND SOCIETY* 144, 145 (Emilio C. Viano ed., 1976)).

184. In *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), the Seventh Circuit affirmed a trial court's dismissal of an action brought under 42 U.S.C. § 1983 alleging that an officer's failure to consider that two teenagers and a fetus were inside a burning car denied them due process of law. In his opinion, Judge Posner cautioned against constitutionalizing all state tort actions, *Joliet*, 715 F.2d at 1205, and explained that the Fourteenth Amendment does not require state governments to provide basic services. *Id.* at 1202-05. The court concluded that the plaintiffs could not recover under federal law unless the state itself had created the danger, intentionally failed to aid the decedents knowing of their presence in the car, or withheld aid on a discriminatory basis. Later, in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), the Supreme Court affirmed that, absent a "special relationship," a state's failure to provide minimal levels of safety to its citizens does not constitute a violation of the Due Process Clause of the Fourteenth Amendment. *See generally* GLENDON, *supra* note 1, at 89-98.

185. On the immunity of state governmental entities and public officials, *see generally* KEETON ET AL., *supra* note 42, §§ 131-132, at 1043-69.

186. *See supra* notes 41-49 and accompanying text.



gate accidents and aid stranded motorists.<sup>187</sup> The dissent questioned the majority's reasoning, since the victim's injuries and provisions in the same Vehicle Code compelled the victim to remain on the scene, making private investigation impossible.<sup>188</sup> Apparently, California's highest court recognized the counterintuition of demanding nothing more from professionals than from amateurs:

In spite of the fact that our tax dollars support police functions, it is settled that the [ordinary] rules concerning the duty—or lack thereof—to come to the aid of another are applicable to law enforcement personnel in carrying out routine traffic investigations. . . . '[N]o special relationship . . . exist[s] between members of the California Highway Patrol and the motoring public . . . or . . . stranded motorists generally . . . .'<sup>189</sup>

Recognizing that the individual officers' employment contract might seem to conflict with this use of the special-relationship doctrine, the court cited the old saw that "the intended beneficiaries of any investigation that is undertaken are the People as prosecutors in criminal cases, not private plaintiffs in personal injury actions."<sup>190</sup> This conclusion, however, overlooks that the same failure to act tends to threaten both litigations: officers who blunder in their investigations and neglect needy citizens fail to preserve evidence critical to *both* private and public lawsuits.

Egregious police nonfeasance is well documented. In *Warren v. District of Columbia*,<sup>191</sup> the District of Columbia Police Department repeatedly ignored, or at least soft-pedaled, the repeated calls of two women who insisted that their downstairs neighbor was being burglarized, beaten, and raped. Officers' cursory drive-by and five-minute investigation permitted repeated attacks not only on the neighbor, but also upon the reporting women in the apartment above. Prior to the rape, beating, and robbery of the two women who notified the police, an officer had assured them that help was on the way, but failed to dispatch the call. Relying on their belief that the police officers were in the house, the two women yelled down to the victim below, unfortunately alerting the attacker to their presence. In denying recovery to all three victims, the

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187. *Williams v. State*, 664 P.2d 137, 140 n.4 (Cal. 1983) (citing CAL. VEH. CODE § 2412 (West 1987)).

188. *Id.* at 146 (Bird, J., dissenting) (citing CAL. VEH. CODE §§ 2400, 20,003 (West Supp. 1992)).

189. *Id.* at 140 (citing *Mann v. State of California*, 139 Cal. Rptr. 82, 86 (Cal. Ct. App. 1977)).

190. *Id.* at 140 n.4.

191. 444 A.2d 1 (D.C. 1981) (en banc).

court noted "the fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."<sup>192</sup> To bolster its conclusion, the court referred to a series of troubling cases involving the broken promises of police officers that directly resulted in severe but non-actionable harm to the victims.<sup>193</sup>

By now it should be apparent that an expanded private duty to rescue and to report serious crimes would impose a broader notion of duty on private citizens—who have expressed no prior interest in engaging in law-enforcement activities—than it would on professional rescuers. If such unequal treatment is defensible it is because fairness dictates that the law should protect repeat players who perform more than their share of helping behavior. Public employment is a good in itself, and with the daily contribution to the public good comes the implied promise that the public will not inappreciatively hold their protectors responsible for every dereliction of duty that might occur. Still, this rationale is weakened upon consideration of the employment contract that law enforcement officers sign to "protect and serve" the community. Only once in these cases is a reason for such a restrictive view of duty given, and then only with a boilerplate reference to "dampen[ing] the ardor of all but the most resolute, or the most irresponsible," and an unsubstantiated pitch against the "floodgates of litigation."<sup>194</sup>

If, to encourage people to occupy professional rescue jobs, we must allow rescuers to deviate from their required courses of conduct without suffering adverse tort judgments, then the solution lies in statutorily imposed immunity from litigation, not in subversive interpretation of the already emptied term "duty." Any other view cheapens law enforcement slogans and, if publicized, would seriously undermine public confidence in those institutions to which we have so completely entrusted our protection.

By creating a highly impersonal and attenuated relationship between rescuer and rescued, delegation of rescue to specialists also comports

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192. *Id.* at 3.

193. *Id.* at 4-12. *See, e.g.,* *Henderson v. City of St. Petersburg*, 247 So. 2d 23 (Fla. Dist. Ct. App. 1971) (police officers had no civil liability for plaintiff's injuries suffered in robbery after officers broke promise to be present when plaintiff delivered goods to dark and secluded part of city); *Massengill v. Yuma County*, 456 P.2d 376 (Ariz. 1969) (en banc) (police officers had no civil liability for deaths in automobile accident, when officer observed automobiles playing "chicken," but made no effort to apprehend the drivers).

194. *Warren*, 444 A.2d at 9 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

with an American preference for blind or remote exchanges among strangers. While contributing to the well-being of strangers through taxation is mandatory,<sup>195</sup> taxpayers generally are ambivalent about the identity of their beneficiaries. If taxpayers learned that their taxes went solely to aid and support a named, drug-dependent, recidivist criminal, they might protest the expenditure or request to have their taxes redistributed.<sup>196</sup> Consequently, taxpayers may be willing to contribute to the common good, but not necessarily to any specific individual.<sup>197</sup> Since taxpayers lack control over the ultimate destination of their tax dollars, their sense of community is strictly on the "macro" or generic level, rather than on the "micro" or specific-actor level. Claims of communal solidarity thus tend to take on an abstract form that is ill-suited to face-to-face rescue.<sup>198</sup>

While delegation relieves us from rescue responsibilities and satisfies our interest in impersonal contributions to the public good, its efficacy is questionable. Localities handle nearly all police and fire protection. Local police and fire services in the United States employ nearly one million people, accounting for annual payroll expenditures of over twenty-four

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195. See, e.g., *United States v. Lee*, 455 U.S. 252, 260 (1982) (holding that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax," and that the Free Exercise Clause of the First Amendment does not prohibit forced payment for Social Security taxes despite taxpayer's religious objections).

196. A taxpayer's attempts to earmark her payments, however, is not a recommended course of action. See, e.g., *Welch v. United States*, 750 F.2d 1101 (1st Cir. 1985). *Welch* involved three taxpayers who filed 1982 tax returns in which they claimed "war tax credit[s]" for "government war crimes," including "a suicidal arms race." *Id.* at 1103. One defendant promised to donate her refund to a non-profit charitable organization, another simply requested that the nonrefundable portion of his taxes "be put to peaceful uses," and the third explained that his credit "represented his opposition to the expenditure of tax dollars on nuclear weapons." *Id.* The IRS assessed all three taxpayers a civil tax penalty of \$500 for filing a "frivolous tax return" under 26 U.S.C. § 6702 (1988). *Id.* See also *Clark v. United States*, 630 F. Supp. 101 (D. Md. 1986) (upholding frivolous tax-return penalty assessed under § 6702 after taxpayers claimed tax credits for CIA operations against Nicaragua, military support of El Salvador, and the absence of effort toward arms control).

197. See WUTHNOW, *supra* note 7, at 95-96:

We feel . . . that it is important to help others in general, but we do not feel obligated to give a specific service to a specific individual. Our giving is not legitimated by a language of duty. It has to be legitimated by a language of fulfillment. I give freely, voluntarily, without obligation; therefore, the experience should also be pleasurable for me.

*Id.*

198. One political theorist writes:

The savage who loves himself, his wife and his child [and] works for the good of his tribe as for his own is in my view more genuine than that human ghost, the [citizen] of the world, who, burning with love for all his fellow ghosts, loves a chimera. The savage in his hut has room for any stranger. [The] saturated heart of the idle cosmopolitan is a home for no one.

J. DUNN, *WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE* 76-77 (1979), *quoted in* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 653 (1986).

billion dollars.<sup>199</sup> This commitment to protecting persons and their property has increased steadily throughout the second half of the twentieth century.

Counties spent twenty times more on police and fire in 1990 than in 1960 in order to pay only three times as many employees.<sup>200</sup> In contrast, cities spent ten times as much to pay almost twice as many employees for the same period.<sup>201</sup> Despite this increased dedication of valuable governmental resources to the protection of persons and their property, the harm these expenditures seek to avoid is outrunning the solution. Since the turn of the century, the population of the United States has more than tripled, from approximately 76 million to 250 million.<sup>202</sup> Meanwhile, the homicide rate is nearly ten times the rate it was in 1900.<sup>203</sup> In 1990, the nationwide murder rate increased by nine percent over the 1989 figure, the largest yearly increase since 1979.<sup>204</sup> Serious crimes against the person (murder, rape, robbery, assault) and against property (burglary, larceny, car theft) occur at an annual rate of nearly fifteen million.<sup>205</sup> The number of violent crimes per capita grew by 355 percent between 1960 and 1990 with only a few pauses in the upward swing.<sup>206</sup>

This investment in law enforcement has done little to protect Americans from crime or inspire confidence in that protection. Apparently unresponsive to public-policy-based solutions, the epidemic of crime in

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199. Tbl. 498, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. (111th ed. 1991).

200. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY GOVERNMENT EMPLOYMENT 1990, at vi (Sept. 1991). Salary expenditures for police and fire protection increased steadily between 1980 and 1990 at a rate of 9% (police) and 11.9% (fire) per year. *Id.* tbl. 2, at 3.

201. Tbl. A, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CITY EMPLOYMENT 1990, at vi (Sept. 1991). *See id.* at 3 (payroll increased an average of 7.1% for police and 6.8% for fire services per year between 1980 and 1990). Although the funds allocated to police and fire protection are nowhere near those allocated to education, these public safety expenditures command an amount approaching that devoted to health and hospitals, equal to that allocated to highways, and greater than that set aside for the sum of sanitation, parks and recreation, and natural resources. *Id.*

202. Tbl. 2, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. (111th ed. 1991).

203. The homicide rate has increased from 1.2 per 100,000 persons in 1900 to 8.7 per 100,000 people in 1989. In 1980, the homicide rate peaked, when the rate was 10.2 homicides per 100,000 persons. Tbl. 292, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. (111th ed. 1991).

204. Roberto Suro, *Driven By Fear: Crime and its Amplified Echoes are Rearranging People's Lives*, N.Y. TIMES, Feb. 9, 1992, § 4, at 1 (citing FBI statistics).

205. Tbl. 287, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. (111th ed. 1992).

206. Suro, *supra* note 204, at 1.

America "has increasingly become a personal challenge requiring private action."<sup>207</sup> Drug czars and "get-tough" policies have failed to achieve their goals; the resulting dread of violent crime has seriously altered the conduct of Americans. In urban settings, many people now refrain from exercising outdoors, wearing jewelry, and visiting cash machines and shopping malls.<sup>208</sup> Some sleep within reach of butcher knives or bricks.<sup>209</sup> Many attend matinees to avoid nighttime travel and vary their schedules to avoid being stalked; some landlords even arm their female tenants.<sup>210</sup> While part of the fear may be traceable to graphic media depictions of crime, the result goes further than foregoing evening walks and extends to dramatic increases in the purchase of guns<sup>211</sup> and home security systems,<sup>212</sup> and in enrollment in self-defense training.<sup>213</sup> Americans have taken these dramatic steps "to regain a sense of personal liberty."<sup>214</sup> They likely will continue, at least until education and remedial programs start to do their part.

Citizens have formed groups to defend against the crimes that tend to appear in certain localities<sup>215</sup> or are targeted against certain groups such

207. *Id.*

208. *Id.*

209. Carlos Sanchez, *Rape Victims Learn to 'Take Back the Night,'* WASH. POST, Sept. 23, 1989, at B1 (rape victim sleeps with a brick under her bed since attack).

210. Dana Priest, *Crimes Against Women Creating Prisoners of Fear; Concerns About Safety Alter Habits, Lives,* WASH. POST, July 8, 1990, at A1. See also WESLEY G. SKOGAN & MICHAEL G. MAXFIELD, *COPING WITH CRIME: INDIVIDUAL AND NEIGHBORHOOD REACTIONS* 47 (1981) (more than 60% of large-city residents fear walking outside at night); JAMES GAROFALO, U.S. DEP'T OF JUSTICE, *PUBLIC OPINION ABOUT CRIME: THE ATTITUDES OF VICTIMS & NONVICTIMS IN SELECTED CITIES* 76 (1977) (forty-five percent of urban residents limit activity because of fear of crime).

211. The National Association of Federally Licensed Firearms Dealers reports that more than 1.8 million handguns are manufactured each year, an increase of nearly 19% between 1985 and 1990. Suro, *supra* note 204, at 1.

212. Homeowners of even modest homes fortify their dwellings. Alarm systems sales increased by 80% in the late 1980s. *Id.*

213. Compare Ronald Kotulak, *What You Can Do to Take Back the Night,* CHI. TRIB., Apr. 16, 1989, TEMPOWOMAN section, at 1 (Chicago Police Department no longer recommends "path of no resistance" to victims of sexual assault) with Pamela Reynolds, *Are Women Giving Up the Fight? Lowered Interest in Self-Defense Worries Some Feminists,* BOSTON GLOBE, Jan. 9, 1990, LIVING section, at 55 (noting decline in women's self-defense enrollment in favor of aerobics classes).

214. Suro, *supra* note 204, at 1. "[T]he accommodations women make [to avoid rape] exert a considerable toll on their time and effort," causing them to "lose a grave amount of personal freedom, . . . leisure . . . social . . . and work opportunities . . . that very much reduce the overall qualities of their lives." Marney Keenan, *The Female Fear: The Threat of Rape Leaves Women Feeling Like Targets,* CHI. TRIB., Apr. 16, 1989, TEMPOWOMAN section, at 1.

215. Aldina Gollin & Ray Smith, *Mayor Rallies for Night on the Town,* NEWSDAY, Aug. 7,

as homosexuals,<sup>216</sup> or religious<sup>217</sup> and racial<sup>218</sup> minorities. Women, who are determined to "Take Back the Night" from predatory men, have protested throughout the country demanding the right to move about freely.<sup>219</sup> Poor people, subject to "domestic terrorism," struggle to create "safe turf" through self-help and crime-watch groups, by introducing permanent 'cop-on-the-block' community policing, [and] by tough and intensive probation for young offenders."<sup>220</sup> Once the harm has occurred, victims' and witnesses' groups attempt to ease the accompanying pain and anxiety.<sup>221</sup>

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1991, at 33 (Mayor David Dinkins attended "National Night Out" rallies in all five boroughs of New York City to protest crime and promote citizen action).

216. Stephanie Chavez, *Hate Crimes Set a Record in L.A. County*, L.A. TIMES, Mar. 20, 1992, at A27 (noting that "[f]or the seventh consecutive year, hate crimes reached record levels in Los Angeles County in 1991, with homosexual men the most frequent victims of increasingly violent assaults"); Jack Curry, *A Gay Protest Against Attacks Becomes Violent*, N.Y. TIMES, June 18, 1990, at B3 ("Queers Take Back the Night" march of over 1000 advocates of gay rights disrupted by hecklers); Stephen Buckley, *Fight on Hill Involving Gay Men, Local Marines Heighten Tensions*, WASH. POST, June 21, 1990, at B6 (gay activist groups allege "gay bashing" by local Marines).

217. In a Los Angeles survey, anti-Jewish incidents accounted for 130, or 86% of the 150 religious hate crimes reported. Chavez, *supra* note 216, at A28.

218. The Los Angeles survey shows that blacks were victims of 130 out of 672 racially motivated crimes. There were 67 against Latinos, 54 against Asian-Americans, 47 against Anglos, and 22 against Arabs. Chavez, *supra* note 216, at A28.

219. See Seth Slater, *Women Doff Bras to Protest Violence*, LA JOLLA LIGHT, Mar. 12, 1992, at 1 (women of University of California at San Diego doffed bras during march, calling for an end to violence against women); Steve Brandt, *County Leads in Fighting Abusers, Women Told*, MINNEAPOLIS STAR TRIB., Sept. 29, 1991, at 1B (workshop on felony domestic assaults was one of 27 sessions presented before Minneapolis' Take Back the Night rally, which drew 5000 marchers); Kristin Eddy, *'Take Back the Night': Positive Steps to Help Women Prevent Rape*, WASH. POST, Sept. 23, 1991, at C5 (Take Back the Night rally in DuPont Circle opened events of Washington, D.C., Rape Awareness Week, by recommending ways to avoid rape); Gloria Totten, *Take Back the Night Rally Seeks to Foster Stand Against Violence*, MINNEAPOLIS STAR TRIB., Sept. 20, 1991, at 21A (editorial by organizer of Take Back the Night rally urges participation and notes that more women in Minnesota are injured by domestic abuse than by car accidents, muggings and rapes combined); Jessica Seigel, *NU Tries to Prevent Sex Attacks*, CHI. TRIB., May 13, 1991, at 5 (frequent rapes on Evanston campus of Northwestern University led to increased security and ROTC escort service for women leaving the library at night); Eric Pryne, *400 Rally Against Violence Toward Women*, SEATTLE TIMES, May 12, 1991, at B2 (Take Back the Night march and rally held on eve of Mother's Day); Ben Kubasik, *Date Rape on College Campuses*, NEWSDAY, Nassau and Suffolk ed., Dec. 26, 1990, at 75 (university women form self-help groups such as SASHA—Students Against Sexual Harassment—and SHARE—Sexual Harassment, Advising Resources and Education—and organize Take Back the Night marches to protest male aggressiveness toward women on several east-coast campuses); Carleton R. Bryant, *UMd. Women Hold Rally*, WASH. TIMES, Apr. 19, 1990, at B2 (80 people attend Take Back the Night Rally at University of Maryland at College Park).

220. Neal R. Peirce, *A Window of Opportunity for Black Americans*, NAT'L J., Apr. 1, 1989, at 809.

221. See NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, VICTIM ASSISTANCE PRO-

Autonomy—the good that duties among strangers threatens—has a more imposing enemy: criminals who commit serious aggressions against persons and their property. These private actors force citizens to restrict their behavior and thus infringe on personal autonomy much more than do limited duties that arise only in the face of serious crimes. Why should society tolerate private (criminal) actors' restrictions on autonomy more than legally imposed restrictions? Perhaps the threat posed by private forces has rebutted any presumption against legal interference with private autonomy. Moreover, as the next section attempts to demonstrate, the interference with autonomy that affirmative duties pose is an inconvenience to which many in America already are accustomed; thus, in reality, any claim that Americans are strictly dedicated to private autonomy unencumbered by affirmative duties is an overstatement.

### *B. Extant Public and Private Surrenders of Autonomy*

Law's preference for individual liberty over communal values might be more slogan than truth. Granted, negative prohibitions intrude less on individual liberty than positive duties, even though every negative prohibition can be described as a positive duty. But the slogan that individual autonomy trumps communal solidarity—that negative prohibitions are better than positive duties—ignores the current pervasiveness of positive duties imposed by law and by contract in the public sphere and in the private workplace. In those settings, positive duties to monitor the behavior of others are justified by accentuating the particular type of harm threatened, by referring to efficient risk allocation, or by stretching the concept of special relationship.

#### *1. Governmental Duties*

Some affirmative duties are defensible on the ground that they protect

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GRAMS & RESOURCES: THE 1991 DIRECTORY (292-page catalog of over 7000 service-providers working on behalf of crime victims across the United States); *Tucson's 24-Hour Project to Aid Victims of Crime is Drawing National Attention*, N.Y. TIMES, May 31, 1983, at A14 (as crime rate climbs in Tucson, Arizona area, volunteers train to respond to family and neighborhood disputes, sexual assaults, child abuse, and other crimes, and to provide victims and witnesses in need with food, shelter, jobs, and counselors who help prepare them for court appearances). See also CAL. PENAL CODE § 679 (West 1986) ("In recognition of the civil and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies . . . the Legislature declares its intent . . . to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity.").

interests "of a widely shared character, belonging to large groups, institutions, and corporate entities."<sup>222</sup> These duties include testifying as a witness to a crime, serving on a jury or as a conscriptee in the armed forces, or satisfying the positive duty to pay taxes.<sup>223</sup> The interests they serve, called "governmental," rather than individual or communal, are "those generated in the very activities of governing," such as collecting taxes, registering aliens, conscripting an army, customs-inspecting, conducting trials and court hearings, operating prisons, etc."<sup>224</sup> While these interests ultimately belong to individuals, they do so only in a diluted sense.<sup>225</sup> Thus, they are outside the criminal law's goal of protecting persons and their property.

## 2. Public Reporting Duties

The California Penal Code discloses a host of affirmative duties which are more directly related to the criminal law's goal of protecting persons and their property. Among these duties are the following:

- 1) law enforcement's duty to notify school authorities when any school employee has been arrested for a sex offense;<sup>226</sup>
- 2) a state mental hospital director's duty to advise the county and law enforcement authorities when a patient is released;<sup>227</sup>
- 3) a corporation's or its managers' duty to notify OSHA of concealed dangers in the workplace;<sup>228</sup>
- 4) authorities' duty to report within two hours any death occurring in state rehabilitative or correctional facilities;<sup>229</sup>
- 5) supervisory and medical personnel's duty in correctional institutions to notify law enforcement employees who have come into contact

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222. FEINBERG, *supra* note 16, at 63. Even before Professor Feinberg, Antony Honoré noted that service to private interests is not, in practical terms, greatly different from the service regularly demanded in the public interest:

To control the violent impulses of our nature is surely more arduous than to overcome the temptation selfishly to leave others in the lurch. Certainly there are important spheres, for instance, taxation and military service, were the law does not shrink from demanding positive action. Why should it do so in the law of rescue?

Honoré, *supra* note 16, at 241.

223. FEINBERG, *supra* note 16, at 164-65.

224. *Id.* (citing HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 120 (1979)).

225. *Id.* at 63.

226. CAL. PENAL CODE §§ 291-291.5 (West 1991 & Supp. 1992) (public school employee); § 291.1 (private school employee); § 291.5 (community college employee).

227. CAL. PENAL CODE § 1026.6 (West Supp. 1992).

228. CAL. PENAL CODE § 387 (West Supp. 1992).

229. CAL. PENAL CODE § 5021 (West Supp. 1992).



with the bodily fluids of HIV-positive inmates;<sup>230</sup>

6) a hospital's or pharmacy's duty to report to law enforcement any wound or injury caused by a deadly weapon, or any injury inflicted in violation of any penal law;<sup>231</sup>

7) a physician's or surgeon's duty to do the same;<sup>232</sup>

8) a hospital's duty to report that a patient it received from a health or community care facility may have been neglected or abused;<sup>233</sup>

9) child-care custodians' (including teachers and their aides), health practitioners', or child protective agencies' duty to report incidents or suspected incidents of child abuse;<sup>234</sup>

10) child protective agencies' duty to notify the state licensing authority when they receive reports of incidents of child abuse;<sup>235</sup>

11) child-care custodians' (including teachers and their aides), health practitioners', or child-protective agencies' duty to agree to file such reports as a condition of employment;<sup>236</sup>

12) child protective agencies' duty to report all nonfrivolous, investigated child abuse cases to the Department of Justice;<sup>237</sup>

13) a firearms dealer's duty to report to various law enforcement agencies the identity of all purchasers or transferees of firearms;<sup>238</sup> and

14) authorities' duty to notify victims of crimes about changes in the status of a convicted defendant.<sup>239</sup>

Each of these duties is imposed upon an employee of an institution, such as a hospital, school, prison, or business entity, to law-enforcement agencies or particular individuals. Whether justifiable on grounds of public safety, by virtue of a special relationship to the public created by the particular employment, or simply because those identified in the statute are best situated to protect against the contemplated harm, each of

230. CAL. PENAL CODE § 7522 (West Supp. 1992); see CAL. PENAL CODE § 7554 (West Supp. 1992) (correctional, custodial, or law enforcement agencies must report incidents covered by § 7522 to State Department of Health Services).

231. CAL. PENAL CODE § 11160 (West Supp. 1992).

232. CAL. PENAL CODE § 11161 (West Supp. 1992).

233. CAL. PENAL CODE § 11161.8 (West Supp. 1992).

234. CAL. PENAL CODE § 11166 (West Supp. 1992). "Child care custodian" is defined at CAL. PENAL CODE § 11166.5(a) (West 1992).

235. CAL. PENAL CODE § 11166.1 (West Supp. 1992).

236. CAL. PENAL CODE § 11166.5 (West Supp. 1992).

237. CAL. PENAL CODE § 11169 (West Supp. 1992).

238. CAL. PENAL CODE § 12076 (West Supp. 1992).

239. CAL. PENAL CODE tit. 17, Rights of Victims and Witnesses of Crimes, § 679 to 679.03 (West Supp. 1992).

these laws imposes an affirmative duty to report the activities of others. Each duty is meant to reduce or obviate an identified social harm, despite the imposition on the reporter's freedom and the privacy of the one whose behavior the report concerns. In fact, several of these provisions involve affinity or trust-based relationships that these affirmative duties to report might disrupt. For instance, doctors, school teachers, and business managers may validly disapprove of a law that forces them to report on the activities of the patients, students, and business entities they serve. However, because of the gravity of the harm, and because they are best positioned to avoid or respond to the harm, these actors are subject to a legally imposed duty to report the harms that do occur.

### 3. *Duties Imposed by Private Employers*

Private employers also impose affirmative duties to report the wrongdoing of others, duties which appear in corporations' expressed business ethics. Not only do employers regularly impose "tattletale" requirements on their employees, but the purpose of such a policy—the economic well-being of the enterprise—makes any other approach self-defeating. IBM's policy is a typical example of this strand of business ethic:

*Protecting IBM Assets.* In IBM, security is everybody's business. IBM's security practices are intended to protect all the company's assets - its people, its property and its proprietary information. Therefore, every employee is responsible for protecting IBM property entrusted to him or her, for using that property and information as authorized by management and for helping protect the company's assets in general. Be alert to any situations or incidents that could lead to the loss, misuse or theft of company property. Report all such situations to your manager or the security department as soon as they come to your attention.<sup>240</sup>

Many "Fortune-100" corporations, including AT&T,<sup>241</sup> Lockheed,<sup>242</sup>

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240. *Employee Conduct Guidelines*, in IBM: ABOUT YOUR COMPANY 179 (1989), reprinted in IBM: BUSINESS CONDUCT GUIDELINES 11-12 (Sept. 1990); see IBM: THIRTY YEARS OF MANAGEMENT BRIEFINGS: 1958 to 1988, 191 (1988) (Frank T. Cary, Management Briefing No. 3-76, Aug. 27, 1976):

"It's not my problem" is an attitude we can't tolerate in IBM. I expect all managers to enforce corporate policy not only in their own areas of responsibility but in any area when circumstances demand it . . . .

When it is clear that *any* company policy is being disregarded, *any* manager who is present and aware of the situation should assume IBM management responsibility and take immediate action.

241. AT&T, A PERSONAL RESPONSIBILITY 11 (1988) ("Employees should promptly report any actual or suspected loss, damage, misuse, theft or destruction of Company property to the AT&T

Southern Company Services,<sup>243</sup> Northrop,<sup>244</sup> U.S. West Communications,<sup>245</sup> Emery Worldwide Services,<sup>246</sup> and Ashland Oil<sup>247</sup> have instituted similar policies that impose a duty to report, but are silent on the consequences of noncompliance. Other "Fortune-100" corporations, such as Teledyne,<sup>248</sup> Texaco,<sup>249</sup> Raytheon,<sup>250</sup> Marriott,<sup>251</sup> and Kroger<sup>252</sup>

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Corporate Security Organization."); *id.* at 17 ("Violations or suspected violations of any of the policies or principles in this booklet, or other Company rules and instructions, must be promptly reported to supervision or the AT&T Corporate Security Organization, as appropriate.").

242. LOCKHEED CORPORATION, THE LOCKHEED WAY 13 (Jan. 1990) ("All employees are encouraged and expected to report any suspected violations of law, regulations, or Lockheed principles of business conduct directly to their supervisor or manager, or a company hot-line coordinator, or the corporate director of business practices."); *cf.* Letter from Donald E. Gore, Director of Business Practices and Corporate Counsel, Lockheed Corporation, to the author (Feb. 18, 1992) (on file with author) ("While we [have] not chosen to specifically enunciate sanctions for failing to report violations, we would, of course, hold an employee accountable in circumstances that their willful inaction in effect compounded a violation in the same manner that we would hold them accountable for knowingly failing to report a known defect in a machine or process that was either hazardous or producing defective products or parts.").

243. SOUTHERN COMPANY SERVICES, CORPORATE POLICY: IRREGULARITIES RELATING TO COMPANY ASSETS OR DOCUMENTS (Dec. 1, 1989) ("All Southern Company Services employees are responsible for identifying situations or activities which may constitute an irregularity and for reporting them to appropriate management. Disappearance of furniture, fixtures, and equipment should [also] be reported promptly.").

244. NORTHROP, STANDARDS OF BUSINESS CONDUCT 16 (2d ed. Apr. 1991) (employees who suspect Northrop's standards of business conduct are being violated should inform a supervisor or manager or contact Northrop's corporate Business Practices Office).

245. *See* Letter from Gregg Rodgers, Counsel, Human Resources, U.S. West Communications, Inc., to the author (Mar. 11, 1992) (on file with author).

246. EMERY WORLDWIDE CLAIMS MANUAL, CORPORATE SECURITY 1 (June 1991) ("The corporate goals are designed to ensure that . . . [e]mployees are made aware of their role in maintaining security on and off the job. . . . [and that i]ncidents are reported, data collected and analyzed, and appropriate action taken."); *id.* at 2 ("The Corporate Security Department encourages employees to assist in the company crime prevention program . . . . [R]emoving dishonest employees from the company payroll protects profits which protects jobs."); *id.* at 3 ("Secret Witness Letters are composed by the Corporate Security Department for the purpose of soliciting information pertaining to major thefts or major theft patterns in a given area. Letters are mailed to employees' home addresses offering a reward and confidentiality.").

247. ASHLAND OIL, INC., CODE OF BUSINESS CONDUCT 7 (July 1989) ("Any officer, employee or other agent of the company who thinks a transaction may be illegal must report this to the company's General Counsel.").

248. TELEDYNE, INC., ETHICS 4 (3d ed. 1991) ("Each employee must advise fellow employees when it appears that their actions may be in violation of this Code . . . . [and] must report immediately any violation of this Code and must cooperate in the investigation of any alleged violation."); *id.* at 16 ("Violation of the Code . . . will be met with appropriate discipline . . . up to and including discharge.").

249. TEXACO TRADING & TRANSPORTATION INC., STANDARDS OF CONDUCT - 1992 ("Violation of any of these basic standards, any Company policy, practice, law, rule or regulation, may result in disciplinary action up to and including termination . . . . Report immediately any personal

provide that an employee who knowingly fails to report another em-

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injury or accident, or damage to any and all property/materials, including that of the Company, to your supervisor, or when appropriate, another management representative."'). See *TEXACO TRADING AND TRANSPORTATION INC., EQUAL EMPLOYMENT OPPORTUNITY STATEMENT OF POLICY* (Apr. 1, 1991) ("Any conduct directed toward any employee which is unwelcome, hostile, offensive, degrading or abusive is unacceptable and will not be tolerated. An employee should immediately report such conduct to our Human Resources Department which will conduct a prompt investigation and take the necessary action."); letter from Texaco President/C.E.O. to Heads of Departments, Divisions, and Subsidiaries (Dec. 15, 1989) ("Reporting and Investigation of Irregularities,"—"Employees who become aware of known or suspected irregularities should report them promptly and confidentially to their supervisor who is responsible for further handling.").

250. The following are among the ethical standards that Raytheon sets for its employees:

3. The maintenance of high ethical business conduct is the responsibility of every employee and Company consultant. It applies to every Company operation. Employees must assure that not only are their actions of a high ethical standard but also that the perception of their activities is at an equally high level. Employees are expected to cooperate in any investigation of ethics violations. Employees are also [expected] to report to their management any violations of ethical conduct principles. Employees who are found . . . guilty of violating Raytheon's principles of business ethics and conduct through their own activities or by failure to report known violations by others may be subject to disciplinary action up to and including dismissal.

4. Uninhibited reporting to management by employees of suspected violations is consistent with the Company's code of ethics.

*RAYTHEON, THERE'S ONLY ONE WAY: BUSINESS ETHICS AT RAYTHEON 11* (rev. ed. Dec. 1989).

Raytheon modeled its policies on those recommended by the President's Blue Ribbon Commission on Defense Management (also known as the Packard Commission), which issued a code of Business Ethics and Conduct. *Id.* at 3-4.

251. *MARRIOTT CORPORATION, ANNUAL BUSINESS CONDUCT CERTIFICATION* (1991) (confidential form required of approximately 5000 management employees, who were queried about their knowledge of certain activities by other employees; an outside audit committee then reviewed the results.) Letter from William O. Kafes, Vice President, Secretary and Associate General Counsel, to the author (Feb. 27, 1992) (on file with author). The instructions to the questionnaire stated:

Marriott's Business Conduct Policy requires that the Internal Audit Department obtain annual certificates from corporate officers and key associates certifying that they have reviewed the Business Conduct Policy, are complying with it and know of no violations (either by themselves or others) not fully disclosed to the Internal Audit Department. Associates who fail to disclose reportable matter, who knowingly make a false report, or who fail to comply with Company policy will be subject to disciplinary action.

*Id.*

252. *THE KROGER COMPANY, THE KROGER CO. POLICY ON BUSINESS ETHICS 5* (Mar. 1991) ("Employees who become aware of facts which lead them to believe that other employees may be involved in conduct which is inconsistent with the standards set forth herein should immediately make those facts known to their supervisor or other responsible officials of the company."); see *id.* at 8:

The support of all employees is required to assure that violations of this Policy are called to the attention of those in the company who should be informed. Concealment of violations is in itself a violation of this Policy . . . .

If we are to hold ourselves to these high standards, each of us must understand that the company's best interests are our own best interests and that we are expected to exercise good judgment as well as moral courage in matters of investigation and reporting covered in this document.

*Id.* at 8.

ployee's misconduct may be subject to disciplinary action, and possibly dismissal.

Employees understand that a fellow employee's theft or misuse of company goods causes each employee of that entity and the entity itself to suffer.<sup>253</sup> Further, it is not clear that a desire for profit maximization alone would excite a heightened or more personalized willingness to report in a 20,000-person (Marriott) or 350,000-person (IBM) universe than physical well-being or survival would in a "portable neighborhood"<sup>254</sup> or municipality. In both contexts—public and private—two conclusions are apparent: (1) security is a value; and (2) adequate security is too expensive or intrusive to attain without uncompensated assistance. If perfect security were affordable, private and public entities would invest in security services until an adequate measure of security was reached, without distracting employees from pursuing their primary tasks. But, neither public nor private entities have invested at such a level, for fear of prejudicing other essential services, compromising profitability, or institutionalizing totalitarianism. Ultimately, while profit-maximization concerns in the corporate setting differ from government's goal of providing citizens with essential services, both government and business face the intractable decision of how to allocate limited resources among competing interests, of which security is only one.

With the exception of "governmental" duties<sup>255</sup> such as taxation, prescription, and compliance with the subpoena power, all of the examples of positive duties discussed earlier stem from the obligor's employment in the public or private sector. By accepting a job in law enforcement, medical services, child care or teaching, or even in private industry, the employee or manager knowingly agrees, or assumes the risk of being required to act on another's behalf or to report another's wrongdoing or suspected wrongdoing. The employee or manager voluntarily assents to

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253. Still, not all "Fortune-100" corporations impose such a duty on their employees. Some corporations make reporting aspirational. *See, e.g.*, UNITED TELECOM, CODE OF ETHICS 15 (1992) ("If you believe that someone has acted or may be acting contrary to the principles and guidelines in the Code, you are *encouraged* to report your knowledge to your management.") (emphasis added). Some corporations impose absolutely no reporting duty. *See, e.g.*, Letter from Robert G. Kenney, Public Relations, United Parcel Service, to the author (Mar. 10, 1992) (on file with author) (UPS has no "specific written policy on reporting of wrongdoings by co-workers"); letter from Steven M. Kin, Senior Counsel, Human Resources, Dow Chemical Co., to the author (Mar. 30, 1992) (on file with author) ("Dow expects its employees to use good judgment . . . [but] has not issued any written policies or regulations requiring employees to report 'any wrongdoing' to management.").

254. *See supra* note 121 and accompanying text.

255. *See supra* notes 222-25 and accompanying text.

those potential entanglements as a matter of contract. Those who truly detest affirmative duties are always free to pursue another occupation. However, because of the limits of education and skill level, the responsibilities owed to dependents, and the vagaries of the job marketplace, alternative work may be difficult to find. And once accomplished, changing jobs cannot always relieve an employee of the demands of loyalty to the new corporate or employment community. Even if employment-based duties are compensated and voluntarily assumed, they are voluntary only in form because finding a job where employers permit workers to ignore co-workers' wrongdoings may be much more easily said than done.

But to state the question as whether these duties are voluntary papers over the more important questions of why affirmative duties are imposed *only* by virtue of an employment relationship, and whether the mere fact of employee status determines the validity of affirmative duties. Once a legislature holds certain public employees subject to criminal penalties for their failure to report others' wrongdoing, it has concluded that the invasion of the employee's privacy, if any, is justified by the decrease in the risk of harm that the report confers upon the public. The same rationale applies to a private, institutional decisionmaker such as IBM. The degree to which one surrenders her privacy interest or assumes the risk of such an invasion has become legislatively or institutionally prescribed.<sup>256</sup> Therefore, if employment settings customarily impose either privately or publicly mandated duties to report the conduct of others, then the sanctity of one's autonomy outside the employer-employee context has already lost some ground. Recognition that the sanctity of autonomy already is compromised and contextual should make the imposition of affirmative duties less threatening than it may first appear.

### CONCLUSION

Criminal laws are meant in part to decrease would-be criminals' appetite for illegal behavior, either by deterrence or by influencing their ra-

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256. *Cf., e.g., Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (holding that aerial photography of chemical company's industrial complex using a \$22,000 camera that revealed details as small as 1/2 inch in diameter violates no reasonable expectation of privacy); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (holding that defendant's privacy expectation that his yard was protected from aerial surveillance, was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed").

tional choice.<sup>257</sup> Criminal laws may have little or no influence, however, on anything except intentionally committed crimes.<sup>258</sup> This explains, for example, the familiar objections to the felony-murder<sup>259</sup> or exclusion-

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257. The idea that the existence and severity of a penalty influences a criminal's decision whether or not to commit a crime is well-settled. See I Bentham, *supra* note 13, at 402 ("It would be hard to say that a madman does not calculate."). Recently, social scientists have begun to distinguish between the concepts of deterrence and rational choice. They define "deterrence" as referring to "any instance in which an individual contemplates a criminal act but refrains entirely from or curtails the commission of such an act because he or she perceives some risk of legal punishment and fears the consequence." Jack P. Gibbs, *Punishment and Deterrence: Theory, Research and Penal Policy*, in *LAW AND THE SOCIAL SCIENCES* 319, 325-26 (Leon Lipson & Stanton Wheeler eds., 1986). "When the deterrence doctrine is expanded to encompass . . . formal and informal social sanctions and both rewards and punishment . . . it becomes rational choice theory." Ronald Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 660 (1990). Professor Akers traces the rational choice theory to "the expected utility model in economics." *Id.* at 653. As Judge Posner notes:

A growing empirical literature on crime has shown that criminals respond to changes in opportunity costs, in the probability of apprehension, in the severity of punishment, and in other relevant variables as if they were indeed the rational calculators of the economic model—and this regardless of whether the crime is committed for pecuniary gain or out of passion, or by well educated or poorly educated people.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 206 (3d ed. 1986).

See *THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING* 1, 13 (Derek B. Cornish & Ronald V. Clarke eds., 1986) (offenders' decisionmaking processes may be "rudimentary," and "constrained by limits of time and . . . information," but it is clear that most criminals exhibit "some degree of planning and foresight . . . and adapt their behavior to . . . contingencies"). *But see* CALIFORNIA ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, *PROGRESS REPORT, DETERRENT EFFECTS OF CRIMINAL SANCTIONS* 7 (May 1968) (questioning whether increased severity increases deterrence) *cited in* KADISH & SCHULHOFER, *supra* note 9, at 151.

258. Some contend that deterrence theory is inapposite when applied to impulsive or unintended conduct, in part because felons are presumptively unaware of the contours of the criminal laws. After the legislative process is complete, the law must be "communicated by the media and imposed by the courts." J.L. Miller & Andy B. Anderson, *Updating the Deterrence Doctrine*, 77 J. CRIM. L. & CRIMINOLOGY 418, 420 (1986). Although "ignorance of the law is no excuse," LAFAVE & SCOTT, *supra* note 41, § 5.1, at 406, critics of the deterrence theory's applicability to negligent crimes point out "the improbability that felons will know the law." David Crump & Susan W. Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL'Y 359, 370 (1985). Proponents, conversely, insist that criminals, like the general population, are aware of serious crimes, and receive their education either through television or through "repeated societal condemnation of others." *Id.* at 371.

259. The felony murder rule provides that a felon may be liable for first-degree murder if a death occurs in the course of the commission or attempted commission of certain felonies, even absent the mental state required for murder. CAL. PENAL CODE § 189 (West Supp. 1992); KADISH & SCHULHOFER, *supra* note 9, at 506-47; LAFAVE & SCOTT, *supra* note 43, § 7.5, at 622-41. Opponents of the rule point out that "there is no basis in experience for thinking that homicides which the evidence makes accidental occur with disproportionate frequency in connection with specified felonies." MODEL PENAL CODE § 210.2 cmt. at 38 (Official Draft 1980). Felony murder proponents, on the other hand, contend that felons are aware of the law through popular culture and enforcement; that by simplifying and facilitating liability and proof, the felony murder doctrine takes away

ary<sup>260</sup> rules, objections grounded in the demand that the criminal law and its procedures achieve their stated goals in order to justify and perpetuate pursuit of those goals. Likewise, widespread adoption of rescue and reporting laws may not significantly change the behavior of bystanders when another person is in distress. Studies indicate, however, that a "legal requirement of rescue would, in moments of hesitation, tip the balance toward the desired action."<sup>261</sup> More importantly, such laws

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claims of "accident" from intentional killers, thus deterring intentional killings, if not accidental ones; and that negligent or even accidental conduct is deterrable. See Crump & Crump, *supra* note 258, at 370-71.

260. Emphasis on the deterrence rationale of the exclusionary rule tends to shift to the rule's advocates the burden of justifying the rule's existence with hard empirical data. See, e.g., *Elkins v. United States*, 364 U.S. 206, 218 (1960) (statistics cannot demonstrate effectiveness of exclusionary rule); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 666 (1970) (concluding that there is no substantial empirical evidence to support the claim that the rule actually deters illegal conduct on the part of law enforcement officials). Proponents of the exclusionary rule argue that there is empirical support for its deterrent effect. See Myron W. Orfield, Jr., Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1033-69 (1987). Data and literature "tentatively suggest that the exclusionary rule has had some deterrent effect in some parts of the country," dependent in part on the departmental education of officers through closely supervised instruction from assistant prosecutors and punishment of noncompliant officers. *Id.* at 1022; Bradley Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?*, 62 JUDICATURE 398 (1979); Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 652 (1982) (quoting *The Exclusionary Rule Bills, 1981: Hearings on S. 101 and S. 751 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)* (statement of Stephen H. Sachs) reprinted in YALE L. REP., Winter 1981-82, at 71, 72) (former Maryland Attorney General testified that careful conversations between assistant prosecutors and FBI agents concerning contours of Fourth Amendment occur principally because both parties "want the search to stand up in court").

261. Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 58 (1972). Professor Franklin discusses, *inter alia*, a study in which subjects were asked to evaluate the behavior of an able-bodied man who refused to help a drowning man whom he easily could have rescued. The subjects who were told that the law imposed a duty to rescue judged the able-bodied man's conduct as immoral, and condemned the man much more harshly than did those subjects who were told the law did not require rescue. *Id.* at 58-59 (citing Harry Kaufmann, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 77 (J. Macaulay & L. Berkowitz eds., 1970)).

Professor Franklin also analyzes a study in which 86% of the citizens of Germany, a country which does impose a legal duty to rescue strangers, tended to be aware of the duty while 75% of United States citizens, where no such duty exists, tended—accurately—to recognize no such duty. Further, when asked how the law should treat would-be rescuers who fail to act in situations that expose them only to low risk, 42% in Germany and 75% in the United States supported "[t]he position that nothing should be done and the matter [should be] left to a person's conscience." Finally, 22% in Germany and 2% in the United States favored "[j]ail sentences for violators." Franklin, *supra* at 59, (citing Hans Zeisel, *An International Experiment on the Effects of a Good Samaritan Law*, in THE GOOD SAMARITAN *supra* note 3, at 209, 210).



would "affect the way people perceive the legitimacy of the behavior in question."<sup>262</sup> This is particularly true in super-legalistic America, where "the chances are reasonably good that a new and forceful legal statement of minimal standards of helping behavior could reinforce and value the deeds of those who already practice the ethic involved, while encouraging the broader development of similar behavior and attitudes."<sup>263</sup> Thus, while "a change in . . . hearts cannot be ordered by legislation,"<sup>264</sup> a well-publicized duty to help strangers "might enhance the perceived desirability of that behavior,"<sup>265</sup> even though the legal imposition of a duty would betray a pronounced skepticism about the prevalence of altruism.<sup>266</sup>

While there is some authority for the proposition that unintentional wrongs are deterrable, the susceptibility of that proposition to proof is less important than the aspirations that the rule in question represents. The same is true of criminal laws that pose difficult enforcement problems, such as rescue and reporting laws. Difficulties in enforcement may produce few successful prosecutions,<sup>267</sup> but this should not influence the legislative decision that certain omissions are so antisocial that they be deemed criminal. For so long as a rule of criminal law creates less mischief than it relieves, it may need no more proof of its efficacy to recommend it. Until some evidence emerges indicating that a rule of criminal law—including a law of misprision or of easy rescue—actually *increases* crime, then the rule, if fairly administered, violates no principle of justice.

Legal recognition of duties among strangers is not about coercion, involuntary servitude, or charity. Like the Good Samaritan parable, it is about "reconciliation, about the healing of social wounds, about wholeness in the organism of society."<sup>268</sup> It is about legal interference in an area where aspirations of friendship, of service, of gaining a reputation for magnanimity, of heavenly reward, and of freeing the mind from pain, are insufficient.<sup>269</sup> Ultimately, rescue and reporting laws do no more

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262. Kaufmann, *supra* note 261, at 77-81.

263. GLENDON, *supra* note 1, at 87-88.

264. Tunc, *supra* note 28, at 43.

265. Franklin, *supra* note 261, at 58. Cf. D'Amato, *supra* note 38, at 809 ("Legal and moral rules are in symbiotic relation; one 'learns' what is moral by observing what other people . . . tend to enforce.") (citing J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1952)).

266. Landes & Posner, *supra* note 28, at 124-27.

267. See *supra* notes 151-57 and accompanying text.

268. WUTHNOW, *supra* note 7, at 184.

269. See THOMAS HOBBS, *LEVIATHAN* ch. 14, at 87 (Michael Oakshott ed., Basil Blackwell 1946) (1651) (when one person transfers a right to another without receiving a right in return, "but

than enforce the norm of reciprocity by recognizing an acute, situational asymmetry between people temporally and spatially brought together by chance.

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one of the parties transferreth, in hope to gain thereby friendship, or service from another, or from his friends; or in hope to gain the reputation of charity, or magnanimity; or to deliver his mind from the pain of compassion; or in hope of reward in heaven; this is not contract, but GIFT, FREE-GIFT, GRACE”).