

GEORGIA LAW REVIEW

VOLUME 44

SPRING 2010

NUMBER 3

ARTICLES

KILLING, LETTING DIE, AND THE CASE FOR MILDLY PUNISHING BAD SAMARITANISM

*Ken Levy**

TABLE OF CONTENTS

I.	INTRODUCTION	610
II.	A BRIEF BACKGROUND ON BAD-SAMARITAN LAWS	616

* J.D., Columbia University Law School; Ph.D., Philosophy, Rutgers University; B.A., Philosophy, Williams College. Member, New York State Bar. Assistant Professor, Louisiana State University Law Center. Former Climenko Fellow and Lecturer on Law, Harvard Law School. Former Visiting Teaching Fellow, Columbia University Law School. I am indebted to the excellent editors at the *Georgia Law Review* for helping me to improve both the substance of my Article and my footnotes. I would also like to thank Eric Blumenson, Daniel Chen, Russell Christopher, Fiery Cushman, Lily Faulhaber, Jorge Garcia, Adriaan Lanni, Ron Mallon, Bruce Mann, Martha Minow, David Reiss, Christopher Robertson, Ben Roin, Brian Sheppard, Jed Shugerman, Ken Simons, Matthew Stephenson, George Vuso, Jonathan Zittrain, participants in the Climenko Fellow workshops, and the law faculties at Harvard, Indiana-Bloomington, Louisiana State University, and Southern Methodist University for helping me to confront difficult questions and consider different ways of improving my position and arguments. Very special thanks to Vincent Chiao, I, Glenn Cohen, John Goldberg, Bernard Harcourt, Phil Heymann, Dan Meltzer, Joe Singer, and Saul Smilansky for taking the time to read a previous draft of this Article and offer me extremely helpful constructive criticisms. Finally, I would especially like to thank Kent Greenawalt, Doug Husak, Carol Steiker, and Lloyd Weinreb not only for reading and commenting on multiple drafts of this Article but also for their friendship and moral support.

III.	THREE EXAMPLES OF BAD SAMARITANISM	621
IV.	THREE UTILITARIAN REASONS FOR CRIMINALIZING BAD SAMARITANISM	626
V.	THE LIFE IS SACRED ARGUMENT	629
VI.	THE CONCEPTUAL DISTINCTION BETWEEN KILLING AND LETTING DIE	630
VII.	THE MORAL EQUIVALENCE APPROACH	638
	A. BLAMEWORTHINESS	638
	B. KILLING INTENTIONALLY VERSUS LETTING DIE INDIFFERENTLY	639
	C. THE CONCEPT OF A LUCKY LETTING-DIE	640
	D. AN EXAMPLE OF A LUCKY LETTING-DIE: TWO NEFARIOUS UNCLES	641
	E. TWO NEFARIOUS PARTYGOERS	642
	F. A REDUCTIO AD ABSURDUM OF THE MORAL EQUIVALENCE APPROACH	644
VIII.	THE SLIGHT MORAL DIFFERENCE ARGUMENT	644
	A. THREE DIFFERENCES BETWEEN KILLING AND LETTING DIE	646
	B. THREE ARGUMENTS THAT THERE IS A MORAL DIFFERENCE BETWEEN DOING AND ALLOWING	648
	C. EUTHANASIA	652
	D. THE LEVEL OF PUNISHMENT THAT BAD-SAMARITAN LAWS SHOULD IMPOSE STRICTLY ON THE BASIS OF THE SLIGHT MORAL DIFFERENCE ARGUMENT AND THE PROPORTIONALITY PRINCIPLE	654
IX.	THE LIBERTARIAN OBJECTION	656
X.	THE ACTUS REUS OBJECTION	663

2010]	<i>MILDLY PUNISHING BAD SAMARITANISM</i>	609
XI.	CAUSATION-RELATED OBJECTIONS	665
	A. THE HARM PRINCIPLE OBJECTION	665
	B. TRIGGERING CAUSE, STRUCTURAL CAUSE, AND CAUSAL RESPONSIBILITY	666
	C. DUTIES AS FUNCTIONS OF RELATIONSHIPS, NOT OF CAUSATION	670
XII.	THE FIVE STRONGEST OBJECTIONS TO BAD-SAMARITAN LAWS	672
	A. THE GROUP OBJECTION	672
	B. THE EVIDENCE OBJECTION	675
	C. THE JUROR SYMPATHY OBJECTION	675
	D. THE TOO-RARE OBJECTION	676
	E. THE COUNTERPRODUCTIVE OBJECTION	678
XIII.	REPLIES TO THE FIVE STRONGEST OBJECTIONS	679
	A. REPLIES TO THE GROUP OBJECTION	679
	B. REPLIES TO THE EVIDENCE OBJECTION	681
	C. REPLIES TO THE JUROR SYMPATHY OBJECTION	682
	D. REPLIES TO THE TOO-RARE OBJECTION	682
	E. REPLIES TO THE COUNTERPRODUCTIVE OBJECTION	685
XIV.	SOME REFLECTIVE EQUILIBRIUM AND A BLOW TO THE PROPORTIONALITY PRINCIPLE	687
XV.	PROPOSED LANGUAGE FOR BAD-SAMARITAN LAWS	690
XVI.	CONCLUSION	694

I. INTRODUCTION

On the morning of June 18, 2008, forty-nine-year-old Esmin Elizabeth Green, a caretaker for the elderly who was suffering from a nervous breakdown, was admitted to the psychiatric ward of Kings County Hospital Center in Brooklyn, New York. Because of chronic overcrowding in the ward, Ms. Green was forced to remain in the waiting room for nearly twenty-four hours. The waiting room is monitored by four video cameras. Here is what the videotapes show on the morning of June 19:

5:32 a.m. Ms. Green slides off her chair onto the floor, face down with her legs splayed. For the next hour, other individuals in the waiting room observe Ms. Green on the floor but do not attempt to help her or call for help.

5:52 a.m. A security guard walks by, looks at Ms. Green for about twenty seconds, and then walks away.

6:02 a.m. Ms. Green writhes on the floor and thrashes her legs.

6:04 a.m. Ms. Green rolls on her back.

6:07 a.m. Ms. Green stops moving.

6:10 a.m. A security guard pushes his chair into camera view. Without leaving his chair, he looks at Ms. Green and then scoots away.

6:33 a.m. A doctor walks into the waiting room, sees Ms. Green on the floor, turns around, and walks away.

6:35 a.m. A nurse walks into the waiting room and kicks Ms. Green in the foot.

6:38 a.m. Several emergency personnel walk in with a stretcher and medical equipment and take Ms. Green's dead body away.¹

¹ For several accounts of this event, see Cara Buckley, *A Life Celebrated, and a City Criticized*, N.Y. TIMES, July 7, 2008, at B3; Jim Dwyer, *After a Death Seen on Tape, Change is Promised*, N.Y. TIMES, July 12, 2008, at B1; Anemona Hartocollis, *Video of Dying Mental Patient Being Ignored Spurs Changes at Brooklyn Hospital*, N.Y. TIMES, July 2, 2008, at B3; John Marzulli, *Video Shows No One Helped Dying Woman*, N.Y. DAILY NEWS, July 1, 2008, at 4; *Tape Shows Woman Dying on Waiting Room Floor*, CNN.COM, July 1, 2008, <http://www.cnn.com/2008/US/07/01/waiting.room.death/index.html#cnnSTCVideo>; and *The Today Show*:

To make matters even worse, medical staff attempted a cover-up. Ms. Green's medical chart was a "hive of fictions," indicating that Ms. Green was "up and about, went to the bathroom" at 6:00 a.m.; that she was "sitting quietly in the waiting area at 6:20 a.m.;" and even included figures for her blood pressure, respiratory rate, and pulse.² After this incident was made public, several members of the medical staff and security were fired or suspended.³

One wonders if worse punishment should have been inflicted not only on these hospital personnel but also on the other individuals in the waiting room who observed Ms. Green's plight and did nothing. This Article will argue that it should have; that New York, not to mention all other states, should have had a "bad-Samaritan" law under which all of the individuals who could have either attempted to save Ms. Green or could have notified professional rescuers of Ms. Green's plight would have been criminally prosecuted.⁴

Hospital Patient Left to Die (MSNBC television broadcast July 1, 2008), available at <http://www.msnbc.msn.com/id/21134540/vp/25472162#25472162>.

² Dwyer, *supra* note 1.

³ Buckley, *supra* note 1.

⁴ For other authors who support criminalizing bad Samaritanism, see generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 70–81, 170–88 (Hafner Publishing Co. 1948) (1789); JOEL FEINBERG, HARM TO OTHERS 126–86 (1984); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 76–89 (1991); James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 LAW Q. REV. 424 (1989); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994); Paul M. Hughes, *Bad Samaritans, Morality, and the Law*, 7 INT'L J. APPLIED PHIL. 9 (1992); John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382 (1976); Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 WASHBURN L.J. 463 (2001); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605 (2001); Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957 (2000); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); Patricia Smith, *The Duty to Rescue and the Slippery Slope Problem*, 16 SOC. THEORY & PRAC. 19 (1990); Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053 (2000); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); A.D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); and Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993).

For opposition to criminalizing bad Samaritanism, see generally THOMAS B. MACAULAY, *Notes on the Indian Penal Code*, in 7 THE WORKS OF LORD MACAULAY COMPLETE 493–97 (Sister Lady Trevelyan ed., London, Longmans, Green & Co. 1875); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974); Walter Block, *The Crime of Blackmail: A Libertarian Critique*, 18 CRIM. JUST. ETHICS 3, 8 (1999); Walter Block & David Gordon, *Blackmail, Extortion and Free*

Bad-Samaritan laws are warranted by the premium that we place on human life, on human beings like Ms. Green. This premium is best reflected by our shared belief that no human being should be *killed* unless there is an extremely good, overriding reason.⁵ The least controversial of these reasons are self-defense and defense of others. A slightly more controversial reason is just war—although the controversy is not usually about whether or not it is morally legitimate to engage in just war but rather about which kinds of wars are just and which are not. And the most controversial reasons to kill are capital punishment, euthanasia, and abortion.⁶ The

Speech: A Reply to Posner, Epstein, Nozick and Lindgren, 19 LOY. L.A. L. REV. 37, 38 n.9 (1985); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. & AM. L. REG. 217 (1908); Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971 (2000); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653 (2006); Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980); and Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385 (1998).

Bad-Samaritan laws are sometimes referred to as "good-Samaritan" laws. But this is a mistake. Good-Samaritan laws, which have been codified by all fifty states, the District of Columbia, the federal government, and the military, protect medical personnel from civil liability for failed non-negligent attempts to make emergency rescues. For discussions of good-Samaritan laws, see *Jackson v. Mercy Health Ctr., Inc.*, 864 P.2d 839, 843 (Okla. 1993); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 575–76 (9th ed. 2008); Marc A. Franklin, Comment, *Vermont Requires Rescue*, 25 STAN. L. REV. 51, 52–53, 60–61 (1972); Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4TH 294, 299–301 (1989); C.J.S. *Physicians, Surgeons, and Other Health-Care Providers* § 104 (2005); 65 C.J.S. *Negligence* § 87 (2005); cf. 35A AM. JUR. 2D *Federal Tort Claims Act* § 113 (2001).

⁵ See Norman L. Cantor, *On Kamisar, Killing, and the Future of Physician-Assisted Death*, 102 MICH. L. REV. 1793, 1806 (2004) ("Our societal ban on virtually all active killing does underscore the importance of human life. Exceptions to the ban are few—self-defense, defense of others, capital punishment, and just war."); Norman L. Cantor & George C. Thomas, III, *The Legal Bounds of Physician Conduct Hastening Death*, 48 BUFF. L. REV. 83, 154–55 (2000) ("Government reinforces the sanctity of human life principle by banning all killings . . . except in extremely limited circumstances. The common exceptions for capital punishment, self-defense, and war have extraordinary justifications . . ."); Rebecca C. Morgan & D. Dixon Sutherland, *Last Rights? Confronting Physician-Assisted Suicide in Law and Society: Legal Liturgies on Physician-Assisted Suicide*, 26 STETSON L. REV. 481, 513 (1996) ("Most members of our society are not against killing another person in any and every case. Rather, unless a person is a pacifist, the ethical mandate is to never kill without a compelling reason. Self-defense, capital punishment, and war have commonly been acceptable contexts for killing another human being.")

⁶ See Cantor, *supra* note 5, at 1806–07 ("Western society has generally criminalized mercy killing; the object of relieving suffering has never been deemed a sufficient justification for assistance to suicide or for voluntary active euthanasia. . . . Thus, the ban on [physician-

reason that we agree that killing is generally impermissible, and the reason that there is such heated debate about whether or not the reasons above do indeed qualify as overriding, is that, as a society, we cherish human life. We regard it as sacred. This value also explains not only why every state has laws prohibiting homicide and manslaughter but also why the punishment prescribed for these crimes is almost invariably the most severe, more severe than the punishment for any other crime.

By definition, letting another person die—i.e., bad Samaritanism—is not killing. A bad Samaritan does not cause or initiate another person's death in the way that a killer does. Rather, a bad Samaritan sees another person dying and does not try to save her even though the attempt would pose little, if any, risk to his own well-being.⁷ And while our intuition is that failing to attempt to rescue is not as morally blameworthy as actively attempting to kill, the former still exhibits a fundamental disregard for the victim's life. To this extent, to the extent that bad Samaritanism fails to respect and promote the premium that we place on human life, especially innocent human life, it conflicts with the value that motivates our laws against homicide and manslaughter. And because bad Samaritanism conflicts with this very same value, it too should be deemed a serious criminal offense. Call this the "Life Is Sacred Argument."

This Article will provide further moral arguments for this conclusion. The first three of these arguments will be utilitarian. Each will attempt to show that bad-Samaritan laws would yield significant benefits not only to potential victims but also to society generally. The next argument, the "Slight Moral Difference Argument," is deontological—that is, based strictly on moral

assisted death] could serve as a symbolic message about the sanctity of life." (citations omitted)); Cantor & Thomas, *supra* note 5, at 155 ("Relief of suffering has not traditionally been deemed a justification for killing, as the almost universal ban on euthanasia shows."); Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69, 120 (1991) ("[W]hat counts as murder . . . is thoroughly controversial. Are abortion, capital punishment, self-defense, euthanasia, and war all instances of justifiable homicide or murder? . . . [E]ven if there is a consensus that murder is wrong, it doesn't resolve perennially intractable moral and political controversies concerning the taking of human life.").

⁷ This point applies at least in *easy-rescue* situations. The expression *easy rescue* will be defined more precisely in Part II.

principles rather than on expected consequences. According to the Slight Moral Difference Argument, which builds upon the Life Is Sacred Argument, when all else is equal, letting die is less, but only *slightly* less, blameworthy than killing. It is less blameworthy than killing because (a) it lacks three elements that killing involves—namely, initiation, causation, and expression of intent; and (b) these three elements *are* morally relevant. Still, letting die is only *slightly* less blameworthy than killing—again, all else being equal—because it shares in common with killing a fundamental disregard for another person's life.

Even if these arguments—the utilitarian arguments, the Life Is Sacred Argument, and the Slight Moral Difference Argument—are successful, they are only half the story. The other half of the story concerns the level of punishment that bad Samaritans should receive. Based on the Life Is Sacred Argument and the Slight Moral Difference Argument alone, bad Samaritans should receive severe punishment. According to the “proportionality principle,” offenses should be punished in proportion to their moral severity.⁸ So if one subscribes to the proportionality principle *and* believes that letting another die for no good reason violates the sanctity of life almost as much as killing, then one will be drawn to the conclusion that letting die should be punished *almost* as severely as a *ceteris-paribus* killing (a killing that is equivalent to the letting-die in all morally relevant respects).

This Article, however, will resist this conclusion. It will argue that bad Samaritans should be punished *not* severely but rather *mildly*—for example, with a hefty fine or short-term imprisonment. The reason that this Article will advocate mild punishment is not because of the arguments that are standardly given—namely, arguments that criminalizing or punishing bad Samaritanism violates deeply embedded criminal-law principles such as the harm

⁸ See *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) (“A punishment out of all proportion to the offense may bring it within the ban against ‘cruel and unusual punishments.’” (citation omitted)); MODEL PENAL CODE § 1.02(1)(e) (“The general purposes of the provisions governing the definition of offenses [include differentiating] on reasonable grounds between serious and minor offenses”); § 1.02(2)(c) (“The general purposes of the provisions governing the sentencing and treatment of offenders [include safeguarding] offenders against excessive, disproportionate or arbitrary punishment.”); see generally SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 167–82 (8th ed. 2007).

principle, the actus reus requirement, and causation requirements. Rather, the reason that this Article will advocate mild punishment is because, contrary to the very strong moral reasons for punishing bad Samaritanism severely, there are some very strong *nonmoral* (that is, practical and psychological) reasons not to punish bad Samaritanism *at all*.

The first of these arguments—what will be called the “Group Objection”—is that it would be both impractical and unfair to punish *groups* of bad Samaritans given the extraordinary difficulties of determining culpability among them and the arguably good reasons that people have for not being good Samaritans when other potential good Samaritans are present. The second argument, the “Evidence Objection,” is that if we respond to the Group Objection by restricting the application of bad-Samaritan laws to *lone* bad Samaritans, we will too rarely have the evidence that we need to arrest, prosecute, and convict. The third argument, the “Juror Sympathy Objection,” is that even in the very rare cases in which we have sufficient evidence, jurors will still be reluctant to convict because they will understand and accept the bad Samaritan’s reluctance to “get involved.” The fourth argument, the “Too Rare Objection,” is that bad Samaritanism is simply too rare to worry about. In the vast majority of easy-rescue situations, people lend a helping hand. The fifth argument, the “Counterproductive Objection,” is that not only easy-rescue attempts but also *dangerous*-rescue attempts are already quite frequent. Given this reality, bad-Samaritan laws would actually *increase* the number of injuries and deaths by motivating the tiny minority of otherwise reluctant individuals to attempt these dangerous rescues and then become hurt or killed in the process.

So, on the one hand, we have some very strong moral arguments for not only criminalizing bad Samaritanism but also punishing it almost as severely as a mens-rea-comparable homicide. On the other hand, we have some very strong nonmoral arguments for not criminalizing, no less punishing, bad Samaritanism at all. What, then, are we to do? It will be argued that we should do what we should always do when faced with two equally compelling sets of arguments for opposite conclusions: compromise. And the perfect compromise between punishing bad Samaritanism severely and not punishing it at all is to punish it *mildly*.

This conclusion seems reasonable enough. But if we accept it we must realize that we are effectively *rejecting*—or, more politely, carving out a *significant exception* to—the vaunted proportionality principle. For we are concluding that, at least in this particular instance, the punishment should *not* fit the crime; that the punishment for the offense should not correlate with the moral severity of the offense; that while bad Samaritanism is *almost as* morally blameworthy as homicide, we should still punish it *much less* than the latter. And this is a conclusion that many people, even proponents of bad-Samaritan laws, might find distasteful. But distasteful as it is, the alternative of failing to criminalize or punish bad Samaritanism at all, which is what forty-six states now do, is even more distasteful. Or so this Article hopes to show.

II. A BRIEF BACKGROUND ON BAD-SAMARITAN LAWS

The debate over bad-Samaritan laws in the United States is over one hundred years old.⁹ It seems to have started gathering real momentum in the 1970s and 1980s, most likely in response to the Kitty Genovese incident, which is discussed in Part XII.A below, and the New Bedford, Massachusetts barroom rape in 1983.¹⁰

Currently, only four states have enacted bad-Samaritan laws: Minnesota,¹¹ Rhode Island,¹² Vermont,¹³ and Wisconsin.¹⁴ This situation contrasts with Quebec¹⁵ and sixteen European countries,¹⁶ all of which have enacted bad-Samaritan laws at some point in the

⁹ The earliest articles on the merits of these laws appear to be by Ames, *supra* note 4, and Bohlen, *supra* note 4.

¹⁰ See Heyman, *supra* note 4, at 677–78 (“[T]he traditional common law may well have recognized a duty to act in cases like the murder of Catherine Genovese and the New Bedford rape—precisely the cases that have generated the greatest public outcry in recent years.” (citations omitted)); Stewart, *supra* note 4, at 388–89 (explaining how certain infamous incidents of bad Samaritanism have outraged the public and motivated legislative reform); Yeager, *supra* note 4, at 20–21 (describing the New Bedford barroom rape in detail).

¹¹ MINN. STAT. ANN. § 604A.01 (West 2000 & Supp. 2008).

¹² R.I. GEN. LAWS § 11-1-5.1 (2002).

¹³ VT. STAT. ANN. tit. 12, § 519 (2002).

¹⁴ WIS. STAT. ANN. § 940.34 (West 2005).

¹⁵ Charter of Human Rights and Freedom, R.S.Q., ch. C 12 (1977).

¹⁶ The European countries are Belgium, Czechoslovakia, Denmark, France, Germany, Holland, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Switzerland, and Turkey. Yeager, *supra* note 4, at 6 n.28.

last 150 years.¹⁷ The strictest is France's law, which imposes five years of imprisonment and a fine of 75,000 euros.¹⁸

The kind of bad-Samaritan law that this Article advocates is the state's formal recognition of a moral duty that we all owe to each other, a duty to attempt to save one another when the burden and risk are low and the potential benefits (namely, helping the stranger to escape from grave danger) are very high.¹⁹ Of course, it is the criminal law's job to define the contours of this lofty, but arguably vague, aspiration. These contours are best captured by the following six elements:²⁰

¹⁷ For discussions of bad-Samaritan laws in Europe, see FEINBERG, *supra* note 4, at 127; GLENDON, *supra* note 4, at 84 ("The problem was seen in European countries as one involving civic duties rather than private rights—and thus the natural solution seemed to be to establish criminal sanctions for failure to rescue."); KADISH, SCHULHOFER & STEIKER, *supra* note 8, at 200–01; Andrew Ashworth & Eva Steiner, *Criminal Omissions and Public Duties: The French Experience*, 10 LEGAL STUD. 153, 154–57 (1990); Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 93, 97–100 (Michael A. Menlowe & Alexander McCall Smith eds., 1993); John P. Dawson, *Rewards for the Rescue of Human Life?*, in THE GOOD SAMARITAN AND THE LAW 63, 70–71 (James M. Ratcliffe ed., 1966) [hereinafter THE GOOD SAMARITAN]; F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 632–34 (1966); Franklin, *supra* note 4, at 59–60 & nn.56–64; Gilbert Geis, *Sanctioning the Selfish: The Operation of Portugal's New 'Bad Samaritan' Statute*, 1 INT'L REV. VICTIMOLOGY 297, 297–300, 301–02 (1991); Murphy, *supra* note 4, at 605 n.1, 610 n.21; Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in THE GOOD SAMARITAN 91; Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 88–104 (2005); Smith, *supra* note 4, at 19–20; Martin Vranken, *Duty to Rescue in Civil Law and Common Law: Les Extrêmes se Touchent?*, 47 INT'L & COMP. L.Q. 934, 938–39 (1998); Yeager, *supra* note 4, at 6 n.28; and Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 639–42 (1952).

¹⁸ C. PÉN. art. 223-6 (2002), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3705>.

¹⁹ Heyman also believes that the duty to rescue is owed not merely to the potential victim but to society generally:

In return [for enjoying the fundamental right to protection by the community], the individual has an obligation to assist in [providing this protection] by acting when necessary to rescue a fellow citizen in danger. This duty is owed not only to the community at large but also to the other members of the community, especially the endangered person. An individual who breaches this obligation can properly be held responsible both to the community through its criminal law and to the injured party in a tort action.

Heyman, *supra* note 4, at 738–39 (citation omitted). See also Yeager, *supra* note 4, at 57–58 ("Ultimately, rescue and reporting laws do no more than enforce the norm of reciprocity by recognizing an acute, situational asymmetry between people temporally and spatially brought together by chance.").

²⁰ Cf. ERIC D'ARCY, HUMAN ACTS: AN ESSAY IN THEIR MORAL EVALUATION 56–57 (1963)

- (1) There is an emergency. An individual (Victim) is in grave danger of suffering death or serious physical injury.²¹
- (2) Another person upon whom Victim is not legally dependent is nearby. (Call her "Nearby".) The emergency is *immediate*.
- (3) Nearby can try to save Victim from injury or death either by directly attempting a rescue or by trying to solicit help from others.
- (4) It would be relatively easy and safe for Nearby to attempt to help Victim in one of these two ways.²²

(listing four similar conditions).

²¹ See Smith, *supra* note 4, at 29 ("I think the best way to construe the notion of clear need as it relates to the duty of the Good Samaritan is in terms of emergency. . . . It is an acute, specifiable event which is short term in the sense that it must be acted on with dispatch or it will likely get worse. It is not self correcting; it requires intervention.").

²² See Heyman, *supra* note 4, at 747 ("[T]he duty to rescue would not require an individual to subject himself (or other innocent persons) to a substantial risk of death or serious bodily harm in order to rescue another."); Hyman, *supra* note 4, at 678–79 nn.47–50 (citing many different instances in which an individual attempted a dangerous rescue and ended up dead or severely injured); Smith, *supra* note 4, at 25–26 (arguing that condition (4) should be relativized to Nearby's individual "limitations or incapacities"); Waldron, *supra* note 4, at 1070 (offering two ways in which the law can handle the inevitable vagueness of terms like *easy* and *safe*: "either by artificially stipulating a bright legal line at some point along what morality regards as a continuum (as we do with speed limits, ages of consent, etc.), or by making it clear (through the use of terms like 'reasonable') that the relevant legal provision is to be administered by prosecutors and juries as a standard, not a rule."); see also Shaya Rochester, Note, *What Would Seinfeld Have Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L.Q. 1185 (2001) (noting that Halakha, which is practical Jewish law, requires individuals to perform not merely easy rescues but also *burdensome* rescues and *dangerous* rescues). Element (4) is motivated by the same basic principle that lies behind the justification of the necessity defense, of which self-defense is a species: the moral permissibility of prioritizing one's own well-being over another's if the two come into conflict. See MODEL PENAL CODE §§ 3.02, 3.04 (Proposed Official Draft 1962) ("Justification Generally: Choice of Evils," "Use of Force in Self-Protection"); see also GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 855–75 (2000) (discussing different justifications of the "necessary defense"); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. 2, § 6 (Peter Laslett ed., Cambridge University Press 1988) (3d ed. 1698) ("Every one as he is bound to preserve himself. . . so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another."); Heyman, *supra* note 4, at 691, 747, 747 n.360 (citing Locke).

- (5) Nobody else appears to be attempting to help Victim, either directly or by calling for professional rescue.²³
- (6) Nearby knows with practical certainty (1) through (5).

The classic example of an easy-rescue situation is Nearby's happening to come across Victim helplessly face down in a puddle and in obvious distress.²⁴ Still, even this example might meet with resistance. What if it is 3:00 a.m. and thirty feet from a bar known to be frequented by loud, violent, pistol-toting ex-convicts? Many people would avoid attempting any rescue in this situation for fear of putting themselves in a dangerous situation. And their fear would arguably be reasonable. So the classic example needs to be further developed: In a visibly safe environment, Nearby comes across Victim, a quadriplegic who fell into the puddle from her wheelchair without anybody around to help lift her back up.

Even if the attempted rescue would *not* be easy and safe, Nearby is *still* a bad Samaritan if she fails to attempt to *call for help* when calling for help would itself be easy and safe.²⁵ Accordingly, five states have adopted duty-to-report statutes, which require witnesses not necessarily to attempt rescues but to call for professional help should they observe a crime in progress or a person in grave danger.²⁶ These duty-to-report statutes, which are the modern-day

²³ Cf. Kleinig, *supra* note 4, at 404 ("Not until one of [a group of bystanders] competently aids [Victim] are the others relieved of their responsibility to help."); Smith, *supra* note 4, at 35–36 ("Given the seriousness of the stakes—life itself, or severe injury—it is not reasonable to assume someone else will take responsibility unless you see someone do it. . . . [U]ntil someone assumes the responsibility, everyone is under the same duty. If no one corrects the situation, all are equally blameworthy.").

²⁴ For variations of this example, see GLENDON, *supra* note 4, at 78; Ames, *supra* note 4, at 112; Epstein, *supra* note 4, at 189–90; Hyman, *supra* note 4, at 682; and Smith, *supra* note 4, at 25.

²⁵ See Yeager, *supra* note 4, at 29–30 ("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.").

²⁶ These states are Florida, Hawaii, Massachusetts, Ohio, and Washington. See FLA. STAT. ANN. § 794.027 (West 2007) (defining failure to report sexual battery as a misdemeanor of the first degree); HAW. REV. STAT. § 663-1.6 (1993) (defining failure to report crime in

ed
te,
rit

ual
lily
ny
ead
be
070
and
lity
ear
be
ter,
the
cha,
also
asic
is a
two
962)
RGE
is of
eter
d to
tion,
o do
f the
747

version of misprision of felony—the crime of failing to report to the authorities knowledge of another person’s crime²⁷—have been helpful in narrowing the scope of the “no-duty-to-rescue” rule²⁸ and

progress as a petty misdemeanor); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2008) (imposing “fine of not less than five hundred . . . dollars” for failure to report violent crime in progress); OHIO REV. CODE ANN. § 2921.22 (West 2006 & Supp. 2009) (“[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.”); WASH. REV. CODE ANN. § 9.69.100 (West 2003) (defining failure to report violent crime or sexual crime or assault against child as gross misdemeanor); see also Schiff, *supra* note 17, at 81, 133–41 (defending a “limited statutory duty to inform the authorities or professional rescue personnel in emergencies”); Smith, *supra* note 4, at 25 (“[I]n a modern society the duty to aid very often amounts to no more than a duty to initiate the social mechanisms which are set up to prevent the harm. You need not prevent the harm yourself.”); Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 5 (2002) (“[R]eporting requirements are quietly and incrementally reshaping American criminal law traditions.”); 50 *State Statutory Surveys: Mandatory Child Abuse Reporting*, 0030 SURVEYS 13 (Westlaw 2009) (providing comprehensive state-by-state list of statutes imposing mandatory duty to report suspected child abuse and neglect).

²⁷ See, e.g., 18 U.S.C. § 4 (2006) (“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”). See also KADISH, SCHULHOFER & STEIKER, *supra* note 8, at 201 (“Only a few American states still recognize [misprision-of-felony], but two others (South Dakota and Ohio) have re-established the offense through statutes that create a general obligation to report any known felony, and many states impose a reporting obligation on eyewitnesses to specific crimes.”); Heyman, *supra* note 4, at 686 nn.48–49 (briefly summarizing history of the offense of misprision); Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1068–69 n.35 (2007) (listing different scholars’ views of misprision); Yeager, *supra* note 4, at 30–38 (discussing relationship between duty-to-report statutes and misprision).

²⁸ *Buch v. Amory Manufacturing Co.*, 44 A. 809 (N.H. 1898), provides a classic statement of the no-duty-to-rescue rule:

Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the statute for its death.

Id. at 810. See also *Yania v. Bigan*, 155 A.2d 343, 345–46 (Pa. 1959) (holding operator of coal strip-mining operation not liable for victim’s death after taunting victim to jump into deep trench full of water and letting him drown); Stewart, *supra* note 4, at 393–94 (“The longstanding general rule in this country regarding a duty to act for the benefit of another is that, with few exceptions, a person has no legal duty to rescue or aid an individual in peril. The duty is absent even if 1) a person ‘realizes or should realize that action on his part is necessary,’ 2) ‘the person imperiled may lose her life in the absence of assistance,’ and 3) ‘the aid can be rendered without danger or inconvenience to the one who could undertake the rescue.’ As morally repugnant as one may find a refusal to give or seek assistance, the fact is that a person has no legal duty, responsibility, or obligation to assist another in peril.”)

thereby shrinking the zone in which bad-Samaritan laws would operate. But a proponent of bad-Samaritan laws would argue that this shrinking process needs to continue even further, that duty-to-report statutes are not sufficient to plug the hole. For, first, some duty-to-report statutes tend to be too narrowly tailored—e.g., applicable only to sexual assault or violent crimes and not to emergency situations more broadly.²⁹ Second, duty-to-report statutes are applicable less to easy rescues than to *dangerous* rescues—rescues that would place a nonprofessional rescuer at significant risk. Third, an attempted easy rescue is highly preferable to calling for help when time is of the essence, as it too often is.³⁰

III. THREE EXAMPLES OF BAD SAMARITANISM

This Part will provide three examples of bad Samaritanism.³¹ These examples are designed to arouse the reader's sympathies and outrage. One might argue that we should not let emotions enter into a rational policy debate. But, quite the contrary, the emotions that

(citations omitted)).

²⁹ See *supra* note 26 and accompanying text.

³⁰ But see Stewart, *supra* note 4, at 414–15 (“Crime-reporting and criminal-victim-assisting statutes are more appropriate forms of governmentally persuaded actions than are general duty-to-assist laws. . . . [P]erforming some act to assist or seek assistance for an injured victim of a crime is a natural response. Such a response is not plagued with the plethora of complications, uncertainty, and detachment often present under a general duty-to-assist situation.”).

³¹ For other examples, see *In re Eric F.*, 698 A.2d 1121, 1126–27 (Md. Ct. Spec. App. 1997) (holding defendant liable for depraved-heart murder after dragging unconscious, lightly clothed friend into the woods on a cold evening and leaving her exposed until she died from hypothermia); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 375 & nn.22–28 (W. Page Keeton ed., 5th ed. 1984) [hereinafter PROSSER & KEETON] (listing numerous court decisions in which people escaped liability for outrageous acts of bad Samaritanism); Stewart, *supra* note 4, at 386 n.1, 389–90 & nn.13–14 (discussing tragedy of Joey Levick, who was beaten to death while onlookers did nothing; and gang rape that occurred at bar in New Bedford, Massachusetts while bystanders neither intervened nor called for help, an incident that was dramatized in the 1998 movie *The Accused*); Yeager, *supra* note 4, at 21–22 (discussing New Bedford barroom rape); Allen G. Breed & Binaj Gurubacharya, *Near the Summit, David Sharp Waved Off Fellow Climbers: “I Just Want to Sleep,”* SEATTLE TIMES, July 17, 2006, <http://community.seattletimes.nwsources.com/archive/?date=20060717&slug=webeverest17> (recounting the story of David Sharp, a man who tried climbing Mt. Everest and was neglected by several fellow climbers after they found him freezing to death inside a mountain cave).

we feel in reaction to these stories are perhaps the *strongest* arguments for bad-Samaritan laws.³²

Example one: On May 30, 2008 at 5:49 p.m., seventy-eight-year-old Angel Arce Torres was crossing from the south to the north side of Park Street in Hartford, Connecticut.³³ Two westbound cars crossed from the westbound to the eastbound lane. One of the cars hit Torres, knocking him violently to the ground, and then sped away. While Torres's body lay lifeless in the middle of the eastbound lane, a pedestrian crossed the street right past him; five cars in the westbound lane drove right by him; and one car in the eastbound lane approached Torres's body, turned around, entered the westbound lane, and drove away. Several other individuals viewed Torres from the sidewalk and did nothing. It took a relatively long time in this context, approximately forty-five seconds after the collision, for the first individuals to approach Torres, at which point a police car, which happened to be passing through on its way to another incident, arrived.³⁴ Of the dozens of people who observed either the accident or Torres's body, only two of them (not four, as some of the media reports indicate) called 911 to report the incident.³⁵ In reaction to this videotape, Chief Daryl Roberts

³² See Bender, *supra* note 4, at 23 n.78 ("There are serious problems with attributions and analyses that dichotomize reason and intuition or rationality and emotion."); Morris B. Hoffman, *Rediscovering the Law's Moral Roots*, 103 NW. U. L. REV.: COLLOQUY 13, 14–15, 16 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2008/26/> ("Emotion is not the enemy of the mind's rationality, it is its lubricant, a kind of evolutionary shortcut when circumstances don't warrant reflection (fight or flight) or when reflection could lead us astray or leave us paralyzed. . . . [L]aw and emotion are two sides of the same coin because the coin is us, and our evolved neuroarchitectures."); Mary Warnock, *The Artificial Family*, in *MORAL DILEMMAS IN MODERN MEDICINE* 138, 154 (Michael Lockwood ed., 1985) ("Indeed the whole notion of reason, on the one hand, and feeling or sentiment, on the other, essentially opposed to each other, seems to me to be a mistake—a hangover from an eighteenth-century way of looking at things. I don't see why a moral view cannot both be grounded in feelings and at the same time (in some suitably broad sense) be rational, or at any rate not irrational."). *But see* Hyman, *supra* note 4, at 695–710 (arguing that emotionally stirring anecdotes about bad Samaritanism "offer a highly unreliable basis for policymaking and scholarship").

³³ Video of this incident can be found at YouTube, Angel Arce Torres 35 Park St. Hartford, Conn Hit And Run, <http://www.youtube.com/watch?v=Eb5cvRVVh4> (last visited Jan. 28, 2010).

³⁴ News Release, City of Hartford Police Department, Hartford Police Release Video of Hit and Run; Public Assistance Requested in Identifying Suspects (June 4, 2008), http://www.hartford.gov/Police/PR_2008/2008_06_04_TorresHitandRunPR_Video.htm.

³⁵ The 911 calls are available at <http://www.wtic.com/pages/2311698.php?>. Although the media represents these as four calls, three of them are the continuation of one longer call between one woman and 911. Both calls come from observers on the sidewalk, not from any

suggested that the Torres incident represents an alarming level of alienation and indifference in our society: "It's a clear indication of what we have become when you see a man laying in the street, hit by a car and people just drive around him, walk by him At the end of the day, we've got to look at ourselves and understand that our moral values have now changed. We have no regard for each other."³⁶

Example two: In *Osterlind v. Hill*, the Massachusetts Supreme Judicial Court told the following story.³⁷ On the morning of July 4, 1925, Albert T. Osterlind and his friend Ryan, both of whom were obviously intoxicated, rented a canoe from Harold J. Hill. Shortly after Osterlind and Ryan left the dock, their canoe overturned. It is not clear from the record what happened to Ryan, but Osterlind hung on to the canoe for approximately thirty minutes, during which time he made "loud calls for assistance." Hill heard Osterlind's cries for help but "utterly ignored" them. Eventually, Osterlind gave up, released his hold, and drowned. Instead of punishing Hill for Osterlind's death or even stating in dicta that Hill's indifference was monstrous but unpunishable, the court said nothing more than this: "The failure of the defendant to respond to [Osterlind's] outcries is immaterial. No legal right of [Osterlind's] was infringed."³⁸

Example three: On May 25, 1997, David Cash Jr. and Jeremy Strohmeyer, both eighteen years old, were playing hide-and-seek with seven-year-old Sherrice Iverson at the Primadonna Resort & Casino near Las Vegas, Nevada.³⁹ At one point, Iverson ran into the ladies' restroom. Strohmeyer followed her in. Cash soon followed

of the drivers who passed by Torres.

³⁶ Excerpt of *Hartford Courant's* transcript of news conference with Hartford Police Chief Daryl Roberts, June 4, 2008 (on file with author); see also Ron Claiborne, Belinda Walker & Jonann Brady, *Why Did No One Help Hit-and-Run Victim?*, June 6, 2008, <http://abcnews.go.com/GMA/story?id=5013503>; Chief, *'We No Longer Have Moral Compass': Video Captures Bystanders Gawking at Hit-and-Run Victim*, WFSB Hartford, June 6, 2008, <http://www.wfsb.com/news/16497579/detail.html>. But see Colin McEnroe, *If You Think You See the Truth, Look Again*, HARTFORD COURANT, June 8, 2008, at A2 (denying that witnesses of Torres's accident were bad Samaritans).

³⁷ 160 N.E. 301 (Mass. 1928).

³⁸ *Id.* at 302; see also Douglas N. Husak, *Omissions, Causation and Liability*, 30 PHIL. Q. 318 (1980) (developing, and then rejecting, a potential argument for the Osterlind court's conclusion that Hill was not liable for Osterlind's death).

³⁹ Nora Zamichow, *The Fractured Life of Jeremy Strohmeyer*, L.A. TIMES, July 19, 1998, at A1. The following account comes entirely from Zamichow's highly detailed article.

Strohmeyer. Cash observed Strohmeyer assaulting and strangling Iverson in a restroom stall and made some minimal attempts to stop Strohmeyer. When these attempts failed, Cash simply left the restroom. Strohmeyer ended up strangling Iverson to death, immediately confessed to Cash, and then traveled with Cash to some other casinos. After the surveillance tape was broadcast all over Nevada and California, Strohmeyer was arrested and is now serving a life term in prison.⁴⁰ But Cash? Cash was not punished at all. For at the time, Nevada did not have any laws against bad Samaritanism.⁴¹

To add insult to injury, Cash conducted several interviews in which he responded to questions about the incident with shameless, psychopathic indifference. A *60 Minutes* episode captured Cash protesting to a radio host on 97.1 FM in Los Angeles:

How much am I supposed to—to sit down and cry about this? I mean . . . let's be reasonable here. Is my life supposed to halt for—like for days, weeks and months on end? . . . The simple fact remains, I do not know this little girl. I do not know starving children in Panama. I do not know . . . people that die of disease in Egypt.⁴²

⁴⁰ *Nevada Oks Penalty for Witnesses Who Don't Report Child Abuse*, L.A. TIMES, June 12, 1999, at A20.

⁴¹ *Id.* In response to this incident, Nevada tried but failed to adopt a bad-Samaritan statute. The best it was able to do was to pass the very narrowly tailored "Sherrice Iverson Bill," which requires nonfamily witnesses to report cases of sexual assault against children or face six months in prison. *Id.* California followed a year later with a virtually identical proposal: the "Sherrice Iverson Good Samaritan Law." *'Sherrice Iverson' Bill Becomes Law*, L.A. TIMES, Sept. 19, 2000, at B4; Will Shuck, *Davis Signs Iverson Child Protection Act: New Law, Named for Victim, Makes Ignoring Crime a Crime*, LONG BEACH PRESS-TELE., Sept. 20, 2000, at A1. Both followed in the footsteps of a Washington statute adopted almost forty years earlier. See WASH. REV. CODE ANN. § 9.69.100 (West 2008) (defining failure to report violent crime or sexual crime or assault against child as gross misdemeanor). Surprisingly, a similar bill, S. 793, 106th Cong. (1999), available at <http://www.govtrack.us/congress/bill.xpd?bill=s106-793>, failed in the United States Congress.

⁴² *60 Minutes: The Bad Samaritan?* (CBS television broadcast Aug. 29, 1999). I am drawing my quotations from CBS's official transcript of the conversation between Ed Bradley and David Cash. Please note that CBS's transcript differs from my own transcript of the interview, which I drafted on the basis of my own observation of the interview (on a videotape that I borrowed from Facing History and Ourselves, which is located at 16 Hurd Road, Brookline, MA 02455). Still, the reader should know that the differences between the two transcripts are not substantive.

Here are some startling excerpts from Cash's interview with Ed Bradley:

ED BRADLEY: Why [did you simply leave the bathroom]?

Mr. CASH: Well, when an 18-year-old male grabs a seven-year-old child, [that's] not a position that I want to be in. Based on what I saw, I mean, it wasn't something that I wanted to stick around and . . . see what would materialize.

.....

Mr. CASH: You know, the simple fact is, . . . there's one person that killed Sherrice Iverson. There's one guy: Jeremy Strohmeyer.

BRADLEY: And there's one other person who could have stopped it.

CASH: [T]echnically I could have stopped it, but based on what I saw . . . I didn't feel her life was in danger.

BRADLEY: If you could go back to that night and do it all over again, what would you do differently?

CASH: I don't feel there's much I *could* have done differently.⁴³

Finally, here are excerpts from Cash's interview with the *Los Angeles Times*:

Los Angeles Times: Why [did you ask Jeremy after he told you that he killed Sherrice] if the little girl was aroused?

David Cash: I don't know, it's just the way I think.

.....

Los Angeles Times: Were you appalled that a friend said he killed a little girl?

Cash: I'm not going to get upset over somebody else's life. I just worry about myself first. I'm not going to lose sleep over somebody else's problems.

⁴³ *Id.* (emphasis added).

Los Angeles Times: Why didn't you turn Jeremy over to the police?

Cash: I didn't want to be the person who takes away his last day, his last night of freedom.

Los Angeles Times: Do you still consider Jeremy a friend?

Cash: Yeah. He didn't do anything to me.

....

Los Angeles Times: Are you angry at Jeremy?

Cash: No, he didn't do anything to me. I miss him as a friend. But there's not much you can do about it. You got to move on.

Los Angeles Times: If you're not angry on your account, what about for your parents, for having dragged them into this?

Cash: No, they're over it.

Los Angeles Times: What about when you think of Sherrice?

Cash: I don't think of it. I don't know her.

Los Angeles Times: Do you feel bad for her?

Cash: The situation sucks in general.

Los Angeles Times: Do you feel worse for her or for Jeremy?

Cash: Because I knew Jeremy, I feel worse for him. I know he had a lot going for him.⁴⁴

IV. THREE UTILITARIAN REASONS FOR CRIMINALIZING BAD SAMARITANISM

The three examples of bad Samaritanism in Part III, in conjunction with the example of Esmin Elizabeth Green,⁴⁵ help to support three main utilitarian reasons why every state should impose punishment for bad Samaritanism.⁴⁶ The first utilitarian

⁴⁴ See Zamichow, *supra* note 39.

⁴⁵ See *supra* notes 1-3 and accompanying text.

⁴⁶ This Article is not wedded to any particular theory of punishment, either retributivist or utilitarian. Instead, it relies on *both* approaches—utilitarian in this Part and retributivist in Part VIII.D. For an explication of the debate between utilitarians and retributivists over desert and punishment, see Lloyd L. Weinreb, *Desert, Punishment, and Criminal*

reason is to help minimize needless deaths and injuries. If Nevada had implemented a well-publicized bad-Samaritan law, the Sherrice Iverson story might have turned out differently. If only from fear of punishment and its consequent stigma, David Cash more likely would have attempted to prevent Jeremy Strohmeyer from further assaulting Sherrice Iverson, whether by direct physical force or by alerting other casino patrons or security to the situation. More generally, by publicizing newly drafted bad-Samaritan laws, states would likely be more successful in deterring bad Samaritanism and motivating our less compassionate neighbors, like Cash, to lend a helping hand—or make a 911 call—when they come across a fellow human being in grave danger.⁴⁷

The second utilitarian reason for criminalizing bad Samaritanism is to provide society an outlet for its moral outrage—just as the criminal justice system currently provides an outlet for moral outrage against people who have committed murder, rape, and theft.⁴⁸ As things now stand, the public—including victims’

Responsibility, 49 *LAW & CONTEMP. PROBS.* (1986).

⁴⁷ See GLENDON, *supra* note 4, at 87–88 (“[P]recisely because our society is so legalistic, 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.”); Franklin, *supra* note 4, at 58 (“From what experiments have taught us about human behavior in rescue situations, we might well conclude that the legal requirement of rescue would, in moments of hesitation, tip the balance toward the desired action. Some rescuers might be moved initially by awareness of such a law.” (internal citation omitted)); Yeager, *supra* note 4, at 56–57 (“Studies indicate . . . that a ‘legal requirement of rescue would, in moments of hesitation, tip the balance toward the desired action.’ . . . 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 . . . encourag[e] the broader development of similar behavior and attitudes.’ (citation omitted)). *But see* Hyman, *supra* note 4, at 703–04, 713 (“[R]esearch into behavioral psychology suggests that rescue without law is most likely the result of hard-wired altruism. . . . As such, the presence or absence of a duty to rescue (let alone ex post awards or public recognition for rescuing) are unlikely to be material factors in whether a rescue occurs It is unlikely that additional moral instruction, in the form of a statutory duty to rescue, will do anything to reach those few individuals who do not understand this basic insight.”); Stewart, *supra* note 4, at 434 (“[M]aking such inaction criminal . . . does not effectively encourage or bring about any significant positive change in how individuals will respond to others in peril. In some instances, the laws may even have a chilling effect on altruistic behavior.”).

⁴⁸ Cf. GLENDON, *supra* note 4, at 83–84 (“What is . . . likely to surprise and disappoint an average citizen is the sense that the law appears to condone particularly shocking forms of anti-social behavior: failures to warn, or act, or summon aid.”); PROSSER & KEETON, *supra* note 31, at 375–76 (characterizing courts’ decisions absolving defendants of liability for acts of bad Samaritanism as “shocking in the extreme” and “revolting to any moral sense”);

l, in
 :lp to
 ould
 arian

utivist
 utivist
 sts over
 riminal

families—must simply sit by and watch bad Samaritans who have exhibited supreme, if not psychopathic, indifference toward their fellow human beings, continue their lives with impunity.⁴⁹ If bad-Samaritan laws were passed and enforced, people would enjoy the same sense of justice that they currently enjoy when other criminals are properly punished. Indeed, if David Cash had been punished for his inhumane indifference to Sherrice Iverson's plight, University of California–Berkeley students and faculty would not have felt the angry need to march and protest Cash's attendance, all in a vain effort to do what the criminal justice system would not—namely, bring Cash closer to his just deserts, something much different, and worse, than continuing to receive a top engineering education.⁵⁰

The third utilitarian reason for criminalizing bad Samaritanism is that it would enable society to express two aspirational messages. The first message is that bad Samaritanism is so morally wrong that the state should severely punish it. The second message is that we're all in this together, that society seriously encourages the life-affirming values that our criminal laws against murder and manslaughter generally represent: community togetherness, and recognition and appreciation of our common humanity.⁵¹ One fringe

Stewart, *supra* note 4, at 387 (“People look to the criminal law to allay their outrage over omissions which they believe are egregious.”).

⁴⁹ Elie Wiesel brilliantly captures what is so evil about indifference:

Indifference elicits no response. Indifference is not a response. Indifference is not a beginning; it is an end. And, therefore, indifference is always the friend of the enemy, for it benefits the aggressor—never his victim, whose pain is magnified when he or she feels forgotten. The political prisoner in his cell, the hungry children, the homeless refugees—not to respond to their plight, not to relieve their solitude by offering them a spark of hope is to exile them from human memory. And in denying their humanity, we betray our own.

Elie Wiesel, *The Perils of Indifference*, Remarks at the White House's 7th Millennium Evening (Apr. 12, 1999), available at <http://www.americanrhetoric.com/speeches/ewieselperilsofindifference.html>.

⁵⁰ For accounts of the protests, see Barbara Ehrenreich, *Conscience on Campus — Criticism of Berkeley Student David Cash*, PROGRESSIVE, Dec. 1998, available at http://findarticles.com/p/articles/mi_m1295/is_1998_Dec/ai_53281642/; and Courtney Robertson, *Get Out of Town: Berkeley Wants One Student to Leave*, DAILY TEXAN, Sept. 30, 1998.

⁵¹ Heyman, *supra* note 4, at 740, 745 (“[R]ecognition of a duty to rescue might not merely reflect but also promote a greater sense of community in contemporary society. . . . [I]ndividuals who belong to the same society are not mere strangers but fellow citizens, a relationship that provides a basis for a general duty to rescue.”); Murphy, *supra* note 4, at 667 (“The presence of [a duty to rescue] in the criminal law reminds us of our responsibilities

benefit of these messages is that they are likely to have a ripple effect beyond minimizing bad Samaritanism to reducing some of the larger ills that our society increasingly faces, including widespread alienation, indifference, and polarization.⁵²

V. THE LIFE IS SACRED ARGUMENT

All three of the utilitarian arguments above make an assumption about which there is *no* debate in our society, not to mention most other societies: human beings are sacred. They have an extremely, if not infinitely, high degree of intrinsic—as opposed to instrumental—value. They are extremely, if not infinitely, valuable in and of themselves, not (merely) for what benefits they may yield to their families, friends, and society generally.⁵³ This is why we

toward other people, even total strangers, and the more qualified the duty, the less powerful this message.”); Ridolfi, *supra* note 4, at 963 (“Enforcing civic responsibility could prove helpful in reestablishing relationships and reinforcing identification with the people around us.”); Yeager, *supra* note 4, at 8, 57 (“Although the [bad-Samaritan] laws are rarely invoked, they not only encourage a climate of increased personal security, but they also betray a view of community, solidarity, and humanity that is worth aspiring toward and expressing by law. . . . Legal recognition of duties among strangers . . . is about ‘reconciliation, about the healing of social wounds, about wholeness in the organism of society.’” (citations omitted)).

⁵² See Elizabeth Gudrais, *Unequal America: Causes and Consequences of the Wide—and Growing—Gap Between Rich and Poor*, HARV. MAG., July–Aug. 2008, at 22–27 (noting the implicit indifference reflected in the growing gap between rich and poor); Yeager, *supra* note 4, at 16, 42–43 (“By creating a highly impersonal and attenuated relationship between rescuer and rescued, delegation of rescue to specialists also comports with an American preference for blind or remote exchanges among strangers.”); *supra* note 36 and accompanying text.

⁵³ Philosophers tend to agree that, given the general application of this point to all human beings, it cannot rest on a religious basis that is not universally accepted. Still, they diverge on the secular source of this intrinsic value. See, e.g., RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 82 (1993) (“Th[e] combination of nature and art—two traditions of the sacred supports the . . . claim that each individual human life . . . is inviolable . . . [E]ach developed human being is the product not just of natural creation, but also of the kind of deliberative human creative force that we honor in honoring art.”); JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 189–94 (2002) (proposing that killing a human being is morally worse than killing an animal because the human’s life is (a) more objectively valuable and (b) more subjectively valuable—i.e., more important to the human than the animal’s life is to the animal); Margaret Olivia Little, *Abortion and the Margins of Personhood*, 39 RUTGERS L.J. 331, 333–35 (2008) (attributing the “sanctity of human life doctrine” to two possible sources: (a) the “natural law tradition”; and (b) the very high value that society places on the interest that each person has in continuing to live); Don Marquis, *Why Abortion is Immoral*, 86 J. PHILOSOPHY 183, 189–90 (1989) (arguing that what makes killing wrong is that it deprives an individual of the opportunity to enjoy her future and fulfill her projects and aspirations); Peter Singer, *Killing*, in *THE OXFORD COMPANION TO PHILOSOPHY* 445–46 (Ted Honderich ed., 1995) (proposing that

condemn and punish killing—especially murder—more severely than any other crime.⁵⁴ And if our criminal law seriously condemns and punishes killing ultimately because killing flouts the very high premium that we place on human life, then it should seriously condemn and punish letting die because letting die *also* flouts this cherished value. A bad Samaritan who lets another person die *also* betrays a fundamental disregard for another human being's life, a disregard—like killing—without which the victim would most likely have survived.

VI. THE CONCEPTUAL DISTINCTION BETWEEN KILLING AND LETTING DIE

It has been argued thus far that criminalizing bad Samaritanism is warranted both by the very high premium we place on human life and the desirable benefits that it would likely yield. Part VIII will provide a deontological (i.e., nonconsequentialist) argument—the “Slight Moral Difference Argument”—for criminalizing bad Samaritanism. But this argument will not make sense without first explaining, and refuting, a critical thought experiment that is designed to show that killing and letting die are morally equivalent. This will be the task of Part VII. And in order to accomplish this task, the conceptual distinction between killing and letting die itself must first be established.

One problem that some may initially have with bad-Samaritan laws is that they seem to violate a fundamental precept of morality—namely, that people may be blamed and punished only for what they *do*, not for what they do *not* do. This formulation, however, is true in three senses and false in the sense that

what makes it wrong to kill a human being are that being's sentience; capacity for autonomy; self-awareness (i.e., her seeing herself “as having a past and future”); and her importance to relatives, friends, and the community as a whole).

⁵⁴ Some torture is very arguably more blameworthy than some killing. See, e.g., Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 125 (1978) (“[A] comparison between some types of killing in combat and some types of torture actually provides an insight into an important respect in which much torture is morally worse. This respect is the degree of satisfaction of the primitive moral prohibition against assault upon the defenseless.”); David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 4 (2005) (“I do not here contend that torture is categorically wrong, but only that it bears an especially high burden of justification, greater in degree and different in kind from even that of killing.”).

matters—the sense that would, if true, weigh against bad-Samaritan laws.

This formulation is true if what a person (i.e., Nearby) did not do is one of the following:

- (1) a nonaction such as a twitch, spasm, or convulsion;⁵⁵
- (2) a mere thought or desire on which Nearby does not actually act;⁵⁶ or
- (3) an action that *someone else* performs and this other person is not someone for whose actions Nearby should be held responsible—e.g., is not her young

⁵⁵ See MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962) (“Requirement of Voluntary Act”) (“(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable. (2) The following are not voluntary acts within the meaning of this Section: (a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.”).

⁵⁶ See MODEL PENAL CODE § 2.01, cmt. 214 (Official Draft and Revised Comments 1985) (stating that the act requirement prohibits punishing thoughts alone); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 91–93 (4th ed. 2006) (explaining that central purpose of act requirement is to prevent punishment for thoughts); GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 49 (1998) (“[P]unishing individuals for their thoughts alone [constitutes] a sensitive taboo in criminal justice. Everyone seems to agree that it would be a perversion of the institution to punish in the absence of action—for thoughts alone.”); WAYNE LAFAVE, CRIMINAL LAW 10 (4th ed. 2003) (“(C)onduct, to be criminal, must consist of something more than a mere bad state of mind.”); Meir Dan-Cohen, *Actus Reus*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 15, 16, 17 (Sanford H. Kadish ed., 1983); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282–83 (2002) (“The maxim that civilized societies should not criminally punish individuals for their ‘thoughts alone’ has existed for three centuries. Generally, the criminal law recognizes that we cannot identify an individual’s thoughts or predict whether antisocial behavior will result from them. Presumably, laws also fail to deter conduct that is involuntary.” (footnotes omitted)); Michael Gorr, *The Actus Reus Requirement: A Qualified Defense*, 10 CRIM. JUST. ETHICS 11, 13 (1991) [hereinafter Gorr, *Actus Reus Requirement*]; Douglas Husak, *Does Criminal Liability Require an Act?*, in PHILOSOPHY AND THE CRIMINAL LAW 74, 88, 89–90 (Antony Duff ed., 1998) (arguing that the act requirement is a principal reason why thoughts are not punished); Jeffrie G. Murphy, *Gorr on Actus Reus*, 10 CRIM. JUST. ETHICS 18, 19 (1991); Christine T. Sistiare, *In the Land of Omissions: An Opinionated Guide*, 14 CRIM. JUST. ETHICS 26, 39–40 (1995). Another reason for the act requirement is evidentiary. Without an observable act, it is argued, we would have no evidence of the agent’s criminal intent. See Murphy, *supra*, at 18–19 (interpreting Gorr to accept the actus reus requirement on this evidentiary basis); Michael Gorr, *Reply to Murphy and Husak*, 10 CRIM. JUST. ETHICS 24, 24 (1991) (suggesting that Murphy’s interpretation is “not quite right”).

child or an agent or employee acting within the scope of Nearby's direction.⁵⁷

Bad-Samaritan laws, however, are not concerned with any of these. Instead, they are concerned with Nearby's failure to attempt an easy rescue. And the argument above that people may not be punished for things that they do not do is false with respect to this kind of omission.

This response makes sense. But it raises a big question: What is an omission? How does an omission differ from nonactions, mere thoughts and desires, and actions by another?

An omission is either (a) a deliberate failure to perform a certain positive action or (b) a failure, whether deliberate or not, to fulfill a moral or legal duty or reasonable expectation.⁵⁸ Importantly, not all

⁵⁷ See MODEL PENAL CODE § 2.06(2) (Proposed Official Draft 1962) ("A person is legally accountable for the conduct of another person when: (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or (b) he is made accountable for the conduct of such other person by the [Model Penal] Code or by the law defining the offense; or (c) he is an accomplice of such other person in the commission of the offense.").

⁵⁸ So the classification of a particular not-doing as an omission of type (b) requires a value judgment, a judgment about what is morally or legally required or reasonably expected. For philosophers who recognize that identification of many omissions is not a matter of purely objective, descriptive, or value-free observation, see D'ARCY, *supra* note 20, at 41-57; H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 38, 139 (2d ed. 1985); DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 173-81 (1987); Myles Brand, *The Language of Not Doing*, 8 AMER. PHIL. Q. 45, 52 (1971); and Douglas N. Husak, *Is the Distinction Between Positive Actions and Omissions Value-Neutral?*, 33 TUL. STUD. PHILOSOPHY 83, 85-91 (1985). Most philosophers offer only (a) or (b), not both, in their definitions of omission. See, e.g., O.H. Green, *Killing and Letting Die*, 17 AM. PHIL. Q. 195, 197-98 (1980) (recognizing only omissions of type (a)—i.e., intentional refraining); Steven Lee, *Omissions*, 16 S.J. PHILOSOPHY 339, 350 (Dec. 1978) ("[T]o attribute an omission is to claim a rule has been broken."); Rollin M. Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659, 666-67 (1937) (suggesting that an omission is not deliberate but rather an "unintentional negative act" resulting from "an absence of the will in the form of forgetfulness or inattention"); Mario J. Rizzo, Foreword, *Fundamentals of Causation*, 63 CHI.-KENT L. REV. 397, 398-99 (arguing that causal judgments are not perfectly objective but derive from judgments about duties: "Suppose Jones hears a small child, who is about to drown in a pool, yelling for help. Although Jones could save the child at little cost to himself, he chooses not to and continues on his evening stroll. If the child drowns, is Jones the (or a) cause? Clearly his inaction is a necessary condition of the child's death, but that in turn is neither necessary nor sufficient to establish a causal connection. Whether common sense attributes causality to Jones' omission depends on the status of Jones' duty (and the child's correlative right) to rescue. If Jones has no such duty recognized in morality or in law, then he is not the (or a) cause of the death."); cf. Frederick Adrian Siegler, *Omissions*, 28 ANALYSIS 98, 104 (1968) (arguing that even if a particular not-doing is contrary to reasonable expectation, it is still not necessarily an omission). *But cf.* Lee, *supra*

not-doings are omissions.⁵⁹ Again, only those not-doings that are either deliberate or of positive actions that the agent was under a duty to perform or could be reasonably expected to perform constitute omissions.⁶⁰ For example, I cannot flatter myself that my high school crushes are currently omitting to e-mail me. Bad as this is, it is even worse. They are just not e-mailing me, period. For they are (presumably) not deliberately refraining from e-mailing me, do not have a duty to e-mail me, and cannot be reasonably expected to e-mail me.

This conception of omissions relies in part on a contrast with positive actions. A positive action is any agent-caused event that does not essentially involve a failure or not-doing in its description. Running, walking, talking, and hitting are paradigmatic examples. They can all be described entirely in positive terms. Their descriptions need not include any references to bodily motions or acts that the agent does not perform. To be clear, this is not to say that all positive actions involve bodily motions.⁶¹ Waiting for the bus

(disagreeing with Siegler).

⁵⁹ FLETCHER, *supra* note 56, at 46 (contrasting omissions with failures to act); Brand, *supra* note 58, at 46–47 (1971) (endorsing distinction between “mere not doing and refraining”); Patricia Milanich, *Allowing, Refraining, and Failing: The Structure of Omissions*, 45 PHIL. STUD. 57, 59 (1984) (distinguishing between “failing” to perform a given action and doing “nothing at all”); A.P. Simester, *Why Omissions Are Special*, 1 LEGAL THEORY 311, 319–20 (1995) (“The list of a person’s not-doings at any given moment is probably endless, and very few of its items are at all interesting. . . . Our language contains words with which we can and do mark out those non-doings which are significant to use: They might be, for example, instances of refraining or neglecting. They might also be omissions, and it is a subset of the latter with which the law is concerned.”). *But see* R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 137 (1994) (identifying not-doings with omissions); Lee, *supra* note 58, at 339 (distinguishing between “not-doings,” which he equates with omissions, and “things not done”).

⁶⁰ *See* D’ARCY, *supra* note 20, at 48 (explaining that not doing is an omission only when *doing* is expected); FLETCHER, *supra* note 56, at 46 (“[N]ot everything we fail to do is properly described as an omission.”); Simester, *supra* note 59, at 320 (“[A]n omission is a certain sort of not-doing.”).

⁶¹ *See* FLETCHER, *supra* note 22, § 8.2, at 601–02 (“[O]ne can kill by standing still; and . . . one can ‘let die’ by moving one’s body.”); Douglas N. Husak, *The Orthodox Model of the Criminal Offense*, 10 CRIM. JUST. ETHICS 20, 20 (1991) (regarding the notion that action requires bodily motion as “unhelpful”); Herbert Morris, *Punishment for Thoughts*, 49 MONIST 342, 347 (1965) (“[I]t is undesirable to restrict ‘external conduct’ to conduct that involves a bodily movement.”).

For authors who suggest that action *does* require bodily motion, see 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 411–15 (Robert Campbell ed., London, John Murray, Albemarle Street 5th ed. 1885); R.G. COLLINGWOOD, THE IDEA OF HISTORY 213 (1946); OLIVER W. HOLMES JR., THE COMMON LAW 54 (Boston, Little, Brown & Co. 1881); MICHAEL S. MOORE, ACT AND

or hiding in a cave are positive actions that do not necessarily involve bodily motions. Still, these are positive actions because their descriptions do not necessarily include references to something that the agent does not do or fails to do.

Naturally, this proposed distinction between positive actions and omissions (or, in the context of criminal law, “misfeasance” and “nonfeasance” respectively) may be used to explain the distinction between killing and letting die. On the one hand, killing is a positive action—an action that may be described in a way that does not necessarily involve any reference to a not-doing or failure to do—that causes another’s death. Examples include shooting, stabbing, and bombing. On the other hand, letting die is a failure to save another’s life that is either deliberate or contrary to reasonable expectation or duty. Examples of the latter include not feeding, not throwing a life preserver, and not calling 911.⁶²

This clear formulation of the distinction between killing and letting die helps us decide what would otherwise seem to be troublesome borderline cases. Suppose Driver is driving a train and he notices an individual (Victim) suddenly run onto the tracks. Clearly, if Driver immediately tries to hit the brakes but the train still hits and kills Victim, Driver has neither killed Victim nor let her die. Rather, the *train* has killed Victim despite Driver’s best

CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 78–112 (1993); Harry G. Frankfurt, *The Problem of Action*, 15 AM. PHIL. Q. 157, 160–62 (1978); Gorr, *Actus Reus Requirement*, *supra* note 56, at 12, 15; Lee, *supra* note 58, at 343; and Wilfrid Sellars, *Fatalism and Determinism*, in FREEDOM AND DETERMINISM 141, 159 (Keith Lehrer ed., 1966). Cf. Siegler, *supra* note 58, at 105–06 (arguing that “motion is essential to actions (human and non-human) but not to acts”).

⁶² See FLETCHER, *supra* note 22, § 8.2, at 601 (“Nor is there a specific verb that might apply to the omission of the physician, the niece, or the neglectful lover. These are cases of ‘letting die.’ And all cases of letting die are of a piece. . . . [E]very person who kills, does so in a different manner, but all those who ‘let die’ do so in the same way.”). Perhaps this Part sufficiently alleviates Doug Husak’s worry that there is “no clear intuitive sense of a distinction between positive actions and omissions that remains to be captured by a philosopher sufficiently clever to formulate a correct analysis.” HUSAK, *supra* note 58, at 180. For alternative accounts of the distinction between killing and letting die, see Jonathan Bennett, *Negation and Abstention: Two Theories of Allowing*, 104 ETHICS 75 (1993), reprinted in KILLING AND LETTING DIE 230 (Bonnie Steinbock & Alastair Norcross eds., 1994) [hereinafter Bennett, *Negation and Abstention*]; Jonathan Bennett, *Whatever the Consequences*, 26 ANALYSIS 83 (1966), reprinted in KILLING AND LETTING DIE, *supra*, at 167, 180–82 [hereinafter Bennett, *Whatever the Consequences*]; and Daniel Dinello, *On Killing and Letting Die*, 31 ANALYSIS 83 (1971), reprinted in KILLING AND LETTING DIE, *supra*, at 192, 194–95.

efforts to prevent this outcome. But what if Driver does *not* hit the brakes and the train then hits and kills Victim? Has Driver killed Victim? Or “merely” let her die? The answer is that he has killed her. Each of the following variations of this example helps to illustrate why.

Variation one: Driver not only does not hit the brakes but actually steps on the accelerator. Clearly, Driver has *killed* Victim. He has performed a positive action—stepping on the accelerator—that caused Victim’s death.

Variation two: Driver does nothing. He sees Victim but does not hit the brakes. The train then hits and kills Victim.

If Driver failed to hit the brakes because he suddenly panicked and “froze,” then it seems that he cannot be said to have let Victim die, much less killed her. For his failure to act was neither deliberate nor contrary to reasonable expectation or duty. Driver cannot be reasonably expected or obligated to hit the brakes when he is suddenly paralyzed.⁶³ But if Driver’s failure to hit the brakes was at all deliberate, then it seems that Driver killed her.⁶⁴ For Driver performed a positive action that caused Victim’s death: he *drove* the train into her. The fact that the train was already in motion before Driver spotted Victim is irrelevant. He was performing a positive action when he spotted Victim, and his continued performance of this positive action then caused Victim’s death.

Variation three: The train is approaching a fork in the tracks when Driver spots Victim running onto the tracks. Driver knows

⁶³ See, e.g., *State ex rel. Kuntz v. Mont.* Thirteenth Judicial Dist. Court, 995 P.2d 951, 960 (Mont. 1999) (“[I]t is entirely conceivable that in circumstances where . . . a legal duty may rightfully be imposed, a failure to summon medical assistance—due to fear, shock, or some other manifestation resulting from the confrontation—would not be a gross deviation from an ordinary standard of care”); DRESSLER, *supra* note 56, at 111 (“[O]ne who stands by as a murder occurs may quite plausibly do so out of fear or shock, rather than malice.”). Still, some may wonder whether or not we can reasonably expect Driver to have risen to the occasion, exerted more self-control, and avoided becoming paralyzed in the first place.

⁶⁴ See Green, *supra* note 58, at 198 (“In driving down the line, the driver is doing something sufficient to cause the death of the man on the track ahead unless the driver turns off. If he refrains from preventing the man’s death by turning off, he runs over and kills the man. His case is more like that of the strangler who kills his victim than that of the lifeguard who lets a swimmer drown.”); see also Weinrib, *supra* note 4, at 253–54 (suggesting that driving and hitting a pedestrian because one fails to hit the brakes in time is an instance of misfeasance or “pseudo-nonfeasance,” not actual nonfeasance).

that it is too late to hit the brakes and that his only way of saving Victim is by swerving left onto the other track. But he does not. Instead, he deliberately refrains from swerving. Given Variation two above, Drive kills Victim. Once again, he performs a positive action—driving the train—that causes Victim's death.

Variation four: The train is approaching a fork in the tracks when Driver spots Victim running onto the tracks. Driver knows that it is too late to hit the brakes and that his only way to save Victim is by swerving left onto the other track. Driver is about to swerve left when he sees yet another individual on the left track. Driver then decides not to swerve and lets the train continue on its path, straight into Victim. Once again, Driver can be said to kill Victim. For, once again, he performs a positive action (driving the train) that causes Victim's death. The only difference between this variation and the second and third variations is not descriptive, but moral. Driver equally kills Victim in all three scenarios. But Driver is blameworthy for killing Victim only in the second and third variations, not the fourth variation. For while Driver can be reasonably expected in the second and third variations to choose stopping or swerving the train and thereby saving Victim over letting the train continue into Victim, he cannot be reasonably expected in the fourth variation to choose swerving the train into the other individual over letting the train continue into Victim.

After four variations, all of which lead to the conclusion that Driver kills Victim rather than lets her die, one might wonder if *any* variation would lead to the opposite conclusion. It will only if at least one crucial condition is satisfied: the agent under consideration is not driving the train. Consider, then, variation five: Collector is a ticket collector and is chatting with Driver when he notices Victim up ahead. Collector knows that Driver, a psychopath, will not stop the train. Collector also knows that there is an emergency brake overhead that he himself can pull. But he does not. Instead, he simply stands there and watches as the train hits and kills Victim. In this variation, Collector lets Victim die. He fails to stop the train and thereby save Victim. Collector cannot be said to kill Victim, however, because Collector did not perform any

2
pe
V
tr
cc
ki
be
be
Fo
ob
ov
pe
di
bl
fa
be
ch
wh
bl
kil
die
no
sa
mc
if h
—
THE
situ
Omi
to d
awa

positive action—namely, driving the train—that helped to cause Victim’s death.⁶⁵

The fifth variation assumes that Collector *could have* stopped the train and *knew* this. But three further variations need to be considered.

Variation six: Collector could *not* have stopped the train and knew this.

Variation seven: Collector could *not* have stopped the train but believed, wrongly, that he could have.

Variation eight: Collector *could* have stopped the train but believed, wrongly, that he could *not* have.

In variation six, Collector cannot be said to have let Victim die. For Collector does not fail, and cannot reasonably be expected or obligated, to perform an action (like applying the brakes or overpowering Driver) that he rightly believes he is powerless to perform. For the same reason, Collector cannot be said to let Victim die in variation seven. The only difference is that Collector can be *blamed* for failing to *try* to save Victim. He cannot be blamed for failing to try in the sixth variation any more than a quadriplegic can be blamed for failing to try to raise his arm and thereby protect a child from a flying object. People cannot be blamed for failing to try what they know is impossible for them to do. But they can be blamed for failing to try to avoid killing even if they *cannot* avoid killing as long as they do not *know* that they cannot avoid killing.⁶⁶

Finally, in variation eight, Collector *can* be said to have let Victim die. For he could have saved her but did not. The fact that he did not know that he could save her—in fact, believed that he could *not* save her—would not change this conclusion. It would only affect our moral judgment of Collector. We would tend to blame Collector less if his belief was reasonable and more if it was unreasonable.

⁶⁵ See JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 81–82, 97 (William Parent ed., 1986) (arguing that the bystander’s letting die in this situation does not amount to a killing).

⁶⁶ Ken Levy, *Why It Is Sometimes Fair to Blame Agents for Unavoidable Actions and Omissions*, 42 AM. PHIL. Q. 93, 94–95 (2005) (arguing that it is fair to blame agents for failing to do the right thing, even if they could not have done the right thing, as long as they were not aware of their inability).

VII. THE MORAL EQUIVALENCE APPROACH

This Part explicates and refutes a philosophically famous thought experiment that is designed to show that, all else being equal, killing and letting die are morally equivalent.

A. BLAMEWORTHINESS

One of the central issues in this Article is whether or not, all else being equal, killing is more blameworthy than letting die. One might argue, however, that it is not the agent's actions or omissions but the agents themselves who are blameworthy. So the issue should be the relative blameworthiness *not* of killing and letting die but rather of the killer and the "letter-die."⁶⁷

There is some merit to this point. Blameworthiness may certainly be predicated of agents. To say that the killer is more blameworthy than the "letter-die" is to say that the killer is more deserving of either the victim's or society-in-general's blame. Of course, this point only raises two more questions: what is blame and what does it mean to be *deserving* of blame? Regarding the first question, blame is at least an attitude, and often a practice reflecting this attitude. Blame qua attitude is the feeling or belief that an individual has committed a wrongdoing, usually a wrongful action or harm, and can be reasonably expected *not* to have committed this wrongdoing. Blame qua practice is the public expression of this attitude—usually by means of censure (written or verbal criticism) or punishment. Generally, the morally worse the wrongdoing, the more severe the censure or punishment.

Regarding the second question, one deserves blame if the blamer is *correct*—i.e., if the person being blamed committed the alleged wrongdoing and can be reasonably expected not to have committed this wrongdoing. In this case, the wrongdoer is the appropriate or proper object of somebody's attitude and practice of blame. Who this somebody is will generally depend on circumstances. For example, if the wrongdoing trivially impacts only a friend, then only the friend

⁶⁷ For a helpful discussion of the issues in this Subpart, see GEORGE SHER, IN PRAISE OF BLAME (2006); and Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES LAW 281, 301–03, 307–08, 311–12 (2007).

is in a position to blame the wrongdoer. But if the wrongdoing seriously impacts anybody, then not only the victim but arguably also society in general is in a position to blame the wrongdoer.

Just as blameworthiness may be predicated of agents, it may be predicated of actions and omissions. Just as it is meaningful to say that, all else being equal, a killer is more blameworthy—deserving of more blame—than a letter-die, so too is it perfectly meaningful to say that, all else being equal, killing is more blameworthy than letting die. What, then, is the difference between the two formulations? Quite simply, the first formulation (blame qua attitude) is ambiguous in a way that the second formulation (blame qua practice) is not. To say that one agent is more blameworthy than another is ambiguous between two different propositions: (a) one agent has a morally worse character or set of dispositions than another or (b) one agent has committed a worse wrongdoing than another. The second formulation, blame qua practice, does not suffer from this ambiguity. It clearly is equivalent to (b) rather than (a). That is why this Article has used, and will continue to use, the second formulation.

Of course, (a) might be the appropriate conclusion to draw from (b) in many, but not all, cases. For it is perfectly possible for one person to commit a worse wrongdoing than another and still have a morally superior character. This is the case if the person who committed a worse wrongdoing on this particular occasion was either acting *out of character* or acting in character but tends overall to commit fewer wrongdoings than another.

B. KILLING INTENTIONALLY VERSUS LETTING DIE INDIFFERENTLY

Consider two individuals. The first individual, Killer, shoots and kills her neighbor, Victim, because Victim has declined to lend Killer her lawn mower. The second individual, Bystander, is vacationing by a swimming pool when she notices that another hotel guest, Hapless, is drowning. Bystander could easily try to rescue Hapless, either by extending her hand, throwing a life preserver, or alerting somebody else near the pool. Instead, Bystander merely resumes suntanning and lets Hapless drown. While both individuals' actions are morally despicable, Killer's intentional killing is generally

considered more blameworthy than Bystander's indifferent letting-die.

From this kind of example, some might conclude that killing is more blameworthy than letting die. But this example does not prove that, *all else being equal*, killing is more blameworthy than letting die. For our moral assessment might be determined—consciously or unconsciously—not by the fact that Killer killed and Bystander let die, but rather by the fact that Killer's behavior was motivated by an intent to kill and Bystander's by indifference. And we tend to think that evil intent is more blameworthy than callous indifference.⁶⁸

C. THE CONCEPT OF A LUCKY LETTING-DIE

To avoid this problem, we need to control for intent. That is, we need to make the intents equal. For only if the intents are equal can we be sure that any perceived moral difference between Killer and Bystander derives from the difference between killing and letting die themselves rather than from an extrinsic difference in intents.⁶⁹

To say that Killer's and Bystander's intents are equal is just to say that both intend to kill another individual for the same reasons and with the same intensity. So Killer intends to kill Victim and Bystander intends to kill Hapless for the same reasons, such as revenge for an earlier slight. But given this new fact, Bystander is

⁶⁸ See R.A. Duff, *Intention, Mens Rea and the Law Commission Report*, 1980 CRIM. L. REV. 147, 156 ("[I]t is in and by intending a result that a man relates himself most closely to it as an agent: for he is not just prepared to bring it about as a by-product of something else, but directs his will towards it."); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 367 (1994) ("[T]he retributivist differentiates different mental states according to the relevant blameworthiness they display, holding constant a particular object of those mental states: intending to cause a death is more blameworthy than being reckless or negligent as to causing death."); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 496 (1992) ("Intending to kill is more culpable than being indifferent to killing, which in turn is more culpable than lacking intention or indifference—all other things being equal.")

⁶⁹ See Violetta Ignieski, *Distance, Determinacy and the Duty to Aid: A Reply to Kamm*, 20 L. & PHIL. 605, 607 (2001) ("When using cases to help establish the moral significance of a particular feature, it is important to ensure that the comparison cases are equal in all respects except for the feature at issue."); Judith Lichtenberg, *The Moral Equivalence of Action and Omission*, 8 (Supp.) CAN. J. PHILOSOPHY 19, 24, 31 (1982), reprinted in KILLING AND LETTING DIE, *supra* note 62, at 210, 215, 222 ("[W]e want to ensure that no differences but action/omission operate, even if only implicitly, to affect our judgment. . . . Simply avowing that [a given action and a given omission] are parallel is not enough to ensure that [assumptions that other asymmetries are embedded in the cases] won't intrude, though not necessarily explicitly or consciously.")

no longer an appropriate name. Let's change it to Lucky, for reasons that will become clear in a moment.

Ex hypothesi, Lucky intends to kill Hapless. But, as things turn out, Lucky ends up not killing her but "merely" letting her die. So Hapless's dying was "given to" Lucky. Lucky intended to bring it about on her own. But by pure coincidence, Hapless began to die in just the way that Lucky intended to kill Hapless without any active involvement by Lucky. Lucky then "merely" allowed Hapless's dying to continue through to death.

This is a *lucky letting-die*—hence the name *Lucky*—because the only apparent difference between Lucky and Killer is a difference in metaphysical *luck*. While Lucky gets lucky and is given Hapless's death exactly how Lucky would have made it happen, Killer does not get lucky and must do the "dirty work" on her own (i.e., actively bring about Victim's death).

D. AN EXAMPLE OF A LUCKY LETTING-DIE: TWO NEFARIOUS UNCLES

The classic example of a lucky letting-die involves two nefarious uncles and their unfortunate nephews.⁷⁰ In one situation (Situation₁), Uncle₁ intentionally drowns his nephew (Nephew₁) in the hopes that he will receive Nephew₁'s inheritance. In the other situation (Situation₂), Uncle₂ intends to drown Nephew₂ in the hopes of receiving Nephew₂'s inheritance. But just before he bends down to do the evil deed, Nephew₂—by complete coincidence—accidentally hits his head on the tub and proceeds to sink under the water. Uncle₂, thanking his lucky stars, intentionally refrains from saving Nephew₂. Moreover, if Nephew₂ should resurface, Uncle₂ intends to push him back down. But this never happens. Nephew₂ never resurfaces. Instead, Nephew₂ drowns without any active involvement by Uncle₂. Uncle₂, then, is guilty not of an active killing, but rather of a lucky letting-die. He got exactly what he wanted and would have brought about—namely, Nephew₂'s death by drowning—without actually having to make it happen himself.

Is Uncle₁'s active killing more blameworthy than Uncle₂'s letting-die? One might very well think not. Under this approach—the

⁷⁰ This hypothetical originated in James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975), reprinted in KILLING AND LETTING DIE, *supra* note 62, at 112, 115–16.

“Moral Equivalence Approach”—Uncle₂ is equivalent to Uncle₁ in all morally relevant respects. Uncle₁'s and Uncle₂'s evil intents are identical, and the only respect in which their actions differ is morally irrelevant, a matter of metaphysical *luck*. While Uncle₂ got lucky and had his dirty work done “for him,” Uncle₁ did not get lucky and had to do his dirty work all on his own.⁷¹ We will call this the “Two Nefarious Uncles Argument.”

E. TWO NEFARIOUS PARTYGOERS

Importantly, the Two Nefarious Uncles Argument would beg the question in favor of the Moral Equivalence Approach if it assumed that there is a special relationship⁷² between the uncles and their

⁷¹ See PETER SINGER, PRACTICAL ETHICS 158–81 (1979) (discussing ethical implications of equivalence between killing and letting die); THOMSON, *supra* note 65, at 78 (arguing against the claim that, all else being equal, killing is always less preferable or morally permissible than letting die); Bennett, *Negation and Abstinence*, *supra* note 62, at 254–55 (“[T]he positive/negative distinction obviously lacks basic moral significance . . . I see no way of finding moral significance in the active/passive distinction.”); Harry Frankfurt, *An Alleged Asymmetry Between Actions and Omissions*, 104 ETHICS 620 (1994) (arguing that it is “implausible” to think that there is a morally relevant distinction between actions and omissions); Rachels, *supra* note 70, at 116 (“In the first place, both men acted from the same motive, personal gain, and both had exactly the same end in view when they acted. . . . Moreover, suppose [Uncle₂] pleaded, in his own defense, ‘After all, I didn’t do anything except just stand there and watch the child drown. I didn’t kill him; I only let him die.’ Again, if letting die were in itself less bad than killing, this defense should at least have some weight. But it does not. Such a ‘defense’ can only be regarded as a grotesque perversion of moral reasoning. Morally speaking, it is no defense at all.”).

Judith Lichtenberg tries to defend the Moral Equivalence Approach with a thought experiment that is arguably simpler than that involving the two partygoers:

Suppose a person finds himself in a room before a set of controls. In the first scenario, he is told that if he pushes a certain button, someone in another room will die. In the second, he is told that if he does not push a certain button, that person will die.

Lichtenberg, *supra* note 69, at 216. In the first situation, Situation₁, pressing Button₁ will kill Victim₁. In Situation₂, *refraining* from pressing Button₂ will kill Victim₂. According to Lichtenberg, it is clear that even though refraining from pressing Button₂ is an omission, it is just as morally blameworthy as pressing Button₁. The difference in muscular movement between pushing and not pushing a button is so slight that it cannot possibly make a moral difference. See also George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1445 (1994) (“Movement . . . has no moral relevance.”); Green, *supra* note 58, at 195 (“Moral generalizations such as that it is worse to kill than to let die . . . cannot be founded on such irrelevancies as the presence or absence of bodily movements.”).

⁷² Black’s Law Dictionary defines *special relationship* as “[a] nonfiduciary relationship having an element of trust, arising esp[ecially] when one person trusts another to exercise a reasonable degree of care and the other knows or ought to know about the reliance.” BLACK’S

nephews. For if there *is* a special relationship,⁷³ then both uncles are no different than two mothers—one who actively drowns her child, the other who lets her child drown. Just as both mothers would rightly be convicted of homicide or manslaughter and punished equally,⁷⁴ so too would both uncles, in which case the Moral Equivalence Approach clearly gets this scenario correct. To avoid this question-begging assumption, then, we will keep everything the same except for the family relationship by replacing the uncles with two adults from the party downstairs: Partygoer₁ and Partygoer₂. This change means that we will also have to change their motives. Unlike the uncles, who wished their nephews dead in order to acquire their inheritance, Partygoer₁ and Partygoer₂ want

LAW DICTIONARY 1402 (9th ed. 2009).

⁷³ *But see* GLENDON, *supra* note 4, at 81 (suggesting that uncles and nephews are *not* in special relationships).

⁷⁴ *See, e.g.*, Faunteroy v. United States, 413 A.2d 1294, 1295, 1300–01 (D.C. Cir. 1980) (involuntary manslaughter); Johnson v. State, 175 P.3d 674, 675, 681 (Alaska Ct. App. 2008) (manslaughter); State v. Rupp, 586 P.2d 1302, 1313 (Ariz. Ct. App. 1978) (involuntary manslaughter); People v. Burden, 140 Cal. Rptr. 282, 283, 293 (Ct. App. 1977) (second-degree homicide); Lewis v. State, 335 S.E.2d 560, 562–64 (Ga. 1985) (homicide); People v. Battles, 418 N.E.2d 22, 22, 25–26 (Ill. App. Ct. 1981) (homicide); Eaglen v. State, 231 N.E.2d 147, 148–49, 151 (Ind. 1967) (involuntary manslaughter); State v. Akright, 506 N.W.2d 465, 467, 470 (Iowa Ct. App. 1993) (felony murder); Simpkins v. State, 596 A.2d 655, 664 (Md. Ct. Spec. App. 1991) (first-degree homicide); Commonwealth v. Hall, 78 N.E.2d 644, 645, 647–48 (Mass. 1948) (second-degree homicide); People v. Sealy, 356 N.W.2d 614, 165, 168 (Mich. Ct. App. 1984) (involuntary manslaughter); State v. Crawford, 196 N.W.2d 915, 916–17 (Neb. 1972) (manslaughter); Zessman v. State, 573 P.2d 1174, 1178 (Nev. 1978) (second-degree homicide); State v. Wright, 332 A.2d 606, 607 (N.J. 1975) (manslaughter); People v. Word, 689 N.Y.S.2d 36, 37 (App. Div. 1999) (second-degree manslaughter); People v. Manon, 640 N.Y.S.2d 318, 319–21 (App. Div. 1996) (criminally negligent homicide); People v. Sika, 526 N.Y.S.2d 683, 684–85 (App. Div. 1988) (second-degree manslaughter); State v. Evangelista, 353 S.E.2d 375, 378–79 (N.C. 1987) (first-degree homicide); State v. Mason, 197 S.E.2d 79, 80–81 (N.C. Ct. App. 1973) (involuntary manslaughter); State v. House, 489 P.2d 381, 385 (Or. 1971) (homicide); Commonwealth v. Miller, 627 A.2d 741, 743 (Pa. Super. Ct. 1993) (third-degree homicide); Commonwealth v. Smith, 567 A.2d 1070, 1071 (Pa. Super. Ct. 1989) (third-degree homicide); State v. Stewart, 663 A.2d 912, 915 (R.I. 1995) (second-degree homicide); Dillon v. State, 574 S.W.2d 92, 93–95 (Tex. Crim. App. 1978) (involuntary manslaughter); Harrington v. State, 547 S.W.2d 616, 617–18, 621 (Tex. Crim. App. 1977) (homicide); DRESSLER, *supra* note 56, at 114 (“[A] parent’s failure to seek medical attention for her seriously ill child, which omission results in the child’s death, will support a conviction for criminal homicide, assuming that the parent acted with the requisite *mens rea*.”); Ashworth, *supra* note 4, at 441 (“[A] conviction for murder by omission is perfectly proper so long as the parent is shown to have had the required mental element.”); 40 AM. JUR. 2D *Homicide* §§ 82–83 (2008) (discussing homicide by withholding food, clothing, or shelter); John D. Perovich, Annotation, *Homicide by Withholding Food, Clothing, or Shelter*, 61 A.L.R. 3D 1207, 1209–13 (1975) (explaining how parent can be held criminally liable for child’s death resulting from parent’s failure to provide food, clothing, or shelter to child).

Child₁ and Child₂ dead, respectively, because these children threaten to outcompete their own respective children in seventh-grade basketball.

F. A REDUCTIO AD ABSURDUM OF THE MORAL EQUIVALENCE APPROACH

There is a very simple, straightforward reductio ad absurdum of the Moral Equivalence Approach. Suppose that the two Partygoers *were* morally equivalent. Then if we assume the very plausible proportionality principle⁷⁵—according to which the degree of punishment that offenders receive should be directly proportional to the blameworthiness of their actions—it follows that the two partygoers deserve equal punishment. And since one of the two partygoers, Partygoer₁, committed first-degree homicide, it follows that Partygoer₂ should also be punished for first-degree homicide. Yet this strikes many, if not most, of us as counterintuitive.⁷⁶ Heinous as it was for Partygoer₂ to let Child₂ die, we still tend to resist the conclusion that Partygoer₂ should be punished for first-degree homicide. For Partygoer₂ did not cause any harm. She did not cause Child₂ to die. (This point will be defended in Parts VIII.B and XI.B.) So punishing her to the same degree as we punish Partygoer₁ seems wrong, in which case the Moral Equivalence Approach must be false.⁷⁷

VIII. THE SLIGHT MORAL DIFFERENCE ARGUMENT

The reductio ad absurdum of the Moral Equivalence Approach rests on our intuition that Partygoer₁ and Partygoer₂ should not

⁷⁵ See *supra* note 8 and accompanying text.

⁷⁶ See, e.g., MACAULAY, *supra* note 4, at 493 (“[I]t will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission.”).

⁷⁷ For a similar reductio ad absurdum of the Moral Equivalence Approach, see D.W. Haslett, *Is Allowing Someone to Die the Same as Murder?*, 10 SOC. THEORY & PRAC. 81, 83–84 (1984) (“[If the Moral Equivalence Approach is correct,] our spending money on anything other than the bare essentials necessary for keeping ourselves or others alive must be viewed as equivalent to killing innocent people. . . . [This point is] radically contrary to the moral intuitions of most people.”).

receive equal punishment. This Part will defend this intuition with a deontological—i.e., nonconsequentialist—argument, the “Slight Moral Difference Argument.” As we will see, the Slight Moral Difference Argument itself rests on several other arguments, including the “Life Is Sacred Argument” discussed in Part V.

If we assume for now that this intuition is correct, it seems that the reductio in Part VII.F works and therefore that the Moral Equivalence Approach is false. But it is very important to note—and virtually no proponent of the opposing “Moral Difference Approach” does—that the Moral Equivalence Approach still is not that far off. While our intuition that Partygoer₁ and Partygoer₂ deserve different punishment is correct, the Moral Equivalence theorist’s sense that the two partygoers’ behaviors are morally equivalent is still quite reasonable. In the end, they are *not* morally equivalent. But the difference between them is only *slight*, not nearly as large as the Moral Difference theorists would normally have us believe.⁷⁸ Indeed, this is why there is such a heated debate in the literature about whether or not the two partygoers are morally equivalent to begin with. Their equivalent evil intents and the children’s “equal” deaths bring them extremely close together. But there is still a difference—letting die is still slightly less blameworthy than killing. The former only comes close to, and does not actually reach, the same level of immorality as the latter.

Given this much, the Moral Equivalence Approach arguably hits much closer to the way things should be than does current criminal practice. Assume that there was ample admissible evidence to prove that Partygoer₁ drowned Child₁, that Partygoer₂ did not at all causally contribute to Child₂’s drowning but rather “merely” let him

⁷⁸ Moral Difference theorists include: MOORE, *supra* note 61, at 58–59 (“[Partygoer₂] is much less deserving of punishment than is [Partygoer₁] because the first did much less wrong. Wrongful as it is to let the child drown, it is much more wrongful to drown the child. Drowning it makes the world a worse place, whereas not preventing its drowning only fails to improve the world.”); Dinello, *supra* note 62, at 196 (“[I]t seems intuitively clear that causing a death is morally somewhat more reprehensible than knowingly refraining from altering conditions which are causing a death.”); Haslett, *supra* note 77, at 89–90 (arguing that practical effect of adopting and acting on Moral Equivalence Approach would be chaos and disaster); Ridolfi, *supra* note 4, at 960 (“I do not mean to suggest that there is reason to equate an act with an omission, that killing and letting die are the same. Even an intentional omission does not make it equivalent to the active infliction of harm. Undeniably, taking life and failing to rescue are different”); Waldron, *supra* note 4, at 1081; and Zipursky, *supra* note 67, at 303–12, 314–15.

drown, and that Partygoer₂ would have drowned Child₂ had luck not intervened at just the right moment. Given this evidence, it is safe to say that judges and juries would gladly find Partygoer₁ guilty of first-degree homicide and reluctantly find Partygoer₂ guilty of nothing at all. So while Partygoer₁ might receive capital punishment or a very long prison sentence, Partygoer₂ would continue to live with impunity. There is something *wrong* about this. Somewhere between the Moral Equivalence Approach's prescription for equal punishment and the criminal law's disparity between maximum punishment (for Partygoer₁) and no punishment (for Partygoer₂) lies the appropriate punishment for Partygoer₂. And this appropriate punishment falls closer to Partygoer₁'s punishment than to no punishment at all. If Partygoer₁'s punishment is a ten and no punishment is a zero, Partygoer₂'s punishment should be somewhere between six and nine.

This Slight Moral Difference Argument contains a number of premises that still require further defense: (a) killing is seriously morally wrong and (b) letting die is less seriously morally wrong. In defense of (b), it will be argued that (b)(1) there are three particular differences between killing and letting die and (b)(2) these three particular differences do indeed make killing worse than letting die. Part (a) was defended in Part V above, (b)(1) will be defended in the following Subpart and (b)(2) will be defended in Subpart VII.B.

A. THREE DIFFERENCES BETWEEN KILLING AND LETTING DIE

Some scholars suggest that we cannot rationally defend our intuition that the Moral Difference Approach is correct—i.e., our intuition that there is a moral difference between killing and letting die, all else being equal. Rather, in much the same manner that David Hume argued that we cannot help maintaining certain rationally indefensible metaphysical beliefs (e.g., in the external world, selfhood, necessary connections between causes and their effects, induction, and libertarian free will),⁷⁹ we accept this

⁷⁹ DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 5-103 (L.A. Selby-Bigge ed., 3d ed. 1975) (1748); DAVID HUME, A TREATISE OF HUMAN NATURE 69-176 (L.A. Selby-Bigge ed., 2d ed. 1978) (1739-40).

proposition not because there is any rational basis for it but merely because we are psychologically “hardwired” to accept it.⁸⁰

But this position seems false. There is a rational basis—actually three closely related bases—for thinking that killing is more blameworthy than letting die. First, only Partygoer₁, not Partygoer₂, *initiates* the death of her intended victim. Second, only Partygoer₁, not Partygoer₂, *causes* her intended victim to die. Third, only Partygoer₁, not Partygoer₂, *expresses her intent* that her intended victim die.

Regarding the first two points, what initiates Child₂'s death is not Partygoer₂ but merely Child₂'s accidentally hitting his head on the tub. And what further causes Child₂'s death after this initial impact is not Partygoer₂ but Child₂'s gradual suffocation. Yes, Partygoer₂ *allowed* Child₂ to drown and stood ready to push him back underwater if Child₂ managed to resurface. But this allowing and counterfactual drowning are not causally responsible for Child₂'s death, at least not in the same way or to the same degree as Partygoer₁'s actively drowning Child₁ is causally responsible for Child₁'s death.⁸¹ Of course, this conclusion hardly makes Partygoer₂ merely an *innocent* bystander. But she still is a bystander—a letter-die—rather than a killer.

These first two points are interrelated. Initiation certainly entails causation. To initiate another's death is to start a chain of events that sooner or later leads to that person's death. But causing does not entail initiating. For not all causes initiate. Some, perhaps most, causes are embedded in the causal chains that began before them.

Regarding the third point, while Partygoer₁ engages in actions that directly result from and reflect or express her evil intent to kill Child₁, Partygoer₂'s actions do not express any such intent. She just

⁸⁰ See Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 *ETHICS* 250, 279 (1993) (suggesting that intuitive force, and centrality to our morality, of distinction between killing and letting die is stronger than any arguments in its support); Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 *SANTA CLARA L. REV.* 383, 428–29 (2005) (expressing skepticism that distinction between killing and letting die can be rationally defended); Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 *J. EXPERIMENTAL SOC. PSYCHOL.* 76, 101–02 (1991) (using an experimental study to show that humans have an “omission bias,” which means that we tend irrationally to favor omissions over positive actions even in contexts where there is actually no moral distinction between them).

⁸¹ This statement will be further defended *infra* Part XI.B.

stands there, which by itself is interpretatively ambiguous among evil intent, callous indifference, ignorance of what is actually going on, and sudden paralysis.⁸² While we may judge a person negatively for *having* a certain evil intent, we tend to judge her *more* negatively for actually *expressing* that intent (whether through words or actions) because an expression of evil intent generally causes more harm.⁸³

B. THREE ARGUMENTS THAT THERE IS A MORAL DIFFERENCE BETWEEN DOING AND ALLOWING

Again, unlike Partygoer₁, who initiated and caused Child₁'s death, Partygoer₂ cannot be said to have initiated or caused Child₂'s death. This causal difference between Partygoer₁ and Partygoer₂—this difference between *doing* and *allowing*—makes a *moral* difference, a difference in their blameworthiness and therefore in the amount of punishment that they deserve. There are three arguments in support of this point.⁸⁴

First, we might just say that this point is self-explanatory. The fact that only Partygoer₁, not Partygoer₂, both initiated and caused her intended victim's death *by itself* both explains and justifies the proposition that Partygoer₁'s behavior is more blameworthy than Partygoer₂'s behavior and therefore that Partygoer₁ should be punished more harshly than Partygoer₂.⁸⁵ On this view, then, we

⁸² Cf. Dressler, *supra* note 4, at 982–83 (“[W]hy did Bystander not act? Maybe he froze up, maybe he didn’t think fast enough, or maybe (reasonably or unreasonably) he believed that helping [a blind person walking into traffic] would jeopardize his own safety.” (emphasis omitted)).

⁸³ Expression of intent is also important for an evidentiary reason: without it, we would not know whether or not Partygoer₂ really would have carried through with actively drowning Child₂ in the first place. Of course we can stipulate—and *have* stipulated—that she would. But in the real world, we could never be sure that Partygoer₂ would not have lost her nerve or that another factor would not have suddenly interfered and kept Partygoer₂ from following through with her evil intent. See David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 LAW & PHIL. 405, 422 (2007) (noting that until action is taken, “we will never know for sure” whether the party would act).

⁸⁴ I thank Lloyd Weinreb for helping me to see that this point must indeed be defended and cannot simply be assumed.

⁸⁵ See 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), at 465–66 (2d ed. 2003) (“Thus if A shoots at B intending to kill but misses, but at that moment B drops dead of some cause wholly unconnected with the shooting, A is not liable for the murder of B, in spite of the simultaneous existence of the two required ingredients, A’s intentional conduct and the fatal

just cannot dig any deeper than our bare, brute intuition—hardwired into us by evolution—that there is a fundamental moral distinction between doing and allowing.⁸⁶

Second, we might consider a highly intuitive analogy such as rape. Suppose that, in a manner similar to the David Cash story,⁸⁷ Evil rapes a young girl while Jerk, Evil's good friend, simply stands by and allows the rape to occur. Jerk does not try to prevent Evil from raping. But neither does he encourage or remove obstacles to the crime.⁸⁸ It seems that, as bad as Jerk's behavior is, Evil's is worse. After all, Jerk did not do anything to the girl; Evil *raped* her.⁸⁹ A similar point applies to Partygoer₁ and Partygoer₂.

result. What is missing is the necessary causal connection between the conduct and the result of conduct; and causal connection requires something more than mere coincidence as to time and place. It is required, for criminal liability, that the conduct of the defendant be both (1) the actual cause, and (2) the 'legal' cause (often called 'proximate' cause) of the result.”)

⁸⁶ See *supra* note 80 and accompanying text.

⁸⁷ See *supra* Part III.

⁸⁸ See Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. (1967), reprinted in KILLING AND LETTING DIE, *supra* note 62, at 266, 273 (distinguishing between two kinds of allowing: “forbearing to prevent” a process already in motion and “enabling” a process to begin or resume by removing an obstacle).

⁸⁹ Cf. *Pope v. State*, 396 A.2d 1054, 1068 (Md. 1979) (holding that defendant did not commit child abuse by simply observing, without trying to prevent, mentally unstable mother from viciously beating her child); *Palmer v. State*, 164 A.2d 467, 474 (Md. 1960) (affirming manslaughter conviction of mother who permitted her boyfriend to beat her child to death); *State v. Walden*, 293 S.E.2d 780, 786–87 (N.C. 1982) (holding parent liable for aiding and abetting assault when she failed to intervene to prevent assault on her child); *Commonwealth v. Howard*, 402 A.2d 674, 676–78 (Pa. Super. Ct. 1979) (holding that defendant's failure to protect her child from her boyfriend's ultimately fatal abuse over a period of weeks was sufficient to warrant her conviction for involuntary manslaughter); Dressler, *supra* note 4, at 977–78 (“Suppose that Alice stands impassively by while boyfriend Bob beats her daughter Carla to death. . . . Alice's moral guilt for failing to prevent harm to her child is not as great as Bob's responsibility for directly killing Carla Alice's liability, if any, should be for violation of some . . . statute [less serious and narrowly defined than homicide] that compels parents to act to protect the well-being of their children.”); Waldron, *supra* note 4, at 1078–79 (“In our discussions of the duty to rescue, an enormous amount turns on the distinction between the active infliction of harm and the failure to provide assistance. Bad as David Cash is, for example, we think there is a huge difference between his wrongdoing and that of his friend Jeremy Strohmeier, who actually molested and killed the little girl.” (emphasis omitted)); *50-Year Sentence for Molestation: O.C. Woman and Her Husband Videotaped Their Child Abuse*, L.A. TIMES, Mar. 7, 2008, <http://articles.latimes.com/2008/mar/07/local/me-sikat7> (wife who videotaped husband sexually molesting drugged four-year-old niece received sentence of fifty years in prison for fifty-five sex-related charges including multiple counts of lewd conduct, anal or genital penetration by a foreign object, using a minor for a sex act, and oral copulation; in prior trial, husband received sentence of fifty years to life in prison for sixty similar counts).

Third, all else being equal, actions that cause another's death are generally considered more blameworthy than actions that do not. And based on the traditional criminal law conception of causation, an action that is not necessary for another's death cannot be its cause. More generally, an action that is not a "but-for" condition of a given event cannot be considered a cause of this event.⁹⁰ On this view, Partygoer₁ is more blameworthy for Child₁'s death than Partygoer₂ is blameworthy for Child₂'s death. For Partygoer₁'s drowning Child₁ is necessary for Child₁'s death, in a way that Partygoer₂'s letting-die is not necessary for Child₂'s death. Regarding the latter, Partygoer₂'s presence is not necessary for Child₂'s death. Had Partygoer₂ not been there at all, Child₂ would still have died at just the same time in just the same way.⁹¹ The same cannot be said of Partygoer₁. Had she been absent, Child₁ would *not* have died at the same time and in the same way.

Still, one might challenge this point by arguing that Partygoer₂'s letting Child₂ die is necessary for Child₂'s death if we characterize

⁹⁰ See, e.g., *United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986) ("Causation in criminal law has two requirements: cause in fact and proximate cause. . . . Cause in fact is relatively simple in this case. But for the conspiracy, James would not have died in the manner he did."); *People v. Schaefer*, 703 N.W.2d 774, 785–88, 790 (Mich. 2005) ("In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause. The concept of factual causation is relatively straightforward. In determining whether a defendant's conduct is a factual cause of the result, one must ask, 'but for' the defendant's conduct, would the result have occurred? If the result would not have occurred absent the defendant's conduct, then factual causation exists." (citations omitted)); MODEL PENAL CODE § 2.03(1)(a) (Proposed Official Draft 1962) ("(1) Conduct is the cause of a result when: . . . (a) it is an antecedent but for which the result in question would not have occurred . . ."); and KADISH, SCHULHOFER & STEIKER, *supra* note 8, at 513–14 ("Factual cause, sometimes called the 'but-for' or 'sine qua non' requirement, simply means that the harm would not have occurred in the absence of the defendant's act. . . . By comparison to the elusive concept of proximate cause, factual causation seems a relatively uncontroversial requirement. . . . [I]ndeed statutes and case law typically treat factual causation as an invariable prerequisite to liability.").

⁹¹ See Larry Alexander, *Criminal Liability for Omissions: An Inventory of Issues*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121, 135 (Stephen Shute & A.P. Simester eds., 2002) (suggesting that killing, as opposed to letting die, requires leaving victim worse off than he or she would have been had killer been absent); Green, *supra* note 58, at 202 ("While both killing and refraining from preventing death were necessary conditions for [Kitty Genovese's] death, their causal status can be distinguished counterfactually. Had the apartment dwellers been away or unable to prevent her death, Kitty Genovese would still have been stabbed to death. On the other hand, had the assailant been elsewhere or unable to carry out his attack, she would not have died.").

are
not.
ion,
e its
on of
this
than
er₁'s
that
ith.
y for
ould
The
Child₁

oer₂'s
terize

sation in
in fact is
d in the
criminal
ponents:
relatively
he result.
he result
n exists."
ft 1962)
the result
ra note 8,
nt, simply
ct. . . . By
relatively
at factual

Issues, in
ute & A.P.
ring victim
: 58, at 202
s for [Kitty
Had the
d still have
ble to carry

Partygoer₂'s behavior in a certain way—namely, as a *letting-die*.⁹² But first, even if this point is correct, there is still a significant difference between Partygoer₂ and Partygoer₁: while our characterizing Partygoer₂'s behavior as being necessary for Child₂'s death *depends* on our characterizing Partygoer₂'s behavior as a *letting-die*, Partygoer₁'s behavior is necessary for Child₁ to die when and how he does *no matter how we characterize* Partygoer₁'s behavior.

Second, if Partygoer₂'s behavior is characterized as *letting Child₂ die*, then this condition may be thought of as a necessary condition of Child₂'s death *only if* the absence of this condition—i.e., its not being the case that Partygoer₂ let Child₂ die—entails that Child₂ survived. But this is not the case. To say that Partygoer₂ did not let Child₂ die is not necessarily to say that Partygoer₂ saved Child₂ and therefore that Child₂ survived. For in addition to Partygoer₂'s saving Child₂, two other situations that are accurately characterized as *Partygoer₂'s not letting Child₂ die* are: (a) Partygoer₂'s performing a failed attempt to rescue Child₂ and (b) Partygoer₂'s just not being there and therefore neither letting nor *not* letting Child₂ die.

In response to this last argument, it might be argued that Partygoer₂'s behavior should instead be characterized as a failure to attempt to rescue Child₂ and that *this* characterization clearly qualifies as a necessary condition of Child₂'s dying. But this characterization qualifies as a necessary condition of Child₂'s death *only if* we assume two further counterfactual conditions: (a) if Partygoer₂ had attempted to rescue Child₂, she would have been successful; and (b) Child₂ would not have been successfully rescued in any other way had Partygoer₂ not made the attempt. This position, however, is tenuous for two reasons. First, *ex hypothesi*, Partygoer₂ wants Child₂ to die. So it is farfetched in the first place to imagine Partygoer₂'s attempting to rescue Child₂. Second, conditions (a) and (b) are highly speculative and unknowable assumptions.⁹³ Condition (a) is certainly speculative and unknowable. Even if we grant the

⁹² See Weinrib, *supra* note 4, at 253 (claiming that failing to toss rope to drowning victim is necessary condition of victim's death).

⁹³ See HART & HONORÉ, *supra* note 58, at 63 (claiming that "there is a sense" in which "arguments one way or another" about what would have happened if one had not made a certain omission "cannot be conclusive").

distant possible world in which Partygoer₂ attempts to rescue Child₂, it is quite possible in that possible world that Partygoer₂'s attempt to rescue Child₂ would not have been successful. Condition (b) is even more tenuous than (a). For it is a counterfactual embedded within yet another counterfactual and therefore *doubly* speculative and unknowable. The first counterfactual is, again, the distant possible world in which Partygoer₂ attempts to rescue Child₂. It would then have to be true of *that* possible world that *another* counterfactual be true—namely, that if Partygoer₂ had *not* attempted to rescue Child₂, nobody else would have either. Again, this might very well not have been the case. It might instead have been true of the possible world in which Partygoer₂ attempted to rescue Child₂ that, had Partygoer₂ not herself made the attempt, either somebody else in the house—for example, another partygoer—would have or Child₂ would have saved himself.

C. EUTHANASIA

The main thesis of this Part—that there is a moral distinction between killing and letting die—does not necessarily apply to euthanasia for three reasons. First, many people believe that death in this particular situation—where an individual is terminally ill, has little time left to live, and is undergoing severe physical and emotional suffering—is actually an all-things-considered good or desirable result.⁹⁴ Second, the fact that the intent behind both passive and active means of euthanizing a terminally ill patient is virtuous—namely, to alleviate the patient's suffering⁹⁵—makes it doubtful that *either* means is blameworthy in the first place.⁹⁶

⁹⁴ See Charles Fried, *The Value of Life*, 82 HARV. L. REV. 1415, 1433 (1969) (“[D]eaths involving considerable prolonged pain and impairment of capacities are in general less desirable than deaths without such suffering.”); Stephen A. Newman, *Euthanasia: Orchestrating “The Last Syllable of . . . Time,”* 53 U. PITT. L. REV. 153, 165–66 (1991) (“Actions such as removing a feeding tube, providing a dose of narcotics for pain knowing it is likely to be fatal, and ending life by so-called ‘active’ means . . . are taken with the view that death is not only inevitable but, under the circumstances, desirable.”); Kathryn L. Tucker & Fred B. Steele, *Patient Choice at the End of Life: Getting the Language Right*, 28 J. LEGAL MED. 305, 312–13 (2007) (“[M]any scholars habitually provide the original definition of the word [*euthanasia*] as being ‘good death’ . . .”).

⁹⁵ See, e.g., Green, *supra* note 58, at 199 (“[M]ercy killings’ . . . clearly do not involve malice or indifference . . .”).

⁹⁶ See Helga Kuhse, *Euthanasia*, in A COMPANION TO ETHICS 294, 298 (Peter Singer

Third, in the euthanasia context, the conceptual distinction between killing and letting die blurs.⁹⁷ As I have previously argued:

[O]ne situation that is not easily classified as either a killing . . . or a letting die . . . is withdrawal of life support itself. On the one hand, it may seem to be a letting die because . . . the physician is failing to prevent the patient's impending death. On the other hand, it may seem to be a killing because terminating the life support involves a positive action by the physician.

The underlying problem is that we have no principled basis for determining the proper baseline—namely, whether or not the patient is already moving toward death. . . . [I]f we deem the patient already to be moving toward death, then the life support system constitutes an active interference. It does not continue but interrupts the movement. So if the physician terminates the life support, she merely removes this interruption and thereby lets the movement toward death continue. [This] is just to say that she lets the patient die. On the other hand, if we deem the patient not already to be moving toward death, then the physician's removing the life support system constitutes an active interference. She actively interrupts the patient's movement toward more life, in which case she may be said to kill the patient.⁹⁸

ed., 1993) (arguing that the agent who performs euthanasia in the appropriate circumstances benefits the patient and therefore acts morally).

⁹⁷ See HUSAK, *supra* note 58, at 179–80 (suggesting that whether we judge a given act of euthanasia to be a positive action or omission depends on how we regard it morally rather than the other way around). This point arguably explains why the distinction between killing and letting die does not comfortably apply in war either.

⁹⁸ Ken Levy, *Gonzales v. Oregon and Physician-Assisted Suicide: Ethical and Policy Issues*, 42 TULSA L. REV. 699, 720 (2007); see also DRESSLER, *supra* note 56, at 118 (“One can as reasonably describe [doctor’s (*D*)s] turning off comatose patient (*P*)’s respirator] by saying ‘*D* failed to provide medical treatment to *P*’ as by saying, ‘*D* voluntarily turned off the machine.’”); MCMAHAN, *supra* note 53, at 378–92 (offering a careful, nuanced discussion of which kinds of failures to sustain or rescue qualify as killing and which qualify as letting die); MOORE, *supra* note 61, at 26–27 (concluding that difficulties in establishing baselines prevent us from successfully distinguishing between acts and omissions as (respectively) what makes the world worse and what fails to make the world better); Ashworth, *supra* note 4, at 437

Because the distinction between killing and letting die does not seem to apply in the euthanasia context, it is often difficult to determine on the basis of this distinction alone whether or not, all else being equal, one is less morally desirable than the other.

D. THE LEVEL OF PUNISHMENT THAT BAD-SAMARITAN LAWS SHOULD IMPOSE STRICTLY ON THE BASIS OF THE SLIGHT MORAL DIFFERENCE ARGUMENT AND THE PROPORTIONALITY PRINCIPLE

What level of punishment should bad-Samaritan laws impose? The arguments in this Part point toward one answer. But it will be argued in Part XIV below that when we factor in nonmoral—specifically, practical and psychological—considerations, there is yet a different, equally plausible answer.

The answer defended in this Part relies principally on two propositions. First, the conclusion of the argument that was laboriously developed just above: All else being equal, killing is more morally blameworthy than letting die. Second, the proportionality principle: punishment should be proportional to the moral severity of the crime.⁹⁹ These two propositions together entail that letting die should be punished severely, just less severely than killing. So in order to figure out how severely to punish letting die, we should look to see how a comparable killing is punished and then scale it down to an extent that seems reasonable and proportional to the moral wrong of letting die.

What would be a *comparable* killing? A comparable killing would be a killing that is equal in all respects except for its being a *killing*—i.e., a positive action, rather than an omission, that causes another's death. Because one of these respects in which the letting-die and killing should be equivalent is the mens rea, it follows that there are really only two kinds of lettings-die: lettings-die that are motivated by callous indifference and lettings-die that are motivated

("Whether we term certain events 'acts' or 'omissions' may be both flexible in practice and virtually insoluble in theory: for example, does a hospital nurse who decides not to replace an empty bag for a drip feed make an omission, whilst a nurse who switches off a ventilator commits an act?"); Dressler, *supra* note 4, at 975 n.22 (noting that line between action and omission is not always "clear-cut" and offers the example of a doctor's "turning off the respirator on her comatose patient in order to let the patient die" as a supporting example).

⁹⁹ See *supra* note 8 and accompanying text.

by purpose. (As an example, David Cash committed an indifferent letting-die, not a purposeful letting-die.) Purposeful lettings-die will generally occur much more rarely than indifferent lettings-die¹⁰⁰ for the simple reason that most lettings-die occur between strangers and therefore not between individuals who would intend to harm each other. Still, the following two kinds of purposeful lettings-die are possible: (a) the “letter-die” is a sadistic psychopath who actually *hopes* that the person in distress will not make it and (b) the letter-die happens to come across somebody she knows and, for whatever reason, wants dead. As explained in Parts VII.C and D, (b) is a lucky letter-die.

So an indifferent letting-die should be punished to a slightly lesser extent than a homicide committed with the same mens rea, and a (much rarer) purposeful letting-die should be punished to a slightly lesser extent than a homicide committed with the same mens rea. Regarding the latter, then, Partygoer₁ should be punished for first-degree homicide, and Partygoer₂ should be punished at a level commensurate with either aiding and abetting homicide, second-degree homicide, first-degree manslaughter, second-degree manslaughter, or criminally negligent homicide. Which of these it should be will depend on how morally egregious the legislature (and jury) thinks Partygoer₂'s lucky letting-die is. Naturally, the more morally egregious they find it to be, the more the punishment should approach that of a comparable homicide.

There is arguably less room for discretion with regard to indifferent lettings-die than with respect to purposeful lettings-die because a letting-die that is motivated by callous indifference falls very close to involuntary manslaughter or criminally negligent homicide.¹⁰¹ The mens reas for these crimes fall conceptually close enough to callous indifference.¹⁰² For criminally negligent homicide, the mens rea is criminal negligence, which is a “failure to perceive

¹⁰⁰ See Husak, *supra* note 61, at 22 (“If I want to bring about someone’s death, in most cases I would be more able to achieve this objective by acting rather than omitting to act. I could wait around for my victim to fall into a lake and be unable to escape, in circumstances where I am the only person able to offer assistance. . . . But such scenarios are rare.”).

¹⁰¹ See 40 C.J.S. *Homicide* §§ 125, 230 (2008) (discussing differences between mens rea required for criminally negligent homicide and involuntary manslaughter).

¹⁰² *Id.* § 230.

the risk from one's conduct."¹⁰³ This mens rea would be more applicable to a letting-die in which the potential rescuer *should have known* that her attempting a rescue would dramatically increase the victim's chance of surviving and therefore that her failing to attempt a rescue would dramatically decrease the victim's chance of surviving.

For involuntary manslaughter, the mens rea is "recklessness, or at least something more than ordinary or simple negligence."¹⁰⁴ This mens rea would be applicable to a letting-die in which the potential rescuer indifferently *disregarded her knowledge* that her attempting a rescue would dramatically increase the victim's chance of surviving and therefore that her failing to attempt a rescue would dramatically decrease the victim's chance of surviving.

Given (a) the proportionality principle and (b) the fact that killing is, all else being equal, more blameworthy than letting die, it follows that indifferent lettings-die should be punished to an equal or slightly lesser extent than involuntary manslaughter or criminally negligent homicide. But, again, we will see in Part XIV that there is an alternative approach to punishment for bad Samaritanism, an approach that rejects the proportionality principle.

IX. THE LIBERTARIAN OBJECTION

Parts IV and VIII offered several different arguments for criminalizing and punishing bad Samaritanism. This and the next three Parts consider several objections against this position.

The first objection, the "Libertarian Objection," rests on two premises:

- (1) The law may not excessively restrict Nearby's liberty. It may not require Nearby to perform actions that are overly burdensome. It may require Nearby only to avoid harming others.

¹⁰³ *Id.* § 125 (citation omitted).

¹⁰⁴ *Id.* ("The essence of criminal or culpable negligence . . . is a disregard for human rights and safety, a wanton or reckless disregard of human life, a disregard of the consequences and an indifference to the rights of others, or a conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the willful creation of an unreasonable risk." (citations omitted)).

(2) Compelling Nearby to perform even an easy rescue excessively restricts her liberty.

From these two premises, it follows that the law may not compel Nearby to be a good Samaritan. It may not impose on Nearby a legal duty to attempt to rescue Victim.¹⁰⁵ Nearby has, and should have, the legal *right to refrain* from attempting to rescue Victim. Whether or not she exercises this right is entirely up to her. Conversely, the fact that Nearby has no legal duty to attempt to rescue Victim means that Victim has no legal right to Nearby's attempted rescue.¹⁰⁶ Victim has at most a *moral right*—whatever that really amounts to—to Nearby's attempted rescue.¹⁰⁷

¹⁰⁵ As defense counsel Jackie Chiles says in the last episode of the hit sitcom *Seinfeld*: “You don’t have to help anybody. That’s what this country’s all about.” *Seinfeld: The Finale (1)* (NBC television broadcast May 14, 1998), available at http://www.seinfeldscripts.com/The_Finale.htm. Funny—and arguably a *reductio ad absurdum* of this objection.

¹⁰⁶ *But see* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35–40 (2d ed. 1996) (challenging distinction between “negative right” not to be harmed and “positive right” to be assisted by suggesting that the former cannot be satisfied without the latter’s being satisfied).

¹⁰⁷ For commentary on the Libertarian Objection, see DRESSLER, *supra* note 56, at 112–13 (“In a society such as ours, which values individual freedom and limited governmental power, the criminal justice system should be used discriminately. Even if a person is *morally* obligated to come to the aid of others, not every violation of a moral duty should result in criminal punishment. . . . [T]he purpose of the criminal law is limited to deterring or punishing persons for causing harm. If it were otherwise, the criminal justice system would intrude too deeply into people’s lives.”); FEINBERG, *supra* note 4, at 129–71 (thoroughly discussing and giving reasons to reject different versions of Libertarian Objection); FLETCHER, *supra* note 56, at 67 (suggesting that letting die is “not a ‘cause’ in the same strong sense that killing” is because only the former is “compatible with respect for the liberty and autonomy of another person”); MOORE, *supra* note 61, at 48, 56–58 (supporting Libertarian Objection); SHUE, *supra* note 106, at 35–40 (challenging distinction between “negative right” not to be harmed and “positive right” to be assisted by suggesting that former cannot be satisfied without the latter’s being satisfied); Dan-Cohen, *supra* note 56, at 20–21 (“Some critics see this failure of the law to reflect basic notions of common morality as the product of an individualistic ethic that places a high premium on selfishness and that is generally hostile to communal ideals of society solidarity.”); Epstein, *supra* note 4, at 197–204 (supporting Libertarian Objection); Fletcher, *supra* note 71, at 1451 (opposing Libertarian Objection); Franklin, *supra* note 4, at 51 (stating that the general absence of a legal duty to attempt easy rescues “is attributed generally to a regard in the common law for individual freedom and personal responsibility” (citation omitted)); Heyman, *supra* note 4, at 676–709 (opposing Libertarian Objection); Kleinig, *supra* note 4, at 403 (“In a culture steeped in individualism, nothing produces more hysteria than measures which encroach on individual liberty. ‘You owe me nothing; I owe you nothing. You stay out of my way, and I’ll stay out of yours.’ That is an extreme expression, but it constitutes an important thread within the Anglo-American sociomoral fabric. And [bad Samaritan] legislation threatens to snap it.”); Philip W. Romohr, *A Right/Duty Perspective on*

While (1) does not require defense, (2) does. In defense of (2), three reasons may be offered. The first is that bad-Samaritan laws would excessively restrict Nearby's liberty by compelling her to be benevolent or charitable. While Nearby may have an "imperfect" or supererogatory duty to be benevolent or charitable, the criminal law should not be used to compel people like Nearby to perform such supererogatory duties. It is and should be used only to compel people like Nearby to perform "perfect" duties—primarily duties to avoid causing harm to others.¹⁰⁸ The second reason is that bad-Samaritan laws would simply impose too great a burden on too many people. As Paul Hughes puts it, "[T]here are so many people in dire straits that it would be impossible to help them all. Even if there were fewer such people, the demands the most desperate would place on our time and energy would be overwhelmingly invasive, leaving us virtually no time for anything else."¹⁰⁹ The third reason is that bad-Samaritan laws would "encourage[] gross intrusion into private affairs. If people believe that failure to render aid will make them liable to punishment, they will intervene where they ought not and otherwise might not."¹¹⁰

the Legal and Philosophical Foundations of the No-Duty-to-Rescue Rule, 55 DUKE L.J. 1025, 1026 (2006) ("Whatever justification a judge or justice may give in an opinion, the principle behind most decisions perpetuating the no-duty rule is the protection of individual rights."); and Simester, *supra* note 59, at 324–25, 334–35 (supporting Libertarian Objection).

¹⁰⁸ See MACAULAY, *supra* note 4, at 497 ("In general . . . the 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. . . . We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible . . ."); Bohlen, *supra* note 4, at 220 (attributing this premise to the "attitude of extreme individualism so typical of anglo-saxon legal thought"); Epstein, *supra* note 4, at 195, 200–01 (arguing that while good Samaritanism may be morally required, it cannot be legally required); Weinrib, *supra* note 4, at 260–92 (arguing, contra Epstein, that a duty to rescue is imminent in the common law).

¹⁰⁹ Hughes, *supra* note 4, at 9 (articulating, but not actually endorsing, this argument); see also MACAULAY, *supra* note 4, at 496–97 (arguing that if we criminally punish failures to attempt easy rescues, we will create a slippery slope toward punishing dangerous or burdensome rescues). For other formulations of this argument, see FEINBERG, *supra* note 4, at 129; and Smith, *supra* note 4, at 24.

¹¹⁰ Kleinig, *supra* note 4, at 405 (articulating and then rejecting this argument). *But see* Perkins, *supra* note 58, at 669–70 (supporting this argument). Ironically, this third argument derives from precisely the opposite kind of worry that motivates bad-Samaritan laws in the first place. While bad-Samaritan laws are motivated by the worry that some people will not "meddle" enough without them, this argument derives from the worry that some people will "meddle" too much with them.

The Libertarian Objection warrants several responses. First, in response to the second and third defenses of (2), it is certainly true that if bad-Samaritan laws compelled individuals either to actively seek out and attempt to rescue people who may be suffering or dying or to respond to advertisements, infomercials, and solicitations seeking aid for starving children (for example), then they would indeed be overly burdensome.¹¹¹ But this is why, as stipulated in Part II, bad-Samaritan laws should be restricted to easy rescues—those situations in which Nearby *already knows* that Victim's life or well-being is in grave danger, Victim is in Nearby's proximity, and the attempted rescue would be *easy* (and safe) for Nearby.¹¹² So while it *would* be overly intrusive to knock on neighbors' doors to see if they are feeding their children, it would *not*

¹¹¹ See MACAULAY, *supra* note 4, at 496 (arguing that if we criminally punish failure to give even minimal, life-saving donations of food or money, we will create a slippery slope toward requiring more costly donations); Haslett, *supra* note 77, at 90–92 (arguing that while the overall consequences would be good if most people contributed as much money as they could to life-saving charities, the overall consequences would be bad if morality, much less law, demanded this extreme altruism); Smith, *supra* note 4, at 29 (“Since checking out every suspicious situation would be an unreasonable restriction on the personal freedom of the agent, and could . . . promote invasion of privacy, it makes sense that we do not consider it a duty to investigate possible problems.”). *But see* Weinrib, *supra* note 4, at 272–73, 281–82, 289–91 (arguing that duty of easy rescue would not turn into general “duty of beneficence”); *cf.* Epstein, *supra* note 4, at 198–200 (arguing that there is no principled distinction between legal duty to attempt easy rescues in emergency situations and legal duty to make life-saving charitable contributions).

¹¹² See MACAULAY, *supra* note 4, at 493–94 (“It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die.”); Igeneski, *supra* note 69, at 610–12 (arguing that our moral duty to rescue nearby victim is stronger than our duty to rescue faraway victim because of what correlates with physical proximity—namely, the “moral determinacy” of situation); F.M. Kamm, *Does Distance Matter Morally to the Duty to Rescue?*, 19 LAW & PHIL. 655, 656 (2000) (arguing that the strength of our moral duty to rescue diminishes with physical distance); F.M. Kamm, *Rescue and Harm: Discussion of Peter Unger's Living High and Letting Die*, 5 LEGAL THEORY 1, 13 (1999) (“Contrary to the common view, our intuitions do not tell us that we always have weaker obligations to aid strangers who are far than those who are near, yet this is consistent with proximity making a moral difference.”). *But see* PETER UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE* 33 (1996) (“[U]nlike many physical forces, the strength of a moral force doesn't diminish with distance. Surely, our common sense tells us that much.”); Heyman, *supra* note 4, at 746–47 (arguing for duty to attempt not only easy rescues but also inconvenient rescues); Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231–32 (1972) (arguing that our moral duties to rescue a nearby drowning child and a starving child far away are equally strong); *cf.* Yeager, *supra* note 4, at 14 (“[E]ach of us should be [legally] permitted to remain a live coward rather than a dead public servant.”).

be overly intrusive to call the police if it were already known that these children were not being fed.¹¹³ Rectifying the latter situation would be perfectly appropriate and should be legally required. Just as people should be punished for actively overlooking heinous positive-action crimes, so too—and for the same reason—should they be punished for actively overlooking heinous omissions.

Second, we need only do a simple cost-benefit analysis. On the one hand, again, the cost of bad-Samaritan laws is that they would restrict Nearby's liberty by requiring her to attempt an easy rescue when the situation arises. On the other hand, the bad-Samaritan laws would provide benefits¹¹⁴ such as an increased number of attempted rescues (and therefore a decreased number of deaths and injuries), an outlet for the public's legitimate moral outrage, and the public promotion of aspirational messages. Given that the restriction on Nearby's liberty is minimal¹¹⁵—as conceded by (2), the second premise of the Libertarian Objection—and given that the benefits just listed are great, it follows that the balance tips significantly in favor of criminalization.¹¹⁶

Third, our society is not so radically libertarian as to prohibit liability for *any* omission. Indeed, the Model Penal Code explicitly states that omissions may be punished:

¹¹³ See Yeager, *supra* note 4, at 26 ("In short, a slight personal intrusion that confers a significant social benefit is justifiable and should be enforced."). *But see* Perkins, *supra* note 58, at 670 ("[I]f neighbors who merely knew [that parents were not feeding their child] were held legally chargeable with the death [of the child], there might be no end of officious meddling in other homes because of a disagreement between parents and neighbors as to what children should eat.").

¹¹⁴ See *supra* Part IV.

¹¹⁵ See *supra* Part IX.

¹¹⁶ See Bender, *supra* note 4, at 34–35 ("In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty. . . . It is not an isolated event with one person's interests balanced against another's."); Ridolfi, *supra* note 4, at 967 ("With every new law there are new restrictions on freedom Nonetheless, laws regulating conduct continue to be necessary."); Waldron, *supra* note 4, at 1083–84 (suggesting that while rescues require restrictions of liberty, they are well worth it); Weinrib, *supra* note 4, at 265–66 ("[I]n the context of rescue, the immense gain in utility through the saving of life may plausibly be thought to outweigh the disadvantage of a small moral retardation inherent in legal compulsion"); Yeager, *supra* note 4, at 1, 47 (lamenting American emphasis on personal autonomy over communal obligations and arguing that crime itself restricts individual autonomy more than requiring individuals to report, or assist in stopping, crimes in progress).

- (1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.
- ...
- (3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
- (a) the omission is expressly made sufficient by the law defining the offense; or
 - (b) a duty to perform the omitted act is otherwise imposed by law.¹¹⁷

Likewise, states have no problem with imposing criminal (and civil) liability for certain kinds of omissions. Five kinds of omissions are criminally punishable.¹¹⁸ An individual may be criminally liable for failing to perform (1) statutory duties (e.g., to pay income taxes, to pay social security taxes on household employees, to report for jury service, and to report for the draft);¹¹⁹ (2) duties arising from a special relationship (e.g., parent-child);¹²⁰ (3) contractual or occupational duties to protect and/or rescue others (e.g., lifeguards and assisted-living nurses or caregivers);¹²¹ (4) a duty to attempt a

¹¹⁷ MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962).

¹¹⁸ See generally *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (“There are at least four situations in which the failure to act may constitute breach of a legal duty. Once can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.” (citations omitted)); *State v. Miranda*, 715 A.2d 680, 687 (Conn. 1998), *rev’d on other grounds*, 864 A.2d 1 (Conn. 2004); DRESSLER, *supra* note 56, at 114–17; GLENDON, *supra* note 4, at 81 (listing additional affirmative duties); MOORE, *supra* note 61, at 31–34 (arguing that criminal liability for omissions, as opposed to acts preceding omissions, is permissible but more the exception than the rule); Perkins, *supra* note 58, at 670–77; Stewart, *supra* note 4, at 394–96, 412–13 (providing helpful summaries of, and sources regarding, these five kinds of punishable omissions as well as statutory duties to assist in very specific circumstances); Yeager, *supra* note 4, at 9–10, 47–54 (providing long list of affirmative duties imposed on individuals “in the public sphere and in the private workplace”); Weinrib, *supra* note 4, at 256–57 (listing additional affirmative duties).

¹¹⁹ See DRESSLER, *supra* note 56, at 114 (providing examples of statutory duties to act).

¹²⁰ See *supra* notes 72–74 and accompanying text.

¹²¹ See *Sabia v. State*, 669 A.2d 1187, 1194 (Vt. 1995) (stating that Department of Social Services employees “had a statutory duty within the scope of their employment to provide assistance in response to plaintiffs’ credible reports of abuse”).

completed rescue once one has begun the attempt and thereby prevented or discouraged others from doing the same;¹²² and (5) a duty to rescue one from a peril that the duty-bound individual herself created.¹²³ So our legal system has decided that it is sometimes permissible for the government to restrict our liberty for the sake of some greater good. It is therefore difficult to see why the government should not pass bad-Samaritan laws, which would clearly serve the greater good of helping to motivate otherwise reluctant bystanders to attempt easy rescues and thereby minimize needless injuries and deaths. That is, the fact that we punish fatal omissions in these other contexts suggests that society regards the "good" of another life's being saved to outweigh the "evil" of the government's punishing an agent for failing to try to bring about this end when she could have. If we do not regard these five kinds of governmental coercion as "profoundly intrusive"¹²⁴ or unjust, then it is difficult to see why we should bear a different attitude toward bad-Samaritan laws.

Finally, there is certainly a difference between the kinds of omissions that bad-Samaritan laws seek to prohibit and the kinds of omissions that fall into the five aforementioned categories: Nearby did not voluntarily undertake this sudden relationship with Victim and therefore did not voluntarily assume any duty to Victim.¹²⁵ But in response to this point, two responses may be made. First, it becomes weaker once bad-Samaritan laws are passed. Like income tax laws, which put society on notice that by choosing to

¹²² See Perkins, *supra* note 58, at 671 ("Once an individual chooses to render to another aid which he is not legally bound to render . . . the law does not permit him, without good reason, to abandon the undertaking at such a point that the other will suffer harm by reason of the partial performance."); Weinrib, *supra* note 4, at 276-77 (contrasting duty to initiate rescue with duty to "properly continue an initiated rescue"). But see Epstein, *supra* note 4, at 194-95 (rejecting idea that one should have a legal duty to complete a rescue if abandoning rescue leaves victim in no worse position than victim was in before attempt started).

¹²³ See KADISH, SCHULHOFER & STEIKER, *supra* note 8, at 205-06 (explicating this duty); *In re Eric F.*, 698 A.2d 1121, 1126-27 (Md. Ct. Spec. App. 1997) (holding defendant liable for depraved-heart murder after dragging unconscious, lightly clothed friend into the woods on a cold evening and leaving her exposed until she died from hypothermia); Epstein, *supra* note 4, at 191-92 (arguing that this fifth duty arises not from any considerations of good Samaritanism but rather from strict liability for causing harm).

¹²⁴ This is Simester's expression. See Simester, *supra* note 59, at 325.

¹²⁵ See Bohlen, *supra* note 4, at 243 ("[N]o man can be saddled with a burden of positive action without some voluntary act on his part which renders him subject thereto.").

work here they have a duty to pay state and federal income taxes, bad-Samaritan laws would put society on notice that by choosing to be in the vicinity of other people, they have a duty to attempt easy rescues should the need arise. Second, even though one might argue that our being in the vicinity of other people may not always be the result of a voluntary choice, the obligation that bad-Samaritan laws would impose would still be just. For the obligation would derive from something arguably even deeper than our voluntary actions. It would derive from our common humanity, from the mere fact that we are in a situation in which a fellow human being needs our help to survive.¹²⁶ If the previous performance of a voluntary action justifies application of the five established categories of omission liability to an agent, then surely the moral imperative of helping to save the life of another within our reach qualifies as a sufficient justification of bad-Samaritan laws.

X. THE ACTUS REUS OBJECTION

In addition to the Libertarian Objection, a second common argument against bad-Samaritan laws is the "Actus Reus Objection." According to the Actus Reus Objection, bad-Samaritan laws would violate a fundamental precept of criminal law: the act requirement. The act requirement stipulates that an offense may not be considered criminal and therefore punishable unless it involves a positive action.¹²⁷ A principal purpose behind this requirement is to avoid the possibility of punishing individuals merely for their "bad"

¹²⁶ See GLENDON, *supra* note 4, at 77 ("Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm. This legalistic assumption is one that fits poorly with the American tradition of generosity toward the stranger, as well as with the trend in our history to expand the concept of the community for which we accept common responsibility."); Waldron, *supra* note 4, at 1102 ("[W]e are constantly in the presence of people we don't know, and we have an array of compelling duties in their regard . . . duties whose stringency bears no correspondence whatever to the degree of our connection to the other people involved or the extent of our antecedent concern. . . . Though there was no *antecedent* special relationship between David Cash and Sherrice Iverson that might ground a traditional duty to rescue, that doesn't mean that their relation was wholly abstract. . . . Their relationship at that time and in that place was morally significant in its particularity, and it was special by virtue of the immediate concrete circumstances of their encounter.").

¹²⁷ MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962).

thoughts and desires alone.¹²⁸ Because omissions like the failure to attempt an easy rescue do not constitute positive actions, they cannot be punished.¹²⁹

There are two main problems with the Actus Reus Objection. First, bad-Samaritan laws do not violate the *purpose* behind the act requirement. Punishing an omission would not amount to punishing thoughts and desires alone. For an omission is not a thought or desire, but something else entirely. An omission is (a) a deliberate failure to perform a certain positive action or (b) a failure, whether deliberate or not, to fulfill a moral or legal duty or reasonable expectation.¹³⁰ Of course, one might respond that it violates the act requirement to punish me for a *failing-to-do* rather than a *doing*. But this point was discussed and refuted in Part X.

Second, there are five categories of omissions that every state routinely punishes.¹³¹ To be sure, the kinds of omissions that bad-Samaritan laws attempt to prohibit do not fall into any of these five categories. They are certainly not statutory, at least not in forty-six states.¹³² Nor do they involve any kind of voluntarily assumed relationship—be it contractual, special, endangerment, or attempted rescue.¹³³ But it would still be morally and legally legitimate to

¹²⁸ See *supra* Part VI.

¹²⁹ For authors who support this argument, see MACAULAY, *supra* note 4, at 497 ("In general . . . the penal law must content itself with keeping men from doing positive harm We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible"); Epstein, *supra* note 4, at 190-91; and Gorr, *Actus Reus Requirement*, *supra* note 56, at 12 (assuming that omissions are a legitimate exception to the act requirement). See also MOORE, *supra* note 61, at 17-34 (arguing that crimes of omission, status, and possession satisfy the purpose behind the act requirement, which is to prevent punishment for "mere intentions of other states of mind"); Husak, *supra* note 61, at 22 (arguing that the act requirement is both over- and under-inclusive and therefore should be replaced with a control requirement); Murphy, *supra* note 56, at 18-19 (expressing skepticism that the act requirement "unites" or successfully satisfies its four purposes: to avoid punishing omissions, to avoid punishing status alone, to avoid punishing thoughts alone, and to avoid punishing involuntary behavior).

¹³⁰ See *supra* Part VI.

¹³¹ See *supra* Part IX.

¹³² To be clear, forty-six states do not have bad-Samaritan statutes. But as indicated above, *supra* note 26, forty-five states do not have duty-to-report statutes.

¹³³ See Kleinig, *supra* note 4, at 399 (arguing that because of a universally applicable duty "to prevent harm or its exacerbation," the stranger who happens upon a dying child owes just as much of a duty to rescue that child as a person to whom the child's care is entrusted, such as its father or doctor).

apply bad-Samaritan laws to situations in which individuals did not voluntarily assume, directly or indirectly, a duty to rescue.¹³⁴

XI. CAUSATION-RELATED OBJECTIONS

Part VIII argued that, all else being equal, letting die deserves less punishment than killing partly because only the latter *causes* death. So Partygoer₂ deserves less punishment than Partygoer₁, in part because, unlike the latter, Partygoer₂ did not *cause* her intended victim's death. But several objections may be made against this argument. This Part will explicate and refute these objections.

A. THE HARM PRINCIPLE OBJECTION

The first causation-related argument against bad-Samaritan laws is that they violate the "harm principle,"¹³⁵ a fundamental precept of morality and criminal law. According to the harm principle, an individual may be blamed and punished only for harm that she causes, not for harm that she does not cause.¹³⁶ So even if (a) Victim dies shortly after Nearby fails to attempt to rescue her and (b) there is a very good chance that Victim would have survived if Nearby *had*

¹³⁴ See *supra* Part IX.

¹³⁵ See FEINBERG, *supra* note 4, at 127–28, 130 (offering two different interpretations of the harm principle, one of which supports maximizing harm prevention (and is compatible with bad-Samaritan laws), the other of which supports minimizing causation of harm (and is incompatible with bad-Samaritan laws)).

¹³⁶ "Equivalence theorists" reject this proposition and hold instead that one should be blamed and punished only for her wrongful actions, over which she has control, not over the harm caused by these actions, over which she has no control. See, e.g., Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363 (arguing that it is useless and unfair to blame and criminally punish for harm given that criminal law can influence only people's reasons for actions and therefore actions, not the consequences of these actions); Weinreb, *supra* note 46, at 66, 72–76 (suggesting that our general belief that agents should be punished for harm that they cause is part of the "normative order," and is a "structural element of human experience," but not a belief that can be rationally justified in terms of desert). But see Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action that Causes It*, 24 LAW & PHIL. 263 *passim* (2005) (opposing the equivalence theory and arguing for the relevance of harm to moral and legal desert).

attempted to rescue her, Nearby still did not *cause* Victim to die.¹³⁷ Therefore Nearby cannot be blamed and punished for Victim's death.

The Harm Principle Objection fails, however, because criminal law does not always abide by the harm principle. First, criminal codes sanction punishment for victimless crimes such as gun possession, drug possession, and prostitution.¹³⁸ Second, criminal codes sanction punishment for inchoate crimes—i.e., crimes that do not necessarily cause any harm, crimes such as attempt, solicitation, and conspiracy.¹³⁹ Third, if we concede one of the premises of the Harm Principle Objection—namely, that omissions do not cause harm—then criminal codes' routine punishment of omissions is also inconsistent with the harm principle. Again, our criminal legal system routinely punishes some omissions.¹⁴⁰

Given the fact that criminal liability is routinely imposed on individuals for victimless offenses, harmless offenses, and omissions, one may not argue that bad-Samaritan laws cannot be passed or enforced merely because bad Samaritanism does not cause harm.

B. TRIGGERING CAUSE, STRUCTURAL CAUSE, AND CAUSAL RESPONSIBILITY

The second causation-related objection is that Partygoer₂ *did* cause Child₂'s death.¹⁴¹ To see how, we first need to distinguish

¹³⁷ See MOORE, *supra* note 61, at 267–78 (arguing that omitting to save is not equivalent to causing harm); JUDITH JARVIS THOMSON, ACTS AND OTHER EVENTS 212–18 (1977) (arguing that only events, not states of affairs, can cause harm; omissions are not events but states of affairs; and therefore omissions cannot cause harm); Bohlen, *supra* note 4, at 220–21 (“[B]y failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation. There is here a loss only in the sense of an absence of a plus quantity.”).

¹³⁸ See, e.g., HART & HONORÉ, *supra* note 58, at 63–64 (rejecting proposition that only harm-causing actions are punishable).

¹³⁹ See *id.*; MODEL PENAL CODE §§ 5.01–.03 (Proposed Official Draft 1962) (defining the inchoate crimes of attempt, solicitation, and conspiracy).

¹⁴⁰ See *supra* Part IX.

¹⁴¹ See, e.g., D'ARCY, *supra* note 20, at 47, 49–50 (implying that a bystander helped to cause harm to a victim and is therefore responsible for this harm if it was “required of” or “enjoined upon” the bystander to attempt to rescue the victim); FLETCHER, *supra* note 56, at 47 (“I have yet to see a convincing argument made against the plausible position of Hart and Honoré that failing to do the expected can be the ‘cause’ of resulting harm.”); HART & HONORÉ, *supra* note 58, at 3, 30–31, 38, 50–51, 127–29, 139–40 (arguing that it is often appropriate to apply

die.¹³⁷
 death.
 iminal
 iminal
 is gun
 iminal
 hat do
 tation,
 of the
 cause
 is also
 l legal

sed on
 ssions,
 sed or
 arm.

AUSAL

r₂ *did*
 nguish

quivalent
 (arguing
 states of
 21 (“[B]y
 is before;
 it he has
 ere a loss

hat only

ining the

l to cause
 ‘enjoined
 / (“I have
 noré that
 tÉ, *supra*
 to apply

between *triggering cause* and *structural cause*.¹⁴² The triggering cause is the event that we tend to regard as explaining why a given event (E) happened rather than not. The structural cause is the entire set of background conditions without which E would not have resulted from the triggering cause. For example, if I strike a match and light some dry twigs on fire, the triggering cause of the twigs’ catching fire is my lighting the match and applying it to the twigs. But the structural cause includes the fact that there was ambient oxygen, the fact that the twigs were flammable, and the laws of nature.

causal language to omissions and background conditions); HUSAK, *supra* note 58, at 160–65 (arguing that letting die can be proximate cause of this death); THOMSON, *supra* note 65, at 91–92 (arguing that it is generally more problematic to identify omissions as but-for causes than it is to identify them as proximate causes); Green, *supra* note 58, at 202 (“[W]here it is possible for A to prevent B’s death, A’s refraining from doing so is a causally necessary condition to B’s death.”); John Harris, *Bad Samaritans Cause Harm*, 32 PHIL. Q. 60, 65 (1982) (noting that “history and folklore are replete” with harms that would not have occurred, and that could not be adequately explained without reference to, certain refrainings); Kleinig, *supra* note 4, at 393 (“Active nondoings, as acts (albeit negative) can figure in causal explanations. The pharmacist who fails to check his labels does something which, given someone’s death, might be cited as its cause. . . . If F is floundering in the water, and I can see and help him, but do nothing, my withholding of aid is a causal factor in his drowning.”); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 551, 563–65, 572–78 (1988) (arguing that even if omissions do not, by definition, alter an existing state of affairs, they may help to cause the state of affairs if (a) the state of affairs diverges from the norm and (b) the action that was not performed would have kept the state of affairs at the norm); Lee, *supra* note 58, at 344 (“There is nothing untoward in the claim that the lifeguard’s omission results in the swimmer’s death. . . . [W]e may take it that at least some omissions involve results. . . . [T]here is some relation here, one that perhaps may be expressed by the connective ‘because’: It is because the lifeguard turned and walked away that the swimmer drowned.”); Eric Mack, *Causing and Failing to Prevent*, 7 SW. J. PHIL. 83, 88–89 (1976) (arguing that if workers die from conditions that their employers could have changed, then the employers have actually *killed* the workers, not merely let them die); Patricia Smith, *Legal Liability and Criminal Omissions*, 5 BUFF. CRIM. L. REV. 69, 76–77 (2001) (“[O]missions are causes. Many legal commentators on tort law have long recognized this. . . . In any given case negative factors may be just as necessary as positive factors for an accurate explanation of why a particular state of affairs comes to be the case. In a given situation brake failure may be a necessary condition (and indeed, the cause) of an automobile accident. The failure of the sprinkler system may be a necessary condition and the correct explanation for why the building burned to the ground. The fact that such conditions are negative makes them no less necessary to (explain) a given outcome.”); Judith Jarvis Thomson, *Causation: Omissions*, 66 PHIL. & PHENOMENOLOGICAL RES. 81, 99–102 (2003) (defending the proposition that omissions can be causes). For helpful discussions of the relationship between omissions and causation, see HART & HONORÉ, *supra* note 58, at 26–61, 127–28, 136–40, 447–49; Ashworth, *supra* note 4, at 434–35; and Green, *supra* note 58, at 201–04.

¹⁴² For discussions of these types of causes, see FRED DRETSKE, EXPLAINING BEHAVIOR: REASONS IN A WORLD OF CAUSES 42 (1988); and Simester, *supra* note 59, at 316.

Given this distinction between triggering cause and structural cause, it is easier to see how some might regard omissions as causes and therefore how Partygoer₂'s letting Child₂ die might reasonably be considered to cause Child₂'s death. Child₂'s death has *one* cause, and this cause is composed of two essential parts.¹⁴³ The first essential part of this cause is the fact that Child₂ accidentally hit his head on the bathtub, sunk under water, and suffocated. The second essential part of this cause is the absence of any interference with the first part. This second part is clearly composed of an infinite number of subparts that did not occur—all the things that did not happen but, if they had, would have prevented Child₂ from dying in that way at that time. The fact that Partygoer₂ did not change her mind and attempt to rescue Child₂ is a subpart of this infinitely large second part of the cause of Child₂'s death. In this way, one may argue that it is part of the cause of—and therefore caused—Child₂'s death.

In response to this second objection, however, two points need to be made. First, it is an abuse of language to suggest that because a given background condition is part of the structural cause of a given event E, it *caused* E. This language is almost always reserved for the triggering cause. At best, a background condition may be said to *help cause* E, be causally relevant to E, or be partially causally responsible for E. Again, it may *not* properly be said to *cause* E or to be the *cause of* E.¹⁴⁴

Second, even if sense could be made of the proposition that Partygoer₂'s failure to rescue Child₂ actually caused—or was *the cause of*—Child₂'s death, Partygoer₂ still deserves less punishment than Partygoer₁.

There are two reasons. First, Partygoer₂ neither initiated Child₂'s death nor *expressed her intent* that Child₂ die. The same cannot be said of Partygoer₁, who *did* initiate Child₁'s death and *did* express her intent that Child₁ die.¹⁴⁵

The second reason is more complicated. Partygoer₂'s allowing Child₂ to drown is not causally responsible for Child₂'s death in the

¹⁴³ See *supra* Part VII.E.

¹⁴⁴ See Kleinig, *supra* note 4, at 401 (distinguishing between conduct's causing harm to another and conduct's serving as "a causal factor in the harm suffered by another").

¹⁴⁵ See *supra* Part VII.A.

same way or to the same degree as Partygoer₁'s actively drowning Child₁ is causally responsible for Child₁'s death. Within each cause, there is a *hierarchy of causal responsibility*. This hierarchy is not determined by which parts of the cause are more necessary than other parts. *Ex hypothesi*, they are all equally necessary. Partygoer₁'s drowning Child₁ is just as necessary for Child₁'s death as is the fact that martians did not swoop in from another planet, overpower Partygoer₁, and rescue Child₁. But Partygoer₁'s drowning Child₁ is still higher up in the hierarchy of causal responsibility than is the absence of martian rescue because we regard it as more *explanatory*, more contributing to our *understanding*, of why Child₁ died in this way at this time. And explanatory value is relative to the audience.¹⁴⁶ What is of primary explanatory value to a coroner may be of only secondary explanatory value to the public, and vice versa. For the coroner and some members of the public, the primary explanation of Child₂'s death is suffocation. For the rest of the public, the primary explanation of Child₂'s death is the fact that Partygoer₂ did not try to rescue him.

Triggering causes tend to rank first in most hierarchies of causal responsibility. They generally help us to understand better why a given event happened when it did better than the relatively static background conditions do. Conversely, structural causes tend to fall below triggering causes in terms of explanatory value. The main exceptions to this point are structural conditions that are more unexpected, deviant, or normatively unwarranted than the corresponding triggering cause. For example, if a person is shot at a firing range, the triggering cause of the victim's death is her being hit by a bullet. But the structural cause—namely, that the victim

¹⁴⁶ See HART & HONORÉ, *supra* note 58, at 39–40 (noting that after a fatal shooting, “we are not looking for the cause of ‘death’, but for the cause of death *under circumstances which call for an explanation*. We want to know why [the victim] died when he did; we do not want to be told what is always the case whenever death occurs. . . . It is the particularity of our interest in a given man's death at a given time that leads us to reject the latest phases of the process as the cause: these do not explain *this man's death now*.”); HILARY PUTNAM, *THE MANY FACES OF REALISM: THE PAUL CARUS LECTURES* 37–40 (1987) (arguing that what counts as a cause depends on the observer's explanatory interests); Kleinig, *supra* note 4, at 392 (“In statements of the form ‘X was *the* cause of Y,’ X normally refers to a single or select number of the causal conditions of Y's occurrence. Which one we select normally depends on whether our interest is in explaining or regulating Y or events similar to Y. In both explanatory and regulatory contexts, the adequacy of a *causal citation*, that is, the denomination of some causally relevant factor as *the* cause, is in part person- or role-relative.” (citation omitted)).

was retrieving bullet casings behind a target—might help better explain to the public why this accident occurred. Likewise, if a mother forgets that she has placed her baby on the roof of her car and drives off, what will help the public understand how the baby became injured is less the triggering cause—i.e., the mother's driving away—and more the structural cause—i.e., the mother's negligently leaving the baby on the roof of the car. People drive all the time, but babies rarely get hurt in the process. So what will better explain these rare instances in which babies get hurt are the correspondingly rare structural conditions that convert these otherwise ordinary triggering causes into preludes to tragedy.

What, then, about the infinitely many parts of the structural cause? How should we rank them against each other? Once again, explanatory value will determine their relative rankings. The fact that Partygoer₂ failed to rescue Child₂ will rank much higher in the hierarchy of causal responsibility than almost all of the other infinite number of parts of the structural cause. Consider three: (a) the fact that martians failed to rescue Child₂; (b) the fact that another person at the party failed to rescue Child₂; and (c) the fact that the laws of nature failed to change such that Child₂ could breathe underwater. The fact that Partygoer₂ failed to rescue Child₂ better explains—and is therefore more causally responsible for—Child₂'s death than (a), (b), or (c) because we would expect this fact to have been different—more so than we would expect these other very probable conditions to have been different. People frequently rescue others. So the a priori probability that Partygoer₂ would rescue Child₂ is much higher than the a priori probability—and therefore our expectation—that any other part of the structural cause of Child₂'s death would not only have been different but different in such a way as to prevent Child₂'s death. And the more we expect a condition to have prevented a given event, the more explanatory, and therefore the more causally responsible, the absence of that condition will be for this event.

C. DUTIES AS FUNCTIONS OF RELATIONSHIPS, NOT OF CAUSATION

The third causation-related objection to bad-Samaritan laws is that initiation of death, causation of death, and expression of intent that the victim die cannot explain entirely why Partygoer₁'s behavior

is more blameworthy, and therefore deserving of more punishment, than Partygoer₂'s behavior. For even when causation, initiation, and intent-expression are all equalized, we might *still* find a difference in blameworthiness and punishment desert. Assume that Mother and Child live with Roommate; it is understood that Roommate does not have any responsibilities toward Child; Roommate is aware that Mother is not feeding Child; and Roommate can, but does not, feed Child. After a few days, Child dies.¹⁴⁷ It seems that Mother and Roommate are equal on all fronts—initiation, causation, and expression of intent.¹⁴⁸ We still believe that Mother is *more* blameworthy, and deserving of *greater* punishment, than Roommate for Child's death. And what applies here applies to the two Partygoers. What accounts for their difference in blameworthiness and punishment desert cannot be initiation, causation, and expression of intent. It must be something else—whatever explains the difference between Mother's and Roommate's blameworthiness.

This is a clever objection, but it falters in the last part. Though Mother and Roommate are equivalent in terms of initiation, causation, and expression of intent, they are *not* equivalent in their *duties* to Child. Mother is in a voluntarily undertaken special relationship with Child. From this special relationship arises Mother's *strongest possible* duty to take care of Child. Roommate, however, is *not* in a special relationship with Child. Therefore her duties to Child are (much) weaker. It is in virtue of this difference in duties that their omissions are not differently causal but differently blameworthy and therefore deserving of different punishment.¹⁴⁹ This distinction in duties, however, is simply inapplicable to the two Partygoers. For *ex hypothesi*, neither is in a

¹⁴⁷ For a similar story that recently occurred in Philadelphia, see *Mom to Stand Trial in Death of 14-Year-Old Danieal Kelly*, PHILA. DAILY NEWS, Nov. 8, 2008, at 04.

¹⁴⁸ See Dan-Cohen, *supra* note 56, at 20 ("Everyone in the world, including the mother, did not feed the unfortunate baby. . . . In this way an omission is less likely than an action to satisfy the need for a clearly ascertainable event that would [c]learly and reliably single out suspects from the rest of the population and serve as a necessary trigger to set in motion police investigations."); Dressler, *supra* note 4, at 979 n.41 (suggesting that not only Mother and Child but everyone else in the world failed to feed Child and therefore helped to cause Child's death).

¹⁴⁹ For helpful discussions of the relationship between duties and causation, see D'ARCY, *supra* note 20, at 47–48; FLETCHER, *supra* note 22, at 604–06; Ashworth, *supra* note 4, at 434–35; and Lichtenberg, *supra* note 69, at 212. See also citation to Rizzo, *supra* note 58.

special relationship with her intended victim. Their duties toward their intended victims are therefore equal—indeed, just as strong or as weak as Roommate's duties to Child. Duties, then, cannot account for their moral differences—either their difference in blameworthiness or their difference in punishment desert. It must be something else. And the only plausible candidates are initiation, causation, and expression of intent.

XII. THE FIVE STRONGEST OBJECTIONS TO BAD-SAMARITAN LAWS

Many different objections have been raised thus far against bad-Samaritan laws. As discussed above, the Libertarian Objection,¹⁵⁰ the Actus Reus Objection,¹⁵¹ and various causation-related objections¹⁵² can indeed be resisted. More troubling than these objections, however, are the arguments that take into account both the practical difficulties with enforcing bad-Samaritan laws and the psychological reasons why decent, ordinarily nonpsychopathic human beings might fail to attempt to rescue their fellow human beings. This Part will offer these arguments. The next Part will propose responses to these objections.

A. THE GROUP OBJECTION

According to the Group Objection, element (5) of bad-Samaritan laws actually renders them unworkable and unjust. Again, condition (5) states, "Nobody else appears to be attempting to help Victim, either directly or by calling for professional rescue."¹⁵³

This condition may be plausible enough if there are only one or two people aware of Victim's plight and in a position to try to help. But it becomes increasingly implausible as the group becomes larger. Consider the Kitty Genovese situation—perhaps the most infamous letting-die.¹⁵⁴ In 1964, in Queens, New York, just under forty people

¹⁵⁰ See *supra* Part IX.

¹⁵¹ See *supra* Part X.

¹⁵² See *supra* Part XI.

¹⁵³ See *supra* text accompanying note 23.

¹⁵⁴ For background information on the Genovese case, see A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES: THE KITTY GENOVESE CASE (1999); Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at 1; and Diane Kiesel, *Who Saw This Happen?*, 69

watched from their apartments as Kitty Genovese was stabbed repeatedly over the course of fifty minutes without attempting either to rescue her or to call the police. Only one person called the police—and even then, thirty-five minutes after the attack began.¹⁵⁵

Most people who read descriptions of this incident are outraged by the witnesses' inaction.¹⁵⁶ We find their indifference to be both alarming and despicable. Indeed, it is this kind of indifference that bad-Samaritan legislation is designed to criminalize. Yet we strongly resist the notion that all of these witnesses should have been rounded up, arrested, prosecuted, convicted, and put in jail.

There are two reasons behind our resistance to this notion—one practical, the other more psychological. Regarding the former, it is generally very difficult, if not impossible, for a prosecutor to determine and prove exactly which members of the standby group let the victim die (or be killed).¹⁵⁷ If there had been a bad-Samaritan law in effect at the time of the Kitty Genovese incident, and if the witnesses had for whatever reason still not been motivated by this law to attempt a rescue, it stands to reason that it would have been very difficult for the police, and therefore for prosecutors, to determine who saw what. The witnesses would have been much less likely to admit to their observations and their inaction simply out of fear of punishment and the stigma that follows it.

This problem arises whenever a group of people lets an individual die. Suppose an individual is struck by a car, the individual lies bleeding in the street, a crowd soon gathers around the body, nobody makes any attempt to rescue the victim, and the victim eventually dies. Even if the police quickly arrived on the scene, it would be very difficult for them, and therefore for prosecutors, to determine which bystanders let the victim die and which did not. Some clearly did. But others may not have either because they arrived on the scene too late, walked or drove by the situation without a clear view, or stood

A.B.A. J. 1208 *passim* (1983).

¹⁵⁵ Gansberg, *supra* note 154, at 1. This letting-die differs from David Cash's letting-die in at least three respects: (1) there were multiple bystanders; (2) these bystanders were not friends with Kitty Genovese's killer; and (3) partly for the second reason, an attempted rescue would have been more dangerous.

¹⁵⁶ See Kiesel, *supra* note 154, at 1208 ("Genovese, whose death made headlines around the world, became for many the symbol for a society that had somehow lost its humanity.").

¹⁵⁷ See FLETCHER, *supra* note 22, at 604–05 (noting difficult questions we must answer in order to assess relative blameworthiness of each individual in a group of bad Samaritans).

in the crowd reasonably unaware that the victim was in grave danger. Simply because of the crowd's amorphous boundaries, its tendency to lose some and acquire others from minute to minute, and people's tendency to flee as soon as the police start making arrests, it would be very difficult, if not impossible, for the police to determine who fell where along the "blameworthiness continuum." And the larger the group, the more difficult this task of sifting out the guilty from the less guilty from the innocent would be. For similar reasons, such an ordeal would likely over-tax both the prosecutor and the criminal justice system of that particular jurisdiction.

Second, even if adequate proof—a video or surveillance tape, for example—could be obtained to prove exactly which bystanders were blameworthy and to what extent, psychological studies show that people behave differently when they are alone and faced with an emergency than when they are in a group and faced with an emergency. When they are in a group, people tend to exhibit the "bystander effect"—i.e., tend to be more reticent about directly addressing the emergency.¹⁵⁸ There are three reasons for this phenomenon. First, people tend to assume initially that somebody else from the group will act or has already called for help.¹⁵⁹ Second, each person in the group infers from the others' inaction that there is not really an emergency in the first place—i.e., that the person in distress is merely pretending or exaggerating.¹⁶⁰ Third, each person is more hesitant to act for fear of interfering or making a fool of herself in front of the others by coming across as impulsive, inept, gullible, or overly anxious.¹⁶¹ Whether or not these rescue-inhibiting

¹⁵⁸ For discussions of the bystander effect, see Russell D. Clark III & Larry E. Word, *Why Don't Bystanders Help? Because of Ambiguity?*, 24 J. PERSONALITY & SOC. PSYCHOL. 392 *passim* (1972); Yeager, *supra* note 4, at 16; Smith, *supra* note 4, at 35; JOHN DARLEY & BIBB LATANÉ, *THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?* 377 (1970); and Bibb Latañe & Judith Rodin, *A Lady in Distress: Inhibiting Effects of Friends and Strangers on Bystander Intervention*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 189, 198-201 (1969).

¹⁵⁹ See, e.g., John M. Darley & Bibb Latañe, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377, 377 (1968) (noting that presence of other bystanders causes diffusion of responsibility, which itself motivates nonintervention).

¹⁶⁰ See, e.g., Clark & Word, *supra* note 158, at 393 (arguing that bystanders' judgments about the situation depend largely on how other bystanders react).

¹⁶¹ See Latañe & Rodin, *supra* note 158, at 200 (suggesting that people avoid attempted rescues for fear of embarrassing themselves in front of other bystanders); Yeager, *supra* note 4,

reasons individually or collectively amount to fully adequate excuses, they certainly excuse this kind of inaction more than inaction on the part of somebody who is alone with the victim and therefore will not experience these social inhibitions.¹⁶²

B. THE EVIDENCE OBJECTION

An advocate of bad-Samaritan laws might respond to The Group Objection by suggesting that we restrict bad-Samaritan laws to situations in which a lone individual fails to attempt an easy rescue. But according to the Evidence Objection, there are two problems with this proposal.

First, if there was really only one individual around who could have attempted a rescue—again, Nearby—this point will be difficult to prove. If Nearby fails to attempt an easy rescue and the victim subsequently dies, only Nearby herself will know this.

Second, even if somebody witnessed Nearby's bad Samaritanism or videotaped the omission, Nearby could always argue that she was either unaware of Victim, or aware of Victim's presence but unaware of Victim's plight. Even with this kind of evidence, it would still be difficult in many cases to prove that Nearby *was* indeed aware.

C. THE JUROR SYMPATHY OBJECTION

According to the Juror Sympathy Objection, even if it could be proven that Nearby *was* aware of Victim and her plight, many juries would still be reluctant to convict Nearby because they would likely sympathize or identify with her. Many of us in Nearby's position would likely be reluctant, rightly or wrongly, to "get involved" for fear of exposing ourselves to various dangers—e.g., infection from

at 17 (stating that bystanders risk "ridicule and derision" by other bystanders if they attempt rescue).

¹⁶² See PROSSER & KEETON, *supra* note 31, at 376 (claiming that, in tort law at least, "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one" has inhibited extension of the duty-to-rescue rule from special relationships to non-special relationships); Schiff, *supra* note 17, at 112 ("In light of the implications derived from bystander-effect research for predicting human conduct in emergency situations, statutes run the risk of ineffectiveness if they require substantial affirmative conduct from any particular bystander when a crowd is present at the scene of an emergency or crime.").

Victim's blood, Victim's exposing us to the same danger, being "set up" by Victim and hidden accomplices, false accusations that we initially caused Victim to be in this dangerous situation, and legal liability for anything that might go wrong during the attempted rescue.¹⁶³

D. THE TOO-RARE OBJECTION

David Hyman argues on the basis of empirical data¹⁶⁴ both that bad Samaritanism is extremely rare and prosecutions under bad-Samaritan laws in the few states that have them even rarer.¹⁶⁵ Even without bad-Samaritan laws, most people probably do the right thing and respond to others' cries for help.¹⁶⁶ This point alone militates against implementing bad-Samaritan laws. And if bad-

¹⁶³ See Stewart, *supra* note 4, at 415 ("Speculation, misunderstanding, intermeddling, and the fear of being 'set up' and victimized are just some concerns a potential rescuer might have under a general duty-to-assist situation."); Yeager, *supra* note 4, at 17 ("[Intervening bystanders] 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. The nightmare then may be most easily resolved by convincing oneself that the victim is not imperiled." (citations omitted)).

¹⁶⁴ Hyman, *supra* note 4, at 663-64.

¹⁶⁵ *Id.* at 656-57, 706, 712; see also Stewart, *supra* note 4, at 424 ("General failure-to-assist laws are examples of laws easily made but rarely enforced. . . . [C]ase law analyzing applications of the statutes is sparse. This is so in spite of the fact that the first general duty statute, Vermont's, has been on the books for thirty years."); Yeager, *supra* note 4, at 8 n.37, 25, 34-35 (noting "dearth of litigation" under duty-to-rescue and duty-to-report statutes). Hyman's methodology involves three steps:

The first step was collecting a dozen leading criminal and tort law textbooks and identifying every occasion in which an actual instance of non-actionable non-rescue was described. The second step involved similarly analyzing every law review article written about the no-duty rule during the twentieth century. . . . Finally, the third step was searching Lexis and Westlaw for newspaper stories, magazine articles, and common law precedent for similar incidents. The study focused on the period from 1994 to 2004 because more recent incidents are more likely to have received press coverage. . . . [T]he analysis necessarily excluded all cases in which an exception to the no-duty rule applied (i.e., in which there was a statutory or common-law duty to rescue).

Hyman, *supra* note 4, at 663-64.

¹⁶⁶ See FLETCHER, *supra* note 56, at 48 ("Most people, in my impression, stop and render aid."); Stewart, *supra* note 4, at 432 ("People will continue to assist others—lack of familiarity, inconvenience, and even risk of harm or death to oneself notwithstanding. Altruistic behavior is still alive and well in this country.").

Samaritan laws were restricted even further to *individuals* who fail to attempt an easy rescue not for a reason with which we can identify but simply because they are psychopathically indifferent to their fellow human beings, then it is arguable that such bad-Samaritan laws would so rarely be triggered that there is simply no need to implement them in the first place.

Indeed, even David Cash—supposedly the paradigmatic bad Samaritan—might not trigger such restricted bad-Samaritan laws. For while Cash exhibited supreme indifference to Sherrice Iverson's plight, he may very well have acted (consciously or unconsciously) on three arguably understandable reasons for failing to attempt to rescue Sherrice, reasons with which many jurors might be somewhat sympathetic: (a) friendship with, and loyalty to, the perpetrator, Jeremy Strohmeyer;¹⁶⁷ (b) a motivated belief, or desperate hope against all appearances, that his good friend would not ultimately harm Sherrice; and (c) fear of being hurt by Strohmeyer, who was high on drugs. Of course, (b) and (c) are in tension with each other. But in the heat of the moment, both may have been oscillating in Cash's head.

Still, even if we deny *any* understandable reason for bad Samaritanism, Hyman's argument might still have merit. Suppose that Nearby failed to attempt a rescue and that when interrogated by the police, she claimed that she was actually *hoping* that Victim, a mere stranger to her, would die. Why? Because she just does not like other people. The police then ask Nearby whether or not she would ever kill from misanthropy. If Nearby responded that she would *not* kill because (a) killing is much worse than letting die and (b) even then, she would never expose herself to liability for homicide, we might conclude that, lame as her reasons for failing to attempt an easy rescue might be, she is still not a *dangerous* person. And since criminal punishment is designed largely, if not primarily,

¹⁶⁷ See *Roberts v. United States*, 445 U.S. 552, 569–70 (1980) (Marshall, J., dissenting) (“[O]ur 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.”).

to incapacitate dangerous individuals,¹⁶⁸ there is really no good reason to punish this bad Samaritan, in which case a bad-Samaritan law targeting only psychopathic bad Samaritans would be unnecessary and inappropriate.

But what if Nearby responded that she *would* kill from misanthropy? Would a jury then conclude that she *is* a dangerous person and support a conviction for her bad Samaritanism? It seems that this might be the strongest case for conviction. But we must then ask once again how frequently we would expect to find such individuals, individuals who meet these three conditions: (1) let somebody die; (2) lack any understandable or mitigating reasons for letting somebody die; and (3) defiantly admit that they would go beyond letting die to killing when the opportunity arises. Clearly, such individuals are few and far between if only because most people, including psychopathic bad Samaritans, would not confess their intent to kill. So if bad-Samaritan laws would apply only to these individuals, and if juries would be comfortable convicting only these kinds of truly psychopathic bad Samaritans, then the laws would never be applied, in which case legislatures would have no motivation to pass them in the first place.

E. THE COUNTERPRODUCTIVE OBJECTION

Hyman cites a number of tragic news articles in which people who attempted rescues—usually attempting to stop a crime in progress—ended up stabbed or shot.¹⁶⁹ And these rescues were performed *without* the pressure of bad-Samaritan laws. According to the Counterproductive Objection, the number of such tragic situations would only increase with the pressure of bad-Samaritan

¹⁶⁸ See, e.g., Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1448–49 n.71 (2001) (noting criminal justice system's "shift from desert to dangerousness" and indicating various ways in which Model Penal Code is concerned with punishing dangerousness); Carol S. Steiker, Foreword, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 791 (1997) (suggesting that since the 1960s, the rationale usually given for long-term incarceration of not only criminals but also the mentally ill and juvenile delinquents has been "protection of society from the 'dangerous.' . . . For practical purposes, the distinction between the 'bad' and the 'mad' had less salience; 'dangerousness' became the category of primary importance and the key determinant of incarceration.").

¹⁶⁹ Hyman, *supra* note 4, at 678–79 & nn.45–50, 713–14.

laws and therefore bad-Samaritan laws might actually lead to *more*, not fewer, deaths and injuries. As a result, we should *avoid* implementing them.¹⁷⁰

The key assumption here is that bad-Samaritan laws would pressure people who would not otherwise have attempted dangerous rescues, either from prudence or indifference, to make the attempt, only to be hurt or killed in the process. And this assumption certainly may have merit. For even though bad-Samaritan laws would explicitly require only easy rescues, citizens may worry that if they refrain from attempting a rescue and are then arrested for their inaction, they will be unable to convince the police, prosecutor, and jury that they reasonably believed that the rescue would *not* be easy but rather quite dangerous. So rather than take *this* risk—the risk of subjecting themselves to arrest, conviction, prison, and stigma—they will simply attempt the rescue and let the chips fall where they may. In some cases, they might be successful. But in many more cases, given that they are not professional rescuers and that, *ex hypothesi*, the situation really *is* dangerous, they may end up injured or dead.

XIII. REPLIES TO THE FIVE STRONGEST OBJECTIONS

The five objections against bad-Samaritan laws in the last Part are very strong, but they are not necessarily unassailable. In this Part, I propose some replies to each.

A. REPLIES TO THE GROUP OBJECTION

The Group Objection succeeds in showing that the unfairness and difficulty associated with enforcing bad-Samaritan laws may increase in proportion to the size of the bystander group. Still, the Group Objection is not sufficient reason to abandon bad-Samaritan laws.

¹⁷⁰ See *id.* at 678–81, 712–16 (arguing that many potential rescuers end up dead or injured from attempting rescues that initially seemed to be easy and safe); cf. Yeager, *supra* note 4, at 57 (“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.”).

First, Hyman casts doubt upon the Group Objection's empirical claims by offering two empirical counterclaims:

[U]nless willingness to rescue declines more than inversely with group size, larger groups actually increase the probability that there will be at least one individual willing to perform a rescue. [The psychological inhibitions to rescue mentioned by the Group Objection] are far from dispositive; even with highly ambiguous conditions and large groups, approximately 30% of subjects are still willing to rescue.¹⁷¹

Second, even if the main point of the Group Objection—i.e., that people more understandably fail to attempt easy rescues when they are in groups rather than alone—is true, this premise alone does not establish that bad-Samaritan laws should be rejected. The mere fact that a law *may*, in *some* circumstances, be difficult to enforce hardly constitutes a valid argument against adopting that law in the first place. For, first, many, if not most, criminal laws present potential evidentiary or enforcement problems. That is usually the job of the courts and juries to work out. So bad-Samaritan laws would be in very good company. There is no reason to think that the evidentiary and enforcement problems that they would encounter would be any more burdensome than those encountered by any other criminal law.¹⁷²

Third, for reasons similar to those provided by the Group Objection, prosecutors often have great difficulties prosecuting gangs, organized crime, accomplices, and accessories-after-the-fact. But these difficulties are hardly good reason either to decriminalize such activities or never to have criminalized such activities in the first place.¹⁷³

¹⁷¹ *Id.* at 700.

¹⁷² See Weinrib, *supra* note 4, at 262 (making a similar point about holding multiple negligent tortfeasors liable).

¹⁷³ See Kleinig, *supra* note 4, at 404 ("If a dozen people know that someone is drowning and any one of them could easily render aid and none of them does . . . why should we think it absurd to hold each of them liable? So long as nobody else renders aid, each is a causal factor in the person's continuing peril. Not until one of them competently aids the drowning person are the others relieved of their responsibility to help. Should it be objected that it will often

C
E
C
E
C
e
C
C
W
V
V
P
tc
—
be
is
su
or
pu

wo
son
wh
per
anc

Fourth, it should be acknowledged that the reasons given by the Group Objection will likely force some divergence between theory and practice. While bad-Samaritan laws impose punishment for *any and all* bad Samaritans,¹⁷⁴ prosecutors will, as a practical matter, be more likely to pursue bad Samaritans in smaller groups than bad Samaritans in larger groups because of the kinds of considerations raised by the Group Objection.¹⁷⁵

B. REPLIES TO THE EVIDENCE OBJECTION

First, potential evidentiary problems abound in the law. Yet they ordinarily do not stop legislators from passing laws against certain actions or omissions if the legislators feel that the particular action or omission in question is seriously wrong. Indeed, many murders are difficult to solve. But this is hardly a good reason to decriminalize murder.

Second, many instances of bad Samaritanism will still be very *easy* to establish. For example, there may be sufficient circumstantial evidence, adequate witness testimony, and even a confession by a conscience-stricken Nearby herself. Indeed, there was plenty such compelling evidence in the David Cash incident.¹⁷⁶

Third, two categories of omissions—premature abandonment of voluntarily assumed rescue and failure to rescue after endangering victim¹⁷⁷—would seem to run into the same kinds of evidentiary problems as bad-Samaritan laws. Yet few see this as a good reason to decriminalize those types of omissions.¹⁷⁸

be difficult if not impossible to track down all the Bad Samaritans, it can be replied that this is no reason why those who can be traced should not be punished. The problem is not substantially different to that encountered in the cases of rioting, illegal mass demonstrations, or gangland activities. Where only some of the offenders can be apprehended, their punishment does not constitute decimation . . .”).

¹⁷⁴ See *supra* Part II for the six elements of bad Samaritanism.

¹⁷⁵ I owe this point to Carol Steiker.

¹⁷⁶ See *supra* Part III.A.

¹⁷⁷ See *supra* Part IX.

¹⁷⁸ See Ridolfi, *supra* note 4, at 965–66 (“Obviously, concern that a [bad-Samaritan] law would make it impossible to know where to draw the line has not prevented us from creating some legal duties. As a matter of fact, we have imposed duties to act in many situations: when there is a contract, special status relationship, if someone creates a risk to another person then fails to act to prevent harm from occurring, and if someone comes to the aid of another person but then abandons the effort, leaving the victim in a worse position. Are these

C. REPLIES TO THE JUROR SYMPATHY OBJECTION

First, *every* law inevitably runs into borderline cases and therefore requires juries and judges to make close calls. But this is hardly reason to give up on laws, juries, or judges.¹⁷⁹

Second, it is not at all clear that juries would always, or even often, sympathize with defendants charged with bad Samaritanism. One of the main points of this Article is that bad Samaritanism is morally heinous. It is for this reason that the public is so morally outraged when it hears about such incidents. For example, much of the Berkeley campus protested David Cash's attendance in an effort both to pressure him to withdraw from the university and to persuade the university to expel him.¹⁸⁰ It seems plausible that these protestors not only would have convicted Cash had they served as jurors at his hypothetical trial for bad Samaritanism, but also that the Berkeley protestors were representative of a much larger portion of the public.

D. REPLIES TO THE TOO-RARE OBJECTION

First, Hyman's very careful methodology does not include instances of bad Samaritanism that were never discovered by the police or the media.¹⁸¹ And we have reason to believe that these undiscovered or unreported incidents are too frequent—at least too frequent to ignore. For, first, hidden cameras are increasingly

relationships different enough to set them apart from the obligations of the rest of us to a fellow citizen? Or, are they the best we can do, given the practical difficulties in administering a law that punishes omissions?" (citation omitted)); Yeager, *supra* note 4, at 57 ("Difficulties in enforcement may produce few successful prosecutions, but this should not influence the legislative decision that certain omissions are so antisocial that they be deemed criminal." (citations omitted)).

¹⁷⁹ See Kleinig, *supra* note 4, at 403 ("Judgments of reasonableness are not impossible of determination, and are the bread and butter of the courts. [Bad-Samaritan] legislation would be no exception in this respect."); Ridolfi, *supra* note 4, at 966 ("[W]e are wise to be cautious—but is it really so difficult to draw lines? Courts routinely engage in individualized determinations that depend on subjective intent and a range of excuses and mitigating considerations. Why not trust the legal system to reach individualized judgments just as fairly where omissions are concerned?").

¹⁸⁰ See *supra* note 50 and accompanying text.

¹⁸¹ Hyman is aware of this "selection bias" in his study. Hyman, *supra* note 4, at 689–91.

capturing incidents of bad Samaritanism.¹⁸² Whether these increasingly available videos are evidence of an increase in the annual rate of bad Samaritanism or of an increase in the *detection* of a stable annual rate of bad Samaritanism, we may conclude either way that bad Samaritanism is not as rare as Hyman might lead us to believe. And as prevalent as hidden cameras are becoming, the vast bulk of our public space is still *not* videotaped. So for every videotape of a letting-die that does surface, it stands to reason that many more lettings-die are going untaped and therefore unnoticed and unreported.

Second, Hyman might very well respond to this point that even if the incidence of unreported lettings-die were too high, bad-Samaritan laws would not help to prevent or reduce them. On the contrary, bad-Samaritan laws would simply drive them further underground, as bad Samaritans would be even more intent on hiding their bad Samaritanism.¹⁸³ But criminal laws and the fear of punishment that they promote are generally effective in deterring people from performing criminal acts. So rather than assuming that the rate of unreported lettings-die would continue at the same rate, we might instead make the equally plausible assumption that the threat of punishment from bad-Samaritan laws would scare many people who would otherwise fail to act into attempting easy rescues.

Third, even if the incidence of not only reported but also unreported lettings-die were extremely rare, bad-Samaritan laws would still be necessary.¹⁸⁴ Given the concentration of most violent crimes in urban areas, it is likely that some, if not many, non-urban and suburban areas in the United States have not prosecuted a murder or rape in decades. Some more rural communities and small towns may have *never* seen one. Yet all criminal codes prohibit murder and rape. (And one can only imagine what message these communities would send by decriminalizing these acts simply because they are rarely performed.) So whether or not a particular criminal prohibition should be, or remain, “on the books” does not

¹⁸² See, e.g., *supra* notes 1–3, 33–36, 39–44 and accompanying text.

¹⁸³ See Hyman, *supra* note 4, at 707 (“[T]here is a plausible argument that imposing a duty to rescue will actually decrease the willingness of witnesses to provide information about such circumstances.”).

¹⁸⁴ See Murphy, *supra* note 4, at 608–09, 611 (rejecting Too-Rare Objection for this reason).

necessarily depend on the frequency of the corresponding criminal act or omission. Some acts and omissions are so heinous that they should be criminally prohibited no matter how infrequently people may perform them.¹⁸⁵ Letting die is just one of those heinous omissions—again, assuming its incidence is rare. Indeed, children are twenty-six times more likely to die from automobile accidents than from kidnappings.¹⁸⁶ Yet this fact hardly means that we should punish the latter much less severely. There simply is no correlation between the rarity of a crime on the one hand, and its moral severity or therefore the punishment that it deserves on the other.

Fourth, some acts should be criminally prohibited no matter how infrequently people perform them because bad-Samaritan laws serve symbolic purposes just as much as practical purposes.¹⁸⁷ Not only are they designed to fulfill the practical purposes of motivating our more indifferent citizens to attempt easy rescues and to punish them if they still are not sufficiently motivated *with* such laws. They are also designed to make two statements. First, they make a (negative) statement that we find David-Cash-like inaction and indifference to a fellow human being¹⁸⁸ to be morally despicable. Second, they make a (positive) statement that we all have a strong affirmative moral duty to attempt easy rescues rather than turning a blind eye to people we happen to find in grave danger.

¹⁸⁵ See Hyman, *supra* note 4, at 707 n.142 (conceding this point). Hong Kong, Japan, and Singapore boast crime rates that are much lower than those of most other countries, including the U.S. (For supporting articles, see Tai-Heng Cheng, *The Central Case Approach to Human Rights: Its Universal Application and the Singapore Example*, 13 PAC. RIM L. & POL'Y J. 257, 283 (2004); David T. Johnson, *Crime and Punishment in Contemporary Japan*, in 36 CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 371, 380 (Michael Tonry ed., 2007); and Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 126–27 (2005).) But this is hardly a good reason for these societies not to have, no less to remove, criminal prohibitions against sufficiently heinous acts and omissions.

¹⁸⁶ Interview by Diane Rehm with Daniel Gardner, Columnist and Senior Writer for THE OTTAWA CITIZEN and Author of THE SCIENCE OF FEAR: WHY WE FEAR THE THINGS WE SHOULDN'T — AND PUT OURSELVES IN GREATER DANGER (2008), in Washington, D.C. (Aug. 5, 2008), available at <http://thedianerehmshow.org/shows/2008-08-05/daniel-gardner-science-fear-dutton>.

¹⁸⁷ See *supra* Part IV.

¹⁸⁸ See *supra* notes 39–44 and accompanying text.

E. REPLIES TO THE COUNTERPRODUCTIVE OBJECTION

The Counterproductive Objection assumes that there are many people (a) who are sufficiently prudent or indifferent to refrain from attempting dangerous rescues in the absence of bad-Samaritan laws and (b) whose prudence or indifference would be overcome by the pressure of bad-Samaritan laws. But first, without evidence, we have no reason to believe that the size of this group is very large.¹⁸⁹

Second, bad-Samaritan laws might actually reduce the number of such tragic rescue attempts by educating the public about when they should, and when they should *not*, attempt rescues. Both the bad-Samaritan laws themselves and the publications of these laws should clearly state that people should attempt rescues only when there is little or no risk to themselves and then offer clear, concrete examples of what constitutes a sufficient level of risk.¹⁹⁰ So the ideal bad-Samaritan laws would clearly state, for example, that (a) people would *not* be liable for failing to attempt to rescue potential victims of crimes in progress but still would be liable in these situations for failing to attempt to call for professional rescue; and (b) potential rescuers in the vicinity of a drowning victim should *not* attempt to rescue the victim by jumping into the water but rather by throwing a flotation device to the victim or by calling for professional rescue.¹⁹¹

Third, the Counterproductive Objection predicts that bad-Samaritan laws will (a) motivate more attempted dangerous rescues and (b) that this increased number of attempted dangerous rescues will itself result in an increased number of injuries and deaths. But there are two problems with using this prediction against bad-Samaritan laws. First, as just argued, the risk of motivating a greater number of attempted dangerous rescues might be minimized by teaching the public never to attempt dangerous rescues. This

¹⁸⁹ See *supra* note 166 and accompanying text; see also Epstein, *supra* note 4, at 203 ("Some men may be moved to guide their conduct by general statements of substantive law, but in most cases any incentives created by the selection of one legal rule in preference to another will be masked by the fear of injury which is shared by defendants and plaintiffs alike.")

¹⁹⁰ See Hyman, *supra* note 4, at 715 (opposing bad-Samaritan laws but making the similar point that the injuries and deaths resulting from good Samaritanism could be reduced by educating the public about these risks).

¹⁹¹ See *id.* at 679 n.49. For further examples, see *infra* Part XV.

kind of education would help to minimize dangerous rescues not merely in bad-Samaritan-law jurisdictions but also in jurisdictions without such laws.

Second, even if bad-Samaritan laws motivated more attempted dangerous rescues, and even if this increase resulted in a greater number of deaths and injuries, it does *not* follow that bad-Samaritan laws would increase the *net* number of deaths and injuries. For, while increasing the number of attempted dangerous rescues, bad-Samaritan laws would likely also increase the number of attempted easy and safe rescues. *This* increase would lead to a *reduced number* of deaths and injuries. And if this reduced number were greater than the increased number of deaths and injuries resulting from attempted dangerous rescues, a greater number of lives and injuries would be spared. Put conversely, *not* having bad-Samaritan laws might very well discourage easy rescues more than having bad-Samaritan laws would encourage dangerous rescues. Of course, this point is speculative. But the Counterproductive Objection is equally speculative; it is, after all, based on a prediction. So speculation cancels out and cannot be used against this second point.

Finally, even if the Counterproductive Objection correctly predicts that bad-Samaritan laws would help to cause some injuries and deaths by motivating dangerous rescues that fail, the correct policy response is not to abandon bad-Samaritan laws. The correct policy response is to set up an insurance fund that would compensate the rescuers or their families for the rescuers' injuries or deaths.¹⁹² Indeed, even without bad-Samaritan laws, legislatures should set up these "rescue insurance" regimes. For it is both unfair and impractical to require well-intentioned rescuers or their families to cover resulting medical expenses and lost wages. It is unfair because this default requirement amounts to a penalty for good Samaritanism. And it is impractical because this default requirement arguably discourages even easy rescues.¹⁹³

¹⁹² Quebec provides such a fund. See An Act to Promote Good Citizenship, R.S.Q., ch. C-20, s.2 (1977) (providing funds for funeral expenses and transportation).

¹⁹³ For arguments that good Samaritans should not bear the entire burden of rescue, see Heyman, *supra* note 4, at 748-49; Hyman, *supra* note 4, at 704, 714; Stewart, *supra* note 4, at 405; Weinrib, *supra* note 4, at 248; and Christopher H. White, Note, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 519-21, 530-44 (2002).

XIV. SOME REFLECTIVE EQUILIBRIUM AND A BLOW TO THE PROPORTIONALITY PRINCIPLE

This Article has provided several arguments for criminalizing and punishing bad Samaritanism. Standing alone, these arguments prevail over some of the objections that have been raised against them, including the Libertarian Objection, the Actus Reus Objection, and the Harm Principle Objection. But they do not necessarily prevail over *all* objections—especially the five objections in Part XII (the Group, Evidence, Juror Sympathy, Too-Rare, and Counterproductive Objections). While the last Part offered replies to each of these objections, one might still come away with the impression that they have been only “dented” and not entirely neutralized. There is still some, if not much, “life” left in most or all of them.

So where does this leave us? On the one hand, we have a very strong set of moral arguments favoring bad-Samaritan laws. On the other hand, we have a very strong set of pragmatic and psychological arguments opposing them. How should we resolve this battle of incommensurables? The most obvious way is to put both sets into reflective equilibrium and see which set tips the balance. But since both sets are arguably equally strong, it is difficult simply to adopt one set at the expense of the other. So my proposal is that we accept *both* sets by striking a compromise between them.

What compromise? The Slight Moral Difference Argument in conjunction with the proportionality principle warrants not only punishing bad Samaritanism, but punishing it *severely*.¹⁹⁴ From (a) the proportionality principle and (b) the conclusion that, all else being equal, letting die is almost as blameworthy as killing, it follows that we should punish bad Samaritanism almost as severely as killing. But the pragmatic and psychological arguments warrant not punishing bad Samaritanism at all. Naturally, the middle ground between punishing bad Samaritanism severely and not punishing it at all is to punish it *mildly*. So the most logical compromise between the moral arguments (for punishing bad Samaritanism severely) and the nonmoral arguments (for not

¹⁹⁴ See *supra* Part VIII.D.

punishing bad Samaritanism at all) is to endorse *mild* bad-Samaritan laws—i.e., bad-Samaritan laws that impose fines of \$5,000 or less, short-term imprisonment, or both.

If we accept this approach, which seems reasonable, then we must reject the proportionality principle. For it was the proportionality principle that helped us move from the near moral equivalence of killing and letting die to the conclusion that letting die should be punished almost as severely as killing. The matter of bad-Samaritan laws, then, establishes a crucial point about the criminal law. It shows that the proportionality principle should be abandoned when strong nonmoral considerations are genuinely in conflict with widely shared moral principles.¹⁹⁵

It may seem unpalatable to abandon the proportionality principle. But it really is not as extreme a move as it might initially seem. We routinely criminalize and punish other kinds of omissions, all of which arguably violate other cherished criminal law principles—again, the harm principle, the actus reus requirement, causal principles, and libertarianism.¹⁹⁶ We should generally, but not universally, abide by the fundamental principles of criminal law. We need to tolerate exceptions to these principles when there are *good* reasons for these exceptions. And, as demonstrated above, there *are* good reasons in this case for abandoning the proportionality principle.

Still, the fact that mild bad-Samaritan laws conflict not only with the proportionality principle but also with these other criminal-law principles may help to explain why so few states have passed them. It is very possible that this tension with the underlying principles of criminal law is what is really bothering most legislators who have even considered the matter.

One possible response to this legislative obstacle is that we put bad-Samaritan laws into a different legal category; that rather than criminalizing bad Samaritanism, we instead turn it only into a tort. This response, however, is questionable. For, first, there are two advantages to criminalizing bad Samaritanism: (a) punishing the

¹⁹⁵ Cf. Doug Husak, *Why Punish the Deserving?*, 26 *NOÛS* 447, 448–49 (1992) (discussing instances in which punishment is deserved but not inflicted because desert is overridden by nonmoral considerations).

¹⁹⁶ See *supra* Parts IX, X, XI.

bad Samaritan, even mildly, is more effective in conveying the message to the community that bad Samaritanism is not merely harmful but seriously morally wrong,¹⁹⁷ and (b) criminalization avoids distracting and cumbersome, if not unresolvable, questions about how much money the victim's life was worth and therefore the amount of damages to exact against the bad Samaritan. Second, we do not want to reduce the issue of bad Samaritanism to questions about money or compensation in the first place. The issue of bad Samaritanism is ultimately about something different—and something more important. It is ultimately about morality, the moral choice between attempting to save another person and letting her die. Those who choose the latter option in easy-rescue situations commit serious moral wrongdoing. And because criminal law is the embodiment of our core moral principles,¹⁹⁸ it is criminal law that needs to condemn and punish this wrongdoing.¹⁹⁹

¹⁹⁷ See GLENDON, *supra* note 4, at 85, 87 (“A moment’s reflection suffices to remind us of how much of American criminal law, like criminal law everywhere, has traditionally been, and remains, a repository of moral norms. . . . Whether meant to be or not, law is now regarded by many Americans as the principal carrier of those few moral understandings that are widely shared by our diverse citizenry. In these circumstances, legal silences can acquire unintended meanings. The absence of a legal obligation to come to the aid of another in peril can begin to miseducate a public which incorrigibly refuses to draw the line between law and morality . . .”); Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 112 (2006) (“Criminal punishment is necessarily a value-laden endeavor, and expanding motive’s role in punishment allows the criminal law to more faithfully reflect shared notions of moral blame.”); Hoffman, *supra* note 32, at 14 (“Criminal law, and many if not most aspects of all law, are coming to be understood as cultural expressions of deeply held, and largely shared, moral intuitions. . . . Criminal law is applied human nature, and its application needs to be richly attuned both to the universality of that nature and to its dizzying variations. . . . Pretending that the criminal law is not a reflection of our deepest moral instincts misses the essential nature of both.”); Dan M. Kahan, *What’s Really Wrong With Shaming Sanctions*, 84 TEX. L. REV. 2075, 2080 (2006) (“Imprisonment so evocatively expresses moral condemnation precisely because, in our society, liberty deprivation successfully marks someone as being unworthy of the respect we believe virtuous persons are due. As such, imprisonment clearly invites continued—indeed, usually permanent—shunning.” (citation omitted)); Kleinig, *supra* note 4, at 405–06 (“There is . . . a false contrast between ‘the prevention of harm’ and ‘the enforcement of morality’ as functions of criminal law. . . . [T]here can be no objection to the contemplated interference with acts whose immorality largely consists in their harm-causing or harm-threatening character. And since Bad Samaritanism is a causal factor in the continuation or aggravation of harm to others, it falls into the category of acts which are rightly proscribed by law.”); Ridolfi, *supra* note 4, at 962 (“[I]n a diverse society like the United States, where religion and ethnic tradition are not the common denominator, common ground lies elsewhere. . . . For Americans, our commonality has its voice in the law.”).

¹⁹⁸ See *supra* note 197 and accompanying text.

¹⁹⁹ See Franklin, *supra* note 4, at 55 (“[A] criminal statute would seem to be the core of any

XV. PROPOSED LANGUAGE FOR BAD-SAMARITAN LAWS

Given Part XIV, what should bad-Samaritan laws actually say? This question merits a two-part answer.²⁰⁰ The first part suggests that bad-Samaritan laws should be rigidly restricted to easy rescues. Easy-rescue situations involve six elements:

- (1) There is an emergency. An individual (Victim) is in grave danger of suffering death or serious physical injury.
- (2) Another person upon whom Victim is not legally dependent (Nearby) is nearby. The emergency is *immediate*.
- (3) Nearby can try to save Victim from injury or death either by directly attempting a rescue or by trying to solicit help from others.
- (4) It would be relatively easy and safe for Nearby to attempt to help Victim in one of these two ways.
- (5) Nobody else appears to be attempting to help Victim, either directly or by calling for professional rescue.
- (6) Nearby knows with practical certainty (1) through (5).²⁰¹

The second part of the answer involves the actual wording of the proposed bad-Samaritan law. Our starting point is the statutory language drafted by Minnesota, Rhode Island, Vermont, and Wisconsin. Minnesota's bad-Samaritan statute states:

A 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

regulatory pattern. It can state the legislature's command most clearly, and its penalties can be keyed more closely than can damages to the gravity of the offense." (citation omitted).

²⁰⁰ See Heyman, *supra* note 4, at 749 (listing various "issues of policy" that a bad-Samaritan law "would have to determine").

²⁰¹ See also *supra* Part II.

reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.²⁰²

Rhode Island's bad-Samaritan 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 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.²⁰³

Vermont's bad-Samaritan statute states:

(a) 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.

...

(c) A person who willfully violates [this provision] shall be fined not more than \$100.00.²⁰⁴

Finally, Wisconsin's bad-Samaritan statute states:

²⁰² MINN. STAT. ANN. § 604A.01 (West Supp. 2000).

²⁰³ R.I. GEN. LAWS § 11-56-1 (1994).

²⁰⁴ VT. STAT. ANN. tit. 12, § 519(a), (c) (2008). For background information on Vermont's bad-Samaritan statute, see generally Franklin, *supra* note 4.

(2)(a) 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.

...

(d) A person need not comply with this subsection if . . . [c]ompliance would place him or her in danger . . . [or] assistance is being summoned or provided by others.²⁰⁵

All four statutes explicitly capture conditions (1), (3), and (4). Condition (2) is explicitly captured by Minnesota's, Rhode Island's, and Wisconsin's bad-Samaritan statutes. Condition (5) is explicitly captured by Vermont's and Wisconsin's statutes. And only Wisconsin's bad-Samaritan statute comes close to capturing condition (6). While the other three statutes use the word "knows," this knowledge explicitly applies only to conditions (1) through (3); the statutes do not suggest that this knowledge also applies to conditions (4) and (5) as well.

The omission of condition (6) from three of the four statutes is problematic. It is simply unfair to punish Nearby for failing to rescue Victim if she did not know either that she could easily rescue Victim or even that Victim required rescuing in the first place. Consider, for example, a homeless person—Harold—who is dying on the sidewalk in the early morning. Tragic as this situation is, we cannot blame or punish any passersby for failing to attempt to rescue Harold. For if Harold, or homeless people more generally, are known to inhabit that area, then passersby may not be reasonably expected to interpret their lying on the sidewalk as dying rather than sleeping.²⁰⁶ Vermont's, Minnesota's, and Rhode Island's statutes should therefore be amended to include condition (6).

More generally, this Article proposes that not only should Vermont, Minnesota, Rhode Island, and Wisconsin amend their statutes but also that the other forty-six states should adopt something similar to the following statutory language.²⁰⁷

²⁰⁵ WIS. STAT. ANN. § 940.34 (West 2005).

²⁰⁶ Cf. Stewart, *supra* note 4, at 414 (“[D]iscovering a person lying on the sidewalk, or hearing noise and seeing movement in a parked car, are not readily discernible situations.”).

²⁰⁷ Most of the language proposed below is inspired by the dangers of rescue that Hyman,

A person at the scene of an emergency who knows that (a) another person is exposed to or has suffered grave physical harm, (b) nobody else is attempting to rescue exposed person, and (c) he or she can indeed provide reasonable assistance without danger or peril to self or others shall give such assistance to exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel.

The potential rescuer must *know* (c) to be the case. This law is not meant to coerce or pressure bystanders into attempting daring or heroic rescues that may result in their being injured or killed as well. Bystanders are urged to take great care in assessing the situation before acting. Only if they determine with practical certainty that attempting a rescue will not put their own or others' well-being at risk should they proceed with the rescue attempt.

To make this point as clear as possible, the following examples are provided to guide potential rescuers' actions during emergencies and ensure their cautious and reasonable behavior:

- (a) You are in a parking lot and see a woman at the steering wheel being held at knifepoint by a man with a mask. Do *not* attempt to intervene or scream for help. Try instead to call discreetly for professional rescue.
- (b) You are in a parking lot and see a man with a mask brandishing a knife and approaching a woman fifty feet away. Immediately alert the woman and all other bystanders to the danger and urge them to flee. Then try to call for professional rescue.
- (c) You are in a shopping mall and see a couple having a heated argument. Suddenly the man pulls out a gun and tells the woman that he is going to shoot

supra note 4, aptly describes. Legislators should draft statutory language only after consulting with police departments and other experts on rescue and personal safety.

- her. Do *not* attempt to intervene or scream for help. Try instead to call discreetly for professional rescue.
- (d) You are about to enter a bank when you see a bank robbery in progress. Do *not* enter the bank or intervene. Try instead to call discreetly for professional rescue.
- (e) You are driving on a two-way street and see an individual lying in the other lane. If you can park your car in the opposite lane without causing a traffic accident, do so and then call for professional rescue. If you cannot safely park your car, call for professional rescue and simply keep driving until you can park your car without danger of causing a traffic accident.
- (f) You are on a street corner when you observe the man in front of you step off the curb and into the path of an oncoming car. Do *not* run out into the street with him. Instead, if the impact is imminent, try to grab him by his clothing and pull him back. If the impact is several seconds away, try either to call the man back to the curb or signal to the car to slow down.
- (g) You are swimming in a pool when you notice an individual struggling to stay afloat in the deep end. Do *not* attempt to swim over and pull the individual out. She may panic, grab on to you, prevent you from rescuing her, and thereby cause you *both* to drown. Instead, throw a flotation device to the individual and call for professional rescue.²⁰⁸

XVI. CONCLUSION

This Article provides significant insight into criminal punishment. Initially, the proportionality principle sounds plausible. We tend to think that we should punish acts and omissions that society considers seriously immoral in direct

²⁰⁸ For another proposed model statute, see Schiff, *supra* note 17, at 134-36.

proportion to their level of immorality. And both the Life Is Sacred Argument and Slight Moral Difference Argument show that bad Samaritanism is indeed seriously immoral.²⁰⁹ So these two arguments together with the proportionality principle recommend severe punishment for bad Samaritanism, punishment that is just slightly less severe than what a mens-rea-comparable killer would receive. The three utilitarian arguments for criminalizing bad Samaritanism help only to reinforce this conclusion.²¹⁰

Still, this conclusion is not quite right. Instead, the final conclusion of this paper is that we should abandon the proportionality principle in this particular case and punish bad Samaritanism only mildly. For pitted against the Slight Moral Difference Argument, the Life is Sacred Argument, and the three utilitarian arguments are five equally strong pragmatic and psychological arguments—the Group Objection, the Evidence Objection, the Juror Sympathy Objection, the Too-Rare Objection, and the Counterproductive Objection—for not punishing bad Samaritanism at all. So rather than arbitrarily accepting one group of arguments over the other, it seems more rational to strike a compromise between them. And the best compromise between severe punishment and no punishment at all is *mild* punishment.

²⁰⁹ See *supra* Parts V, VIII.

²¹⁰ See *supra* Part IV.

al
ls
d
ct