Bad Samaritanism and the Duty to Render Aid: A Proposal

Mark K. Obseck

University of Michigan Law School, mosbeck@umich.edu

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BAD SAMARITANISM AND
THE DUTY TO RENDER AID:
A PROPOSAL

Bad Samaritanism\(^1\) is an age-old problem that never seems to subside. Each year we hear of new variations on a recurring theme: people witness their fellow citizens in serious danger, but refuse to help.\(^2\) Some cases of Bad Samaritanism, such as the Kitty Genovese murder\(^3\) and the New Bedford, Massachusetts pool table rape,\(^4\) have achieved significant notoriety. Many other

The author wishes to thank Stephen Barker and William Pierce for their helpful criticisms of earlier versions of the model statute presented in this Note.

1. The term derives its meaning from the Biblical parable of the Good Samaritan. *See Luke* 10:25-37. Professor Feinberg defines the “Bad Samaritan” as:
   1. a stranger standing in no “special relationship” to the endangered party
   2. who omits to do something—warn of unperceived peril, undertake rescue, seek aid, notify police, protect against further injury, etc.—for the endangered party,
   3. which he could have done without unreasonable cost or risk to himself or others,
   4. as a result of which the other party suffers harm, or an increased degree of harm,
   5. and for these reasons the omitter is “bad” (morally blameworthy).


2. A typical example of such behavior occurred in August of 1984 in the village of Pinckney, Michigan. A group of young people at a party witnessed two young men savagely beat and kick fifty-seven-year-old Arthur Dining and stuff him in the trunk of his car. The two attackers—with several of the partygoers still present—then took Dining’s car for a joy ride, stopping twice to beat Dining further, in spite of his pleas for mercy. Finally, after returning to the party for a while with Dining still in the trunk, the two attackers drove to a deserted area, dumped Dining on the side of the road, and burned his car. Dining’s body remained undiscovered for several days. “If any one of them had picked up a phone,” said Pinckney Police Chief William Smith, “that man might be alive today. But it was the same old thing about not wanting to be involved, not caring enough to call. And as a result, we’ve got a murder case.” Ann Arbor News, Aug. 21, 1984, at A1.

3. In this infamous case, a knife-wielding assailant attacked a young woman named Kitty Genovese three separate times over a period of thirty-five minutes on her own residential street. Thirty-eight of Genovese’s neighbors witnessed the attacks, but no one helped her or even called the police. Only after the victim’s death did one witness bother to summon the police, who arrived on the scene within two minutes of the call. N.Y. Times, Mar. 27, 1964, at A1.

4. Attackers repeatedly raped a woman on the pool table of a local tavern in New Bedford, Massachusetts, while fifteen patrons watched. Not one of these witnesses summoned the police during the entire seventy-five minute episode, and some, in fact, cheered the rapists on, encouraging them to continue. Newsweek, Mar. 21, 1983, at 25;
cases of this sort, however, go relatively unnoticed.5

As a general rule, the law in this country, unlike the law in many other countries,6 has never prohibited Bad Samaritanism.7 Legal commentators, however, have long criticized this aspect of the law and have advocated countering Bad Samaritanism by enacting a generalized duty to rescue.8 Two states, Vermont9


5. The author has discovered a number of cases like this that have been reported in the last two years alone (1983-84); it is likely that others have occurred as well. In one reported incident, several youths in Manhattan attacked a couple on a subway in front of fifty passive bystanders; they attempted to rob the couple and then stabbed the woman in the eye. Ann Arbor News, Mar. 13, 1984, at C1. In another incident, someone stabbed a woman to death on a busy street in Virginia as twenty people looked on. Id. In St. Louis, thirty people stood by and made no effort to help or summon the police as two youths sexually assaulted a fourteen-year-old girl. Id. In San Antonio, two bystanders ignored the cries of a man who fell off a ledge into nine feet of water. After saying something to him, they walked away and let him drown. Kiesel, supra note 4, at 1209. In Baltimore, someone beat, robbed and stripped a female security guard in the lobby of an apartment building, then wrapped a blanket around her head and set it on fire. Several people in the building heard her screams, but no one investigated or called the police. Hopkins News Letter, Nov. 16, 1984, at 1. In San Francisco, someone kidnapped a man from his car in front of a group of onlookers, none of whom bothered to call the police. U.S. NEWS AND WORLD REPORT, Nov. 14, 1983, at 56. In Colorado, the chief of police of a small town lay on the side of a road crying for help after a rattlesnake bit him. None of the fifty motorists who passed by helped him or even called for assistance. Id. In California, a young woman was beaten to death on Christmas day in her apartment. Her neighbors ignored her cries for help for twenty-five minutes and only afterward called the police, who arrived on the scene within five minutes of the call. Grand Rapids Press, Dec. 27, 1984, at A3.

For a discussion of some of the "classic" cases of Bad Samaritanism, see W. PROSSER, LAW OF TORTS 340-43 (4th ed. 1971).

On a more positive note, people often perform acts of Good Samaritanism as well. One of the more noteworthy incidents occurred recently in Detroit. Collin Boatright, a four-foot nine-inch fourteen-year-old boy, spotted a six-foot two-inch man preparing to rape a young girl. After instructing a neighbor to call the police, young Boatright picked up a large stick, ran across the street to the house in which the attacker had dragged the girl, and confronted him. "I was scared," said Boatright, "really scared. I felt like an ant looking up at a giant, but I couldn't let him get away with attacking that little girl. So I drew my stick and told him to stop. I was ready to hit him like he was a baseball and I was trying to hit a home run." The police arrived shortly thereafter and arrested the would-be rapist. Detroit Free Press, Feb. 26, 1985, at A3.

6. At least twenty-one countries have passed laws prohibiting Bad Samaritanism, including France, Italy, and Germany. See Feldbrugge, Good and Bad Samaritans, 14 AM. J. COMP. L. 630, 655-57 (1966); Rudzinski, The Duty to Rescue: A Comparative Analysis, in THE GOOD SAMARITAN AND THE LAW 91 (J. Ratcliffe ed. 1966).

7. See generally W. PROSSER, supra note 5, at 338-50; W. LAFAVE & A. SCOTT, CRIMINAL LAW 182-91 (1972). For a discussion of the exceptions to this rule, see infra notes 29-44 and accompanying text.

8. See, e.g., B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 25-26; J. FEINBERG, supra note 1, at 126-86; Ames, Law and Morality, 22 HARV. L. REV. 97 (1908); Benditt, Liability for Failing to Rescue, 1 LAW & PHIL. 391 (1982); D'Amato, The "Bad Samaritan" Paradigm, 70 NW. U.L. REV. 798 (1975); Feldbrugge, supra note 6; Honoré, Law, Morals and Rescue, in THE GOOD SAMARITAN AND THE LAW, supra note 6, at 225; Hughes, Criminal Omissions, 67 YALE L.J. 590 (1958); Kleinig, Good Samaritanism, 5 PHIL. & PUB. AFF.
and Minnesota,\textsuperscript{10} have adopted such laws, thereby making it a
misdemeanor for people who witness others in serious danger
not to render reasonable assistance, provided they can do so
without endangering themselves. Two other states, Rhode Is-
land\textsuperscript{11} and Massachusetts,\textsuperscript{12} have taken a similar but more con-

\textsuperscript{9} 382 (1976); Linden, \textit{Rescuers and Good Samaritans}, 34 \textit{Mod. L. Rev.} 241 (1971); Rud-
note 6; Weinrib, \textit{The Case for a Duty to Rescue}, 90 \textit{Yale L.J.} 247 (1980); Woozley, \textit{A

\textsuperscript{10} MINN. STAT. ANN. § 604.05 (1984):

1. \textit{Duty to assist}. 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 can do so without danger or peril to himself or others, give rea-
sonable assistance to the exposed person. Reasonable assistance may include ob-
taining or attempting to obtain aid from law enforcement or medical personnel.
Any person who violates this section is guilty of a petty misdemeanor.

2. \textit{General immunity from liability}. Any person who, without compensation or
the expectation of compensation renders emergency care, advice, or assistance at
the scene of an emergency or during transit to a location where professional
medical care can be rendered, is not liable for any civil damages as a result of
acts or omissions by that person in rendering the emergency care, advice, or as-
assistance unless that person acts in a willful and wanton or reckless manner in
providing the care, advice, or assistance. Any person rendering emergency care,
advice, or assistance during the course of regular employment, and receiving
compensation or expecting to receive compensation for rendering such care, shall
be excluded from the protection of this section.

For the purposes of this section, the scene of an emergency shall be those
areas not within the confines of a hospital or other institution which has hospital
facilities, or an office of a person licensed to practice one or more of the healing
arts. . .

For the purposes of this section, compensation does not include nominal pay-
ments, reimbursement for expenses, or pension benefits.

\textsuperscript{11} R.I. GEN. LAWS §11-37-3.1 to §11-37-3.4 (1983):

11-37-3.1. \textit{Duty to report sexual assault}. — Any person, other than the victim,
who knows or had reason to know that a first degree sexual assault or attempted
first degree sexual assault is taking place in his/Her presence shall immediately
notify the state police or the police department of the city or town in which said
assault or attempted assault is taking place of said crime.

11-37-3.2. \textit{Necessity of complaint from victim}. — No person shall be charged
under 11-37-3.1 unless and until the police department investigating the inci-
servative approach to Bad Samaritanism, requiring those who witness certain violent crimes to notify the police.

In general, these four statutes appear to be a step in the right direction. They are not, however, free from problems. On the one hand, the Vermont and Minnesota duty-to-rescue statutes are burdensome insofar as they may require witnesses to get personally involved in rescue attempts. The Rhode Island and Massachusetts duty-to-notify statutes, on the other hand, impose a more reasonable duty but restrict its scope too much. The duty to notify arises in these states only when people witness certain specific crimes.\(^\text{13}\) This Note argues that states should follow

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11-37-3.3. \text{FAILURE TO REPORT—PENALTY.} —Any person who knowingly fails to report a sexual assault or attempted sexual assault as required under 11-37-3.1 shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than one year or fined not more than five hundred dollars ($500) or both.

11-37-3.4. \text{IMMUNITY FROM LIABILITY.} — Any person participating in good faith in making a report pursuant to § 11-37-3.1 shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report.

12. \text{MASS. ANN. LAWS ch. 268, § 40 (Michie/Law Co-op. Supp. 1985)}: 40. \text{FAILURE OF WITNESS TO REPORT AGGRAVATED RAPE, RAPE, MURDER, MANSLAUGHTER, OR ARMED ROBBERY; PENALTY.}

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

13. The Rhode Island statute is especially puzzling. It imposes the duty only when the witness observes an actual or attempted first-degree sexual assault. \text{See supra note 11. Why such a duty should apply when someone witnesses a rape but not, for example, a murder, is difficult to understand.}

Both statutes, moreover, encounter potentially serious problems insofar as they predicate liability on the witness's having known or having had reason to know that she was witnessing a particular type of crime. \text{See Kiesel, supra note 4, at 1208. The Rhode Island statute imposes liability only if the witness knew or had reason to know that she was witnessing a first-degree sexual assault. See supra note 11. Similarly, the Massachusetts statute imposes liability only if the witness knew that she was witnessing an aggravated rape, rape, murder, manslaughter, or armed robbery. See supra note 12. Predicating liability in this manner raises the following problems for both statutes, although these problems are particularly acute for the Massachusetts statute because it requires actual knowledge.}

First, the imposition of liability seems to require the witness to have known (or in the case of the Rhode Island statute, to have had reason to know) the elements of the crime she witnessed in order to be convicted for failing to notify. This would put an enormous burden on the prosecution because most defendants could not doubt truthfully claim that they did not \textit{know}, and could not have been expected to know, that what they were
Rhode Island and Massachusetts in enacting the duty to notify rather than the duty to rescue, but it also proposes that states generalize this approach so that the duty arises in all types of cases in which people witness others in serious danger. Part I of this Note explains the history of the law's response to Bad Samaritanism. Part II discusses the benefits of enacting a duty to notify. Part III responds to various objections that might be raised against the duty to notify. And Part IV offers a model statute for legislatures to follow in enacting the duty to notify.

I. BACKGROUND

This section discusses briefly the early common law's laissez-faire attitude toward Bad Samaritanism. It then considers the various exceptions to this position which have arisen during the last one hundred or so years in response to its apparent harshness.

A. Historical Development

The early common law imposed no general duty to rescue or notify. In fact, it specified very few situations in which one person witnessing was, for example, a first-degree sexual assault rather than a second-degree sexual assault.

Second, even if a witness had the capacity to have had such knowledge (e.g., the witness was a criminal defense attorney), imposing liability in this manner would apparently make it impossible for the state to convict the witness for failing to notify unless the attacker was ultimately convicted of one of the specific crimes listed. For example, if the attacker accepted a plea bargain and plead guilty to second-degree sexual assault, it would be extremely difficult to prove that the witness knew or should have known that she was witnessing a first-degree sexual assault, when it was never established by the court that the attacker in fact committed such an assault.

This then raises a third problem: because the witness apparently cannot be convicted for failing to notify until the attacker is convicted of one of the specific crimes listed, the state will often be unable to try, or at least convict, the witness until the attacker has been through a lengthy trial, and perhaps an appeal. Such a delay may well violate the witness's constitutional right to a speedy trial. U.S. Const. amend. VI.

The Model Statute this Note proposes avoids the problems of the Rhode Island and Massachusetts statutes by predicating the duty to notify on the purely factual question of whether the witness knew or had reason to know that the victim was in serious physical danger. See infra Part IV, Model Statute. This means that the witness can be convicted whether or not she knew the elements of any crime, and whether or not the attacker is ultimately convicted. All the trier of fact has to do is determine whether a reasonable person would have known that the victim was in serious physical danger.

14. See Frankel, Criminal Omissions: A Legal Microcosm, 11 Wayne L. Rev. 367, 367-84 (1965); Hughes, supra note 8, at 590-97. See also Glazebrook, Criminal Omiss-
son had a legal obligation to do something for another.\(^5\) Over the years, courts and legislatures began to formulate certain exceptions to the no-duty-to-rescue rule.\(^6\) These exceptions, however, developed slowly, so that even as late as a century ago, English courts generally acquitted mothers who let their children die of starvation rather than seek public assistance.\(^7\)

The reasons for this seemingly callous legal stance are not entirely clear. Most commentators mention that the King's Court needed to allocate its limited resources to stopping violent crimes, and could not be troubled with "mere" omissions.\(^8\) As Professor Frankel notes, the "rough and ready criminal law of the garrison society could not spare the manpower in a world of rogues, robbers, and felons, a world of hot blood and quick death, to punish the subtler harms arising by omission."\(^9\)

Another likely factor seems to have been society's emphasis on individualism and self-reliance.\(^10\) An "invisible hand" mentality prevailed, and people believed that a struggle among selfish individuals would automatically maximize the common good.\(^11\) Jurists of the day may have felt that enacting positive duties\(^12\) like a duty to rescue would undermine individualism and self-reliance and lead to a society based on weakness.

Another reason for the common law's reluctance to enact a duty to rescue may have been the failure of omissions to evoke fear in people.\(^13\) Violent crimes scare people: individuals tend to think that they could be the next victims. Acts of omission, on the other hand, such as failing to help someone bleeding to death on the side of the road, may make people indignant, but they do not provoke the instinct of self-preservation that makes individuals see the perpetrator as a potential danger to themselves or society.\(^14\)

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\(^1\) See Frankel, supra note 14, at 375-76.
\(^2\) As Professor Frankel puts it:
Finally, theoretical considerations may have contributed to the early common law's reluctance to impose a duty to rescue. The seemingly tenuous causal connection between omissions and harm, for example, apparently troubled some jurists. Likewise, the courts may have felt that positive duties like the duty to rescue imposed too great a burden on individual liberty to justify any benefits that might result from their enactment.

Whatever the reasons, the no-duty-to-rescue rule became embedded in the law through the effect of stare decisis. This rule remains the law today, though courts and legislatures have, especially during the last one hundred years or so, carved out certain exceptions to it in response to its apparent harshness.

B. Current Exceptions

With the exception of Vermont, Minnesota, Rhode Island and Massachusetts, the law in the United States imposes a duty to...
rescue or render aid only in certain situations. For convenience’s sake, these situations can be grouped into five roughly distinct categories. First, courts have imposed a duty to render aid upon parties who share special relationships. These include relationships of intimacy and relationships in which the party upon whom the duty is imposed gains economic benefits from the association. Parents, for example, have a duty to care for their children, innkeepers have a duty to protect their guests, and employers have a duty to watch out for their employees.

Second, courts have recognized that individuals bound by certain contractual agreements have a duty to render aid. A railroad gateman, for example, has an obligation to lower his gate when necessary and will be held liable for any injuries to passengers that result if he fails to do so. Likewise, a lifeguard who sits idly by and watches a swimmer drown may be liable for the swimmer’s death. Thus, courts impose a duty to render aid upon those whose job it is to help others.

Third, courts have imposed a duty to rescue upon those who put others in danger through ordinary negligence. Thus, a golfer who negligently endangers another golfer by an errant shot has a duty to that golfer. Likewise, a person who accidentally starts a fire in a building has a duty to provide reasonable assistance to another person trapped inside.

Fourth, a person who begins to render assistance to another has a duty to provide continued assistance if the rescuer’s terminating the rescue attempt would put the victim in a worse position than he was in prior to the rescue attempt. The rescuer must not abandon the victim, in other words, unless the rescuer leaves the victim in at least as good a position as the victim was in prior to the attempted rescue. If, for example, someone volunteers to care for an infant, then fails to do so adequately and the child dies, that person will be liable for the child’s death. The rationale for this rule is that a potential rescuer’s aborted rescue attempt discourages others from helping who could otherwise save the victim.

30. See generally W. Prosser, supra note 5, at 338-50; W. Lafave & A. Scott, supra note 7, at 182-91. See also Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962).
35. See W. Lafave & A. Scott, supra note 7, at 185.
37. W. Lafave & A. Scott, supra note 7, at 186.
Fifth, courts have imposed certain duties to warn or rescue on landowners. For example, landowners must look out for the safety of their business visitors. Furthermore, a landowner may have a duty to warn an innocent trespasser if the landowner knows that the trespasser is in danger while on the premises.

Finally, a duty to aid others in certain circumstances may be specifically imposed by statute. For example, hit and run statutes require drivers to stop and render aid after an accident, even, in some jurisdictions, if the driver was not at fault. In addition, a few states have statutes requiring people to assist police or firefighters when called upon to do so.

II. Reasons for Enacting a Duty to Notify

The enactment of a duty to notify would serve several purposes. Most importantly, a duty to notify would help to deter the harm that results from Bad Samaritanism. In addition, the statute would function as a formal declaration of society's disapproval of Bad Samaritanism. Finally, enacting a duty to notify may help to stimulate good samaritan behavior that goes beyond the requirements of the statute.

A. Deterrent Effect

A duty-to-notify statute would reduce the harm resulting from Bad Samaritanism in at least three ways. First, it would directly mitigate the harm to victims of violent crimes and serious accidents.
dents. In many cases, a timely phone call to the police would save the victim. The stabbings in the Genovese murder, for example, occurred over a period of thirty-five minutes, but the police arrived only two minutes after they were called.\textsuperscript{46} It is quite likely that if someone had called the police after the first of the attacks, Ms. Genovese would have survived. In the New Bedford case, in which the attack went on for more than an hour, an early phone call would no doubt have prevented much of the victim's trauma.\textsuperscript{47} And in several of the other cases referred to earlier, prompt notification of the police would probably have prevented the tragedy.\textsuperscript{48} A duty-to-notify statute, then, by compelling people to notify the police immediately when they witness others in very dangerous situations, should prevent some of the harm that would otherwise result.\textsuperscript{49}

Even in those situations in which notice to the police is not timely enough to prevent harm to the victim, the duty-to-notify statute would have a preventative impact insofar as it increases the likelihood that an attacker will be caught and prevented from committing future crimes. If the statute compels people to notify the police more quickly and more frequently than they otherwise would in the case of violent assaults, then presumably the odds of catching the attackers will increase.

Finally, the duty to notify would probably have a general deterrent effect as well. If the odds of a violent attacker's being caught are increased because there is an increased likelihood that the police will be notified of the attack if it is witnessed, then there should be a corresponding drop in violent crimes in

\textsuperscript{46} See supra note 3.
\textsuperscript{47} See supra note 4.
\textsuperscript{48} See supra notes 2 and 5. The Pinckney murder case provides a good example of a death that could probably have been prevented through prompt notification of the police. Dining did not die for some time after he was originally beaten and stuffed in his trunk, as evidenced by the fact that he continued to plead for mercy when his attackers stopped twice later on to beat him further. If one of the witnesses had called the police when Dining was first beaten and put in his trunk, he may well have survived.
\textsuperscript{49} Often, of course, merely notifying a police agency may be less efficacious than a rescue attempt. If a witness sees someone drowning, for example, a phone call to the police might not elicit help quickly enough to save the person's life. Nonetheless, a notice requirement has certain advantages over a rescue requirement—above and beyond those discussed in the rest of this Note—that tend to offset this loss in efficiency. First, requiring people to notify rather than attempt a rescue lowers the risk that the victim will be further harmed through a negligent rescue attempt by a non-professional. Second, the notice requirement lowers the risk of injury to the would-be rescuer. Rescues can often be dangerous, see U.S. NEWS & WORLD REP., Nov. 14, 1983, at 56, so it is safer to have police and medical professionals perform them. Thus, the duty-to-notify statute may, all things considered, prove nearly as efficient in preventing overall harm as a duty-to-rescue statute.
cases in which the attacker perceives a risk of being detected.\textsuperscript{50} In other words, criminals would be less inclined to commit violent assaults in the presence of witnesses if they knew that the witnesses were legally obligated to call the police.\textsuperscript{51}

To produce these three deterrent effects, the duty-to-notify statute would, of course, have to compel people to notify the police more frequently than they otherwise would. Given certain basic principles of criminology, there are several ways in which the duty-to-notify statute should be able to accomplish this objective. First and foremost is a criminal law’s ability to coerce people to obey through fear of punishment.\textsuperscript{52} By increasing the cost to witnesses of not notifying the police, the statute should increase notification.\textsuperscript{53}

Second, the statute would eliminate any uncertainty people might have about whether they are expected to notify the police when they witness someone in grave peril. Doubts about societal expectations can sometimes prevent people from doing something they would normally be inclined to do.\textsuperscript{54} Thus, some people who might otherwise call the police when they witness someone in serious danger refrain from doing so because they are afraid their actions will be considered “meddling.”\textsuperscript{55} The duty-to-notify statute would eliminate this uncertainty by letting people know that their failure to notify is a criminal offense.

Finally, the statute would probably influence people simply by virtue of its being the law. For some people, the statute’s influence would derive from their belief that they ought to be law-abiding, regardless of the sanction or likelihood of being caught.\textsuperscript{56} For others, a change in the law would help to change their attitudes: people who once viewed Bad Samaritanism with indifference may begin to find it morally unacceptable when it is prohibited by law.\textsuperscript{57}

\textsuperscript{50} See Friedman, Commonsense on Deterrence, reprinted in J. Kaplan & J. Skolnick, Criminal Justice 54-58 (3d ed. 1982).
\textsuperscript{52} See S. Glueck, Crime and Correction 78-79 (1952).
\textsuperscript{55} See Note, supra note 53, at 556-57.
\textsuperscript{56} See C. Andrain, Political Life and Social Change 23-24 (2d ed. 1974).
\textsuperscript{57} See infra notes 63-64 and accompanying text.
B. Statement of Disapproval

In addition to its preventative value, the duty to notify would serve the important function of formally declaring society's disapproval of Bad Samaritanism.\(^{58}\) It would let bad samaritans know that our society does not condone such harmful behavior. This may be important not only as a symbolic declaration, but also for its impact on people's attitudes toward the law as a whole.\(^ {59}\) As Professor Honoré notes, it is one of "those indubitable and unprovable commonplaces which are the very meat of jurisprudence that people's attitudes to particular laws often depend on their reverence for the law as a whole. If so, the failure of the law to reflect and reinforce moral duties undermines other, quite distinct laws."\(^ {60}\) Given the moral outrage that people often harbor toward bad samaritans,\(^ {61}\) the failure of the law to prohibit Bad Samaritanism may have an adverse impact on people's respect for the legal system generally.\(^ {62}\)

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58. As sociologist Joseph Gusfield has observed: "Laws are statements of public policy and opinion as well as instruments for courts to implement and police to enforce. The very passage of a law is an act of public definition of what is moral or immoral." Gusfield, Social Sources of Levites and Samaritans, in The Good Samaritan and the Law, supra note 6, at 196.

59. See Honoré, supra note 8, at 239-40.

60. Id.

61. Even those who claim that legal sanctions against Bad Samaritanism are unjustified usually grant the appropriateness of moral outrage. See, e.g., Henderson, Process Constraints in Torts, 67 CORNELL L. REV. 901, 942-43 (1982). See also Buch v. Amory Mfg. Co., 69 N.H. 257, 260, 44 A. 809, 810 (1898)(judge grants that defendant may be a "moral monster" but holds that he is nevertheless under no legal obligation to render aid).

62. One commentator has argued that a formal societal condemnation of Bad Samaritanism is undesirable insofar as it levies an unfair moral censure against those—such as overly timid people—who cannot conform their conduct to the requirements of the law. See Note, The Duty to Rescue, 47 IND. L.J. 321, 324-25 (1972). This argument, however, confuses the notion of condemning a certain type of behavior, on the one hand, and condemning an individual, on the other. The law may condemn certain behavior, such as murder, without necessarily condemning or blaming a particular individual who engages in it. The individual may have a legitimate excuse, such as insanity, that negates both the individual's responsibility for, and the law's condemnation of, the individual's behavior. It would be foolish, though, to argue that the law should not label as blameworthy a type of behavior that is harmful because some individuals who violate the law cannot be held responsible for their actions. The law serves an important function in condemning harmful behavior such as killing and Bad Samaritanism, even if in exceptional circumstances courts decide not to condemn individual killers or bad samaritans.
C. Increased Altruism

Imposing a duty to notify may also inspire people to do altruistic acts that go beyond the minimal requirements of the duty. Legal scholars have often said that the law not only reflects people's values, but also helps to shape them.\textsuperscript{63} If this is so, then it is likely that a legal prohibition against Bad Samaritanism could help change people's attitudes about "getting involved."

At least one empirical study supports this position.\textsuperscript{64} In this experiment a large number of subjects were asked to fill out a questionnaire that polled their moral judgments on a number of hypothetical factual situations involving various degrees of Bad Samaritanism. After some of the hypotheticals the subjects were told that the bad samaritan's behavior was illegal; after others they were told that the behavior was not illegal. The experiment's result was that significantly more people thought a bad samaritan's behavior was immoral when they thought it was illegal than when they thought it was legally permissible.\textsuperscript{65} This finding indicates that people's attitudes about a particular type of behavior are shaped by what they perceive to be the law's response to that behavior.

If this is true, then imposing a duty to notify should lead people to an increased awareness of the harmfulness of Bad Samaritanism and to a greater appreciation of its moral unacceptability. Increased moral censure of Bad Samaritanism, in turn, may inspire people toward greater altruistic behavior,\textsuperscript{66} and it may also help to bring about a heightened sense of community among individual members of society.

III. Possible Objections to the Duty to Notify

Legal commentators have raised several objections to the enactment of a duty to rescue that one might also raise against the enactment of a duty to notify. Some of these objections are primarily theoretical: they assert that there is something fundamentally illegitimate about enacting positive duties of this sort.

\textsuperscript{63} See, e.g., D'Amato, supra note 8, at 809; Frankel, supra note 14, at 400.

\textsuperscript{64} Kaufman, Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgement, in ALTRUISM AND HELPING BEHAVIOR, supra note 54, at 77.

\textsuperscript{65} Id. at 80.

Other objections are more practical in nature. They assert that even if the duty to rescue is a good idea in principle, in practice it would be undesirable and ineffective.

Because objections such as these will probably constitute the main bar to the adoption of a duty to notify, they merit and receive extensive consideration in this Note. Although some of these objections have merit against the duty to rescue, none has much force against the duty to notify. Thus, none of these objections is of sufficient importance to outweigh the benefits of a duty to notify, and none constitutes a good reason not to adopt the duty to notify that this Note proposes.

A. Theoretical Objections

Four major theoretical arguments have been raised in the legal literature against the duty to rescue. One asserts that omissions cannot give rise to liability because they do not cause harm. Another asserts that all non-contractual positive duties the state imposes are illegitimate. A third asserts that the duty to rescue is a type of forced altruism and that forced altruism is wrong. And the fourth holds that the duty to rescue imposes an undue burden on individual liberty. Although the last of these arguments has some force against the duty to rescue, none of the arguments presents a problem for the duty to notify.

1. The Causal Argument—The Causal Argument against the enactment of a duty to rescue consists of two claims.\(^67\) The first is that a failure to rescue cannot be the cause of harm because it is merely an omission. The second is that it is unfair and inconsistent with the American legal system to punish people for harm they do not cause.\(^68\) A proper analysis of the first element is beyond the scope of this Note: the causal status of omissions is a difficult question and one that has aroused much controversy.\(^69\) It is not necessary to address this question, how-

\(^67\) See J. Feinberg, supra note 1, at 165-85; Husak, Omissions, Causation, and Liability, 30 Phil. Q. 318 (1980).

\(^68\) For examples of the Causal Argument, see Mack, Bad Samaritanism and the Causation of Harm, 9 Phil. and Pub. Affs. 230 (1980); Weinryb, Omissions and Responsibility, 30 Phil. Q. 1 (1980). See also Epstein, A Theory of Strict Liability, 2 J.Leg. Srud. 151, 194-95 (1973) (employing a version of the Causal Argument to justify the no-duty-to-rescue rule in tort law).

\(^69\) For arguments against the view that omissions cause harm, see Weinryb, supra note 68; Mack, supra note 68. For arguments in support of the view that omissions can be causes of harm, see H.L.A. Hart & A. Honore, CAUSATION IN THE LAW 24-47, 58-64 (1959); J. Feinberg, supra note 1, at 165-85. See also Kleinig, supra note 8, at 391-98
ever, if the second element of the Causal Argument can be discredited. The remainder of this section attempts to do so, arguing that in fact this second element is either false or irrelevant, depending on how it is construed.

If the second element of the Causal Argument is construed to mean that the American legal system does not impose liability on anyone who has not caused harm, then it is false. Perpetrators of inchoate crimes, such as criminal attempts and conspiracies, are liable in the absence of harm. So, for example, are those who fail to perform certain state-imposed positive duties, such as the duty to pay one's income taxes or the duty to report for service when drafted by the military. If, on the other hand, the second element of the Causal Argument is construed to mean that it is unfair to punish people for causing harm they did not in fact cause, then it may well be true, but it is irrelevant to the duty to notify. For the failure to prevent harm can easily be conceptualized as an offense distinct from the offense of causing harm.

Indeed, if certain omissions do not constitute causes of harm, then they not only can, but must, it seems, constitute an independent basis for liability. Consider, for example, a case in

(,arguing that omissions are "causal factors"). For an excellent analysis of causation generally, as well as its specific application to the law, see H.L.A. HART & A. HONORE, supra, at 1-122.

70. See W. LAFAVE & A. SCOTT, supra note 7, at 423-95.
71. See infra notes 81-82 and accompanying text.
72. See Husak, supra note 67. To argue that failure to prevent harm could not constitute an independent ground for liability, the proponent of the Causal Argument would either have to argue that causation is a necessary condition for liability or offer some other general principle according to which liability for failing to prevent harm is illegitimate. But the claim that causation is a necessary condition for liability is contradicted by the law governing inchoate crimes, by state-imposed positive duties, by laws against drunk driving, etc. See supra notes 70-71 and accompanying text. And it is difficult to imagine any other plausible principle of liability that would preclude imposing liability for failure to prevent harm. See infra note 73.

73. Consider in general the exceptions to the no-duty-to-rescue rule discussed in Part I, supra notes 29-44 and accompanying text. If these cases are correctly decided, they either belie the claim that omissions cannot cause harm, or they demonstrate that allowing harm can itself be an independent source of liability. The causal question loses its importance because liability is imposed in these cases regardless of the causal status of the omissions. See Note, Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 UCLA L. Rev. 252, 267-69 (1984).

Of course, to refute the Causal Argument, one need not argue that failing to prevent harm must constitute an independent source of liability if omissions do not cause harm; it is enough that it legitimately can. This then puts the burden of proof on the opponent of the duty to notify to both offer some reason why it is wrong to impose liability for merely failing to prevent harm, and to explain why at the same time it is permissible to impose liability for failing to prevent harm in the babysitter case and the other cases
which a babysitter fails to warn children that it is not safe to play with the blender, and as a result, their fingers are cut off. Would a judge absolve the babysitter of all responsibility for the harm if one could demonstrate conclusively that the babysitter's omission could not properly be said to have caused the harm? That certainly seems unlikely. Rather, a court confronted with such a demonstration would probably hold that the babysitter's omission was itself actionable, even if it was not a cause of the harm, because the babysitter had by virtue of his employment a duty to try to prevent harm to the children, as well as a duty not to harm them. The law does not, in such a case, punish the babysitter for causing harm he did not in fact cause; rather, it punishes the babysitter for allowing harm he should have prevented.

Causation may have a bearing on the degree of responsibility involved in such cases, but it does not constitute a necessary condition for liability. Thus, the Causal Argument fails, regardless of the causal status of omissions, because there is no reason why omissions like failing to notify cannot themselves constitute grounds for liability, whether or not they constitute that constitute the exceptions to the no-duty-to-rescue rule. See supra notes 29-44 and accompanying text.

Professor Weinryb attempts to provide such an explanation through an appeal to what he calls the "uniqueness requirement" of responsibility ascriptions. According to this principle, the "idea of responsibility requires that it should be uniquely ascribed." Weinryb, supra note 68, at 9. A causal connection is one way to meet this uniqueness requirement, Weinryb claims. But it can also be established in certain contexts through "voluntary obligations," such as promises, and through what he calls "role responsibility."

The liability which is imposed in the cases that constitute exceptions to the no-duty-to-rescue rule, he claims, results from voluntary obligation or from role responsibility. In the latter, the defendant assumes a certain role by virtue of a special relationship he has with the victim. This role brings with it particular duties that do not arise in ordinary cases of Bad Samaritanism in which there are no special relationships between the parties. Thus, Weinryb argues, liability is properly imposed in the exceptions to the no-duty-to-rescue rule because they, unlike instances of Bad Samaritanism generally, satisfy the uniqueness requirement.

Although Weinryb's explanation is consistent, it is not very compelling. He offers no arguments in support of his claim that responsibility must be uniquely ascribed, and the claim itself seems incorrect. The law does, in many instances, hold numerous people liable for the same tort or crime. Indeed, it is difficult to imagine how the law could possibly ascribe responsibility uniquely for offenses such as conspiracy. Justifying liability in terms of role responsibility, moreover, begs the question. It is not very enlightening to explain that a parent has a duty to rescue her drowning child but a stranger does not because the role of a parent carries with it certain affirmative duties and the role of a stranger does not. That merely restates the rule: a parent has a duty to rescue her child, but a stranger does not. To justify the rule, Weinryb would have to explain why the law should treat the roles of the parent and the stranger differently.

74. See Woozley, supra note 8, at 1288-89.
distinct grounds from actually causing harm.\textsuperscript{75}

2. The Libertarian Argument—The duty to notify might be challenged on Libertarian grounds as a politically illegitimate positive duty.\textsuperscript{76} According to Libertarianism, the only political obligations people have are to keep their contractual obligations and to avoid harming other people; consequently, a government that requires more than this from its citizens violates their rights.\textsuperscript{77} Thus, it may be argued, it is illegitimate for the state to impose a general duty to notify, because people have not contracted to notify, and they do not harm others by failing to notify, but merely fail to help them.

One can make several responses to the Libertarian Argument. First, Libertarianism's plausibility as a viable theory of political obligation is certainly open to question. Although an adequate critique of the theory is beyond the scope of this Note, it should at least be noted that most political philosophers find Libertarianism's view of political obligation impoverished.\textsuperscript{78} This, of

\textsuperscript{75.} Professor Jerome Hall puts the point this way:

[If] a husband sees his wife standing in the way of an oncoming train, or a father sees his infant immersed in the bathtub and, being able to do so, he fails to act, no one doubts his penal liability on the ground that the train, in the one case, the water in the other, caused the death. . . . This indicates that physical causation alone does not determine liability. There must be something else, and in criminal omissions, that element is illegal inaction, one might say, wrongly allowing the forces of physical causation to operate when one, bound by law, could have altered one of the consequences.

J. HALL, supra note 45, at 195-96.

Even if one rejects the Causal Argument, however, one might still claim that punishing omissions violates the criminal law's \textit{actus reus} requirement insofar as an omission is not an act. The rationale behind the \textit{actus reus} requirement, however, is not to restrict the criminal law to positive acts, but to prohibit punishment for a mere harmful disposition or a culpable mental state. See W. LAFAVE & A. SCOTT, supra note 7, at 175. Failing to pay one's taxes, failing to comply with a military draft, and failing to carry one's license when driving are examples of omissions that the criminal law prohibits. These make it clear that the concept of \textit{actus reus} includes omissions as well as positive acts. Or as Professor Williams puts it: "It is therefore less misleading to say that a crime requires some external state of affairs that can be characterized as criminal." G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 31 (1980).


\textsuperscript{77.} R. NOZICK, supra note 76, at ix; Hospers, supra note 76, at 12-13.

\textsuperscript{78.} Even within the Liberal tradition, the Libertarian position on positive duties is opposed by both of the main currents of political theory: Utilitarianism, on the one hand, and the mainstream of contemporary Kantianism, or rights-theory, on the other. For discussion of the Utilitarian position on positive duties see, e.g., J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, chs. 1, 17, § 19 (1789); R. BRANDT, ETHICAL THEORY 413-22 (1959). For discussion of the mainstream rights-theory position on positive duties see, e.g., C. FRIED, RIGHT AND WRONG 110-19 (1978); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE § 49(c) (1797); J. RAWLS, A THEORY OF JUSTICE 114-17 (1971).
course, does not demonstrate that Libertarianism is wrong, but it should make one suspicious of Libertarianism as a basis for criticizing a law.

Furthermore, even if one were to grant the Libertarian position on political obligation, it would not necessarily follow that a duty to notify would be illegitimate. It might be possible to justify such a duty even within the narrow confines of Libertarianism. Professor Feinberg, for example, has argued forcefully that a failure to rescue or notify can be a source of harm to other people.\(^7\) If this is true, then the state can legitimately impose a duty to rescue or notify on people, even within a Libertarian framework. A duty to notify may also be justifiable within the Libertarian framework on quasi-contractual grounds.\(^8\) According to this view, the government is justified in imposing a duty to notify on people because by doing so it also confers on them a benefit, namely, increased protection in the event that they are ever in serious danger.

From a practical and legal standpoint, the most important objection to Libertarianism is that it is not consistent with the American legal system. Libertarianism may be of considerable theoretical interest, but its practical import is not very significant because the law does impose positive duties on people that go beyond honoring contracts and avoiding harmful behavior. For example, the law requires people to pay taxes to promote the general welfare,\(^9\) and it often requires them to serve in the military during times of war.\(^2\) The law compels people to render assistance to others under the exceptions to the no-duty-to-rescue rule,\(^8\) and it imposes a duty upon entrepreneurs to keep their business premises safe.\(^4\) Libertarians may object to such duties, but they nevertheless remain firmly entrenched within the American legal system.


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80. The notion of quasi-contract, as applied to political theory, is basically equivalent to Rawls's "principle of fairness." *See* J. Rawls, *supra* note 78, at 108-14. The duty to notify can be seen as creating, in effect, a cooperative scheme that benefits all, and that therefore entitles the majority to demand cooperation from all. For a criticism of this theory see R. Nozick, *supra* note 76, at 90-95. Cf. A. Simmons, *Moral Principles and Political Obligations* 101-42 (1979)(criticizing Nozick's argument, but joining Nozick in rejecting the principle of fairness).


82. *See* Arver v. United States, 245 U.S. 366 (1917) (upholding the constitutionality of the draft).

83. *See* supra notes 29-44 and accompanying text.

not accept Libertarianism may object to the idea of a statute that requires people to do something to aid others. One such objection is that a law that required people to perform altruistic acts would vitiate the moral worth of those acts. According to this argument, an altruistic act has moral worth only if it is performed without coercion. Thus, if the law required rescues, they would cease to be morally valuable.

This argument seems Kantian insofar as it stresses the importance of motivation in determining the moral worth of an action, and undoubtedly it has a certain intuitive plausibility. For example, it seems reasonable to suppose that a person who sends money to feed the poor out of charity is more virtuous than a person who sends money to the poor because of a legal obligation. Actually, though, the argument is flawed because it confuses the idea of a legal obligation with the idea of coercion.

Kant's point is that an action has moral worth only if the motivation behind it is respect for the moral law. If the action is coerced through fear of legal or other sanction, or is done for selfish ends, then it is not virtuous. But it does not follow from the fact that an action is required by law that its performance is coerced. Many people obey such laws voluntarily. They would do what the law specified regardless of whether the law required them to do so. For these people, good acts do not cease to be

85. See Epstein, supra note 68, at 200-01.
86. Id.
87. See Weinrib, supra note 8, at 266 n.73.
88. One might argue, however, that even when one takes motive into account, an altruistic act required by law seems slightly less virtuous than an equivalent act not required by law. For example, a person who gives money to the starving when not obligated by law to do so may seem more virtuous than one who gives when required by law, even though in both cases the donor gives out of a sense of love for his fellow man rather than fear of legal sanction. Thus, one could argue that enacting positive legal duties diminishes the overall amount of goodness or virtue in the world.

Even if one accepts this notion of increasing and decreasing the overall goodness or virtue in the world, however, it does not follow that enacting positive duties would result in a net reduction of goodness or virtue. For it is also plausible to view a person who sits in a bar and allows a rape to take place as more blameworthy than a person who notifies the police out of fear of legal sanction, even though both individuals act wholly from self interest. Thus, if enacting positive duties decreases the amount of goodness in the world, then apparently it also decreases the amount of moral evil in the world, because it prevents people from omitting to do their duty. Doing one's duty for a selfish reason, in other words, seems less blameworthy than failing to do one's duty at all. Thus, any decrease in goodness or virtue in the world resulting from the enactment of positive duties would seem to be offset by a corresponding decrease in evil.

89. See I. Kant, FOUNDATIONS OF THE METAPHYSICS OF MORALS § 1 (1785).
90. Id.
91. See E. Johnson, CRIME, CORRECTION & SOCIETY 17-26 (1964) (emphasizing the important role extra-legal social norms play in influencing social behavior).
good merely because they are required by law.

Indeed, if requiring a virtuous act by law vitiates its moral worth, then it should follow that honesty in one’s handling of other’s property would lack moral worth because of the existence of laws against larceny and conversion.92 By the same reasoning, one might advocate legalizing assault or murder so as to maximize the moral value of the behavior of those who voluntarily refrain from maiming and killing. It seems strange, in other words, to argue that a certain type of reprehensible behavior should be legal because it would be better if people voluntarily refrained from such behavior. It might indeed be better not to have criminal laws in a world in which everyone did as he should without external coercion. But that world is not our world, and in our world criminal sanctions are often a necessary response to harmful behavior.93

Yet even those who do not accept the argument that forced altruism vitiates the moral worth of altruistic acts might feel un-

92. See Woozley, supra note 8, at 1292-93.

93. Professor Epstein apparently anticipates this objection by arguing that the preservation of moral worth is not the only factor to be considered in determining the legitimacy of a law. He seems to advocate a balancing test between the need to preserve the moral worth of voluntary acts by not hindering freedom, and the need to control harm to others by restricting freedom. He views the no-duty-to-rescue rule as striking the proper balance between these competing concerns. See Epstein, supra note 68, at 200-01.

The claim that criminal prohibitions diminish the moral worth of good acts is not very plausible, though, unless one also holds that this loss in moral worth can be offset by a corresponding lessening of moral evil brought about by the law’s ability to deter immoral acts and omissions. See supra note 88. Preserving the moral worth of actions, therefore, is not a significant factor to be considered in determining the legitimacy of a law, and there is thus no need to balance it against the desire to prevent harm.

Even if one were to grant Epstein’s view regarding the moral worth of actions, however, together with his claim that the goal of preserving moral worth must be balanced against the goal of preventing harm to society, it is not clear that the no-duty-to-rescue rule would strike the proper balance between preventing harm and preserving moral worth.

Epstein apparently thinks that striking the proper balance between these competing interests would lead one to draw the line so as to distinguish “conduct which is required and that which, so to speak, is beyond the call of duty,” and that the no-duty-to-rescue rule accomplishes this result. Epstein, supra note 68, at 201. He does not explain, however, why he thinks that a distinction drawn between acts required by duty and acts beyond the call of duty would strike the best balance between preventing harm and preserving moral worth. Nor, as Professor Feinberg argues, is it very plausible to say that the distinction between positive duties and negative duties corresponds to the distinction between actions required by duty and those beyond the call of duty. It seems wrong, for example, to say that a person who lets a baby drown in one foot of water is not morally blameworthy. Rescuing the baby is obligatory, it seems, not something above and beyond the call of duty. See J. FEINBERG, supra note 1, at 149-50. Thus, even if one were to grant Epstein’s claim that a law requiring people to rescue would diminish the moral worth of that action, it would be far from clear that such a duty would on that account prove undesirable.
easy about enacting a law that requires people to perform charitable or altruistic acts. Such uneasiness, however, is unfounded. In the first place, imposing a duty to notify is really not equivalent to forcing people to perform charitable acts. The duty to notify applies to all people equally. Instead of requiring one class of people to benefit another without remuneration, it makes all of us donors in the event we witness another in serious danger, and allows all of us to be recipients if we are ever in serious danger. Thus, the duty-to-notify statute should not prove problematic even for those who believe that it is wrong for government to compel charitable acts.

Furthermore, our system of government already imposes legal requirements that come much closer to the idea of forced charity than does the duty to notify. When the state taxes people to redistribute wealth through welfare payments, for example, or when it uses tax money to send famine relief to a foreign country, it is requiring people to contribute to the well-being of others without receiving anything in return. Thus, even if the duty to notify were a type of legally enforced charity, it would not be inconsistent with the American legal system.

4. **The Individual Liberty Argument**—A further argument against the duty to rescue is that it would impose an undue burden on individual liberty. This argument raises an important consideration, but its force against the duty to notify is quite limited.

The argument seems plausible because, other things being equal, certain positive duties impose a greater restriction on people’s freedom than negative duties. This greater burden exists because one may have to perform a positive duty such as the duty to rescue without warning; thus, it can take people by surprise. If people witness someone in serious danger, they must drop what they are doing and try to assist the person. A negative duty, on the other hand, such as a law prohibiting theft, is something people can plan their lives around because they always know what they can and cannot do.

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94. Here an analogy with taxing people to provide police protection seems apt. Imposing a duty to notify is one way the state can provide protection to its citizens. In effect, the statute “deputizes” an individual to assist the police when that person witnesses someone in serious danger.


97. See Frankel, supra note 14, at 424; Epstein, supra note 68, at 198.

98. See J. FEINBERG, supra note 1, at 163-65.
That a particular law imposes a positive rather than a negative duty, however, is certainly not the only or most important factor to be considered in determining how great a burden it imposes on individual liberty. A negative duty may be very burdensome, and a particular positive duty may hardly be burdensome at all. The main factor is how contrary to the individual’s lifestyle the duty is, not whether it is positive or negative. A law prohibiting homosexual acts among consenting adults, for example, may prove to be much more burdensome for some people than a law requiring people to carry their driver’s licenses with them when they drive. Thus, one cannot necessarily conclude that a law imposes an undue restriction on individual liberty merely because it imposes a positive duty.

In the case of a duty to rescue, one might reasonably argue that the cost imposed by the duty—having to get personally involved in a rescue attempt—outweighs the benefits of the law. But a similar argument against the duty to notify is not very plausible, for the duty’s impact on individual liberty is quite minimal. The Model Statute this Note proposes simply requires people to notify a police agency if they witness someone in serious danger. The average person is likely to encounter such a situation only rarely, and some people may go their entire lives without such a duty arising. Furthermore, the statute does not ask all that much of people; it requires only that they make a reasonable effort to notify a police agency if the duty arises. Given the great harm that can result from Bad Samaritanism, this seems a small price to pay.

B. Practical Objections

Legal commentators have raised several arguments designed to show that the duty to rescue would be impracticable. One claims that it would be impossible to draw a line between the duty to rescue and other positive duties of which most people would not approve. Another asserts that the duty to rescue would be “non-verifiable,” and therefore undesirable. A third argument claims that the duty to rescue would be unenforceable. And a fourth asserts that the duty to rescue would encourage criminals to feign injury in order to lure would-be rescuers into

99. See infra Part IV, Model Statute.
100. Id.
101. See supra notes 2-5 and accompanying text.
Duty to Render Aid

traps. These four objections are somewhat plausible with regard to the duty to rescue. They do not, however, raise significant problems for the duty to notify.

1. The Line-Drawing Argument— Some commentators have claimed that even if the duty to rescue is a good idea in theory, its enactment might not be because of the difficulty of drawing a line between this duty and more extensive infringements on individual liberty that are undesirable.\(^{102}\) The problem, as some commentators see it, is that duties requiring actions such as rescue, which society may approve of, cannot be distinguished from duties that society would probably not want to impose on people, such as a duty to give money on demand to starving beggars.\(^{103}\)

It is difficult to see, however, why one would think that enactment of a duty to rescue or notify would lead to more intrusive duties. Proponents of this argument may feel that it is impossible to formulate a clear, bright-line rule that would distinguish the duty to rescue from more intrusive duties, but such a fear is unfounded. Although some proposed duty-to-rescue statutes may suffer from open-endedness,\(^{104}\) it is by no means an intractable problem. The Minnesota duty-to-rescue statute, for example, limits the duty to cases in which the witness is “at the scene of an emergency.”\(^{105}\) This precludes the possibility of extending the duty to require people to give money to a beggar.

Duty-to-notify statutes, moreover, are even less likely than duty-to-rescue statutes to contain expansive language. It is very difficult to imagine how a statute requiring notice could be interpreted to require someone to give money to a beggar, or to require a doctor to travel to another country to operate on a sick

\(^{102}\) See, e.g., T. Macaulay, Notes on the Indian Penal Code, in 17 Complete Works 318-20 (1898); Epstein, supra note 68, at 198-99; Hale, supra note 21, at 215.

\(^{103}\) Professor Epstein puts the argument like this:

Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty. . . . Even if the rule starts out with modest ambitions, it is difficult to confine it to those limits. Take a simple case first. X as a representative of a private charity asks you for $10 in order to save the life of some starving child in a country ravaged by war. There are other donors available but the number of needy children exceeds that number. The money means nothing to you. Are you under an obligation to give the $10?

Epstein, supra note 68, at 198-99.

\(^{104}\) See, e.g., the Model Statute proposed by Rudolph, supra note 8, at 499-509.

person, or to require any other such duty. Imprecision, therefore, should pose no real problem for a carefully drafted duty-to-notify statute.

Perhaps, though, the Line-Drawing Argument is directed toward the threat of judicial activism. People may fear that "liberal" judges will extend the duty to rescue beyond the intent of the legislature to include actions such as giving money to beggars, in the same way that the federal courts have apparently extended such protections as civil rights and the right to privacy beyond the original intent of the framers. This fear is also unfounded, however, because it ignores a crucial difference between constitutional interpretation and statutory interpretation. The former can be overridden only after a constitutional convention or a two-thirds vote of Congress, together with the approval of three-quarters of the states. A statute that receives an undesirable interpretation, on the other hand, can generally be altered by a simple majority vote of the legislature. If a legislature that passes a duty-to-notify statute dislikes the interpretation it gets from the courts, it can always change the statute to correct the problem. Thus, judicial interpretation poses no more of a line-drawing problem than legislative drafting.

106. These examples are mentioned by Macaulay, supra note 102, at 314-15.
109. U.S. Const. art. V.
110. 81A C.J.S. States § 52 (1977); Delaware ex. rel. Morford v. Emerson, 40 Del. 328, 340, 10 A.2d 515, 520 (1939).
111. Advocates of the Line-Drawing Argument may also have in mind a more theoretical objection to the duty to rescue. They may think that there is no principled difference, only a difference in degree, between requiring people to rescue and requiring them to give money to beggars, and that any line drawn between the two is therefore arbitrary and unjustified.

If this is the argument, however, then it is not very persuasive. It simply does not follow from the fact that two concepts differ only as to degree that the concepts are not meaningfully distinct, or that a distinction made on the basis of such concepts is unjustified. The concepts "black" and "white" are clearly and meaningfully distinct, notwithstanding the fact that there are no clear zones of discontinuity in the gray area between them where one could hope to draw a bright line. Differences in degree can be very important, and even if the difference between requiring people to rescue and requiring them to give money to beggars is merely one degree, it certainly does not follow that a legal line drawn between the two is unjustified or arbitrary in an invidious way. Society may, for example, think that non-burdensome positive duties are legitimate, while burdensome ones are not. Such line-drawing is common in the law, and necessary if one is going to strike an equitable balance between competing considerations.

Consider, for example, the use of force in self-defense. Whether such force is legitimate or not depends on whether it is "reasonable." See W. LaFAve & A. Scott, supra note 7, at 391-97. Although the difference between reasonable force and unreasonable force is one of degree, it does not follow that the concepts of reasonable force and unreasonable
2. The Non-Verifiability Argument—One commentator\textsuperscript{112} has raised a related argument against the duty to rescue that concerns the inability of individuals to know in a given situation whether the statute requires them to act or not. He refers to this inability as the problem of "non-verifiability."\textsuperscript{113} The difficulty, according to this commentator, is that in many cases would-be rescuers cannot determine whether acting or refraining from acting is more likely to expose others to risks of harm. The resulting uncertainty is unfair to those upon whom the duty is imposed, and it encourages unwanted meddling in the affairs of others. For example, a person who witnesses a young couple struggling in the back seat of an automobile "may not be sure whether he is watching a rough and tumble courtship or an imminent rape. A call to the police may be either helpful or traumatic in its effect, depending on the circumstances."\textsuperscript{114} The situation is different with other laws, according to this view, because the person in doubt may always err on the side of safety. But with the duty to rescue, an error on either side may cause harm.

Although this objection may have some validity against certain duty-to-rescue statutes, due to the fact that mistaken "rescues" have the potential for infringing on people's personal lives, it has little force against the duty-to-notify statute this Note proposes. First, the duty to notify arises only when the witness knows or has reason to know that someone is in grave physical peril.\textsuperscript{115} Thus, a truly ambiguous situation like the "rape" case would not trigger the duty. Furthermore, the duty is limited to notifying the police and does not compel people to become personally involved in such situations; thus it reduces the possibility of unwanted meddling.

The non-verifiability problem is not, moreover, unique to positive duties such as the duty to notify. On the contrary, it arises in a number of legal contexts. People defending themselves from attack, for example, are faced with a similar dilemma: whether to use only moderate force and risk further attack, or to defend themselves vehemently and risk exceeding the bounds of "reasonable force," thereby committing an assault of their own.\textsuperscript{116}

\textsuperscript{112} See Henderson, \textit{supra} note 61, at 932-35.

\textsuperscript{113} Id. at 932. Henderson views verifiability as one of several "process constraints" that have shaped the common law rules governing tort liability.

\textsuperscript{114} Id. at 934 n.163.

\textsuperscript{115} See \textit{infra} Part IV.

\textsuperscript{116} See W. \textsc{Lafave} & A. \textsc{Scott}, \textit{supra} note 7, at 391-97.
Nor is it true with the duty to notify that the person deciding whether or not to notify the police cannot err on the side of safety. The person who believes, but is not sure, that an individual is in grave peril should play it safe and notify the police. In very few legitimate situations are law-abiding people in a public place harmed by someone's notifying the police about what they are doing. In the "rape" case, for example, it is clear that the risk of harm is much greater if the witness refrains from calling the police than if she calls the police and leaves it up to them to determine whether or not the situation is worth investigating. Surely the harm resulting from a rape is greater than the harm likely to result from a police officer's temporarily interrupting the passion of a pubescent pair who are probably breaking the law by making love in public anyway.\textsuperscript{117}

Thus, the individual who is unsure whether to notify or not should err on the side of safety and call the police. Rather than being a drawback, this safety factor should prove to be an asset. It will encourage people to notify the police in situations in which they do not actually know that the victim is in serious danger, but believe it to be probable nonetheless. In such situations, it is preferable that the police be aware of the danger and make their own assessment of the situation, within the constraints of the fourth amendment,\textsuperscript{118} than to risk allowing serious harm. Hence, the supposed problem of "non-verifiability" may be more of a benefit than a burden.

3. The Enforceability Argument—At least one commentator has argued that a duty to rescue would prove unenforceable;\textsuperscript{119} a similar objection might also be raised against the duty to notify. The main thrust of this objection is that the police cannot identify all those who may witness a serious accident or violent attack and then fail to report it.

Although some people who violate the duty-to-notify statute would undoubtedly escape detection, the statute's effectiveness does not depend on the police's ability to catch all, or even most, of the offenders. If the risk of getting caught represents a substantial threat, most people would probably conform to the easy requirements of the statute rather than risk criminal sanction.\textsuperscript{120} People react in this way to many other criminal laws. Although most people who actually violate these laws are not apprehended

\textsuperscript{117} See Model Penal Code, § 251.1 (1962).
\textsuperscript{118} See, e.g., Terry v. Ohio, 392 U.S. 1 (1968) (before investigating, officer must have reasonable belief that criminal activity may be afoot).
\textsuperscript{119} See Note, supra note 62, at 327.
\textsuperscript{120} See supra notes 50, 52.
on any given instance, the threat that they will be is enough to keep many people from breaking the law.

Furthermore, the law’s ability to stimulate compliance with its dictates is not limited solely to coercion through threat of punishment. It is likely that some people who might not otherwise assist someone in peril would obey a duty-to-notify statute simply because it is the law, and others would do so because of the law’s role as a moral teacher and guide. Thus, many people would obey the law, even if the risk of getting caught violating it is slim.

Finally, enforcement of the duty to notify would probably not prove as difficult as it might at first seem. The European duty-to-rescue statutes have apparently not encountered serious enforcement problems, and there is no reason to believe the duty-to-notify statute presented here would be any more difficult to enforce. In many cases of Bad Samaritanism, the identity of the witnesses is not in doubt. And even when the identity of the witnesses is more difficult to determine, the police should be able to identify some of the witnesses by questioning people known to be in the vicinity of the crime or accident, such as neighbors. Thus, although enforcement of the duty-to-notify

121. In the case of crimes such as burglary, car theft, carrying a concealed weapon, etc., the majority of violations are either undetected or unsolved. See H. Bloch & G. Geis, supra note 66, at 123-26. See also M. Phillipson, Understanding Crime and Delinquency 102 (1974); J. Wilson, supra note 51, at 224.

122. See supra notes 54-57 and accompanying text.


124. Consider the cases of Bad Samaritanism discussed earlier in this Note, supra notes 2-4 and accompanying text. In almost half of these cases, there was apparently no problem identifying witnesses.

125. A problem that could arguably arise from the duty to notify is a possible chilling effect it might have on getting certain witnesses to talk. Someone who witnesses a serious crime but does not notify the police may, when later questioned by the police, deny being a witness for fear of being convicted under the duty-to-notify statute. Although this is a legitimate concern, there are several reasons why it should not present a significant problem. (I am indebted to Michael Gilliland for bringing this problem to my attention.)

First, the chilling effect generally applies only to people witnessing crimes. In the case of accidents and injuries there is usually not the same need for witnesses to testify. So far as crimes are concerned, the main way to avoid the chilling effect is to offer immunity to those witnesses suspected of withholding information because they fear being prosecuted under the duty to notify. Of course, offering immunity raises problems of its own; in particular, it can greatly weaken the statute’s ability to deter Bad Samaritanism. If the prosecution grants people immunity when they violate the statute, it seems, then there will not be any incentive for them to comply with it.

In fact, however, this fear is exaggerated. Even if the prosecution granted everyone immunity, the statute would still serve a preventative purpose. The granting of immunity basically affects only the law’s ability to coerce people into compliance, and as noted
statute might not be easy, it would not be so difficult as to viti-
ate the benefits of the statute. Police are professionals at law
enforcement, and the duty to notify would probably present less
of an enforcement challenge than many existing laws.

4. The Faker Argument—A further problem with the duty
to rescue is that criminals may feign serious injury to lure
would-be rescuers into a trap in order to rob them.126 Such inci-
dents do occur from time to time,127 and a duty-to-rescue statute
seems to encourage such criminal behavior by making it easier
for those feigning injury to entice would-be rescuers into their
traps.

The duty-to-notify statute, however, avoids this problem. It
does not require a witness to risk injury or attack by assisting a
victim personally. It only requires witnesses to call the police.
Thus, the duty to notify does not compel people to do something
that might appear safe, but may in fact be dangerous. The duty-
to-notify statute may even discourage such ploys, for if wit-
tnesses, in accordance with the statute, summon the police when
they see someone who appears to be injured, they alert the po-
lice to the trap should the “victim” turn out to be faking.

earlier, there are other ways in which the statute would stimulate compliance, and other
reasons for having such a statute. See supra notes 53-66 and accompanying text.

Furthermore, it probably would not be necessary to grant immunity to all or even most
of the witnesses in most criminal cases because the police would generally not need to
question everyone who witnessed the attack to make a case. Those who are not needed as
witnesses could still be prosecuted. Because a witness to a violent crime would not gener-
ally know whether the police would need his testimony, he would risk prosecution by
failing to notify. It would also be possible to grant partial immunity to those who coop-
erate, thereby eliminating the chilling effect while preserving the statute’s ability to levy
sanctions against violators. Thus, the prosecution’s ability to grant immunity to certain
witnesses in order to obtain information should not significantly detract from the stat-
ute’s ability to compel people to notify.

In fact, in certain cases the duty to notify may actually enhance the ability of police to
obtain information. The chilling effect presents a problem only with regard to those wit-
nesses who would otherwise testify, except that they fear prosecution under the duty-to-
notify statute. Others who would fail to notify, however, would probably refuse to testify
after the fact as well, whether or not there was a duty to notify. By offering these recalci-
trant witnesses partial or full immunity from the duty to notify, the police could offer
them an incentive to testify that would otherwise be lacking.

126. See D’Amato, supra note 8, at 811 n.47.

127. For example, in Detroit, a young college student stopped to help a man who was
lying on a sidewalk, apparently injured. When the student approached the man, the man
suddenly sat up, pointed a gun at the student, and demanded his money. After taking
his wallet, the man told the student to lie on the ground, and then shot him dead. De-
IV. A MODEL STATUTE

This section proposes a model statute that legislatures could use as a guide in drafting duty-to-notify statutes. The comments that follow the statute explain its various provisions.

DUTY TO NOTIFY

SEC. 1. Any person who knows or has reason to know that another person is in serious physical danger, and who witnesses this person's predicament, shall notify a police agency of the danger as soon as reasonably possible, unless:

(a) the person witnessing the predicament knows that a police agency has already been notified; or
(b) the person witnessing the predicament is unable to notify a police agency with a reasonable effort; or
(c) the endangered person appears able to notify a police agency without outside help.

SEC. 2. A violation of Section 1 is a misdemeanor punishable by a fine of not more than $500, imprisonment for a term not to exceed 30 days, or both.

SEC. 3. Proof of a violation of this statute does not constitute grounds for imposing civil liability on persons who violate the statute.\textsuperscript{128}

Comments

This statute imposes a general criminal duty to notify on those who witness another in serious physical danger. It contains

\textsuperscript{128} The purpose of Section 3 is, of course, to prevent this criminal statute from being used as a tool for enacting civil liability through the doctrine of negligence \textit{per se}. See W. Prosser, \textit{supra} note 5, at 190-204. This Note does not argue against the enactment of civil liability for Bad Samaritanism, but merely suspends judgment in light of the more complicated problems such liability involves. In particular, certain problems involved in allocating responsibility for the harm which results from Bad Samaritanism require further study. For arguments against enacting civil liability by authors who are in favor of criminal liability, see D'Amato, \textit{supra} note 8, at 801-04; Benditt, \textit{supra} note 8, at 409-48.
certain qualifications, however, that are necessary to prevent it from being overly inclusive.

A. Serious Physical Danger

The statute limits the duty to notify to situations in which the victim is in “serious physical danger.” This means that a witness need not notify the police unless the victim is suffering serious bodily harm, or there is a substantial possibility that the victim will suffer such harm in the immediate future. The duty thus extends only to serious cases. It applies, for example, when the victim is being beaten, shot, stabbed, or raped, or when there is a substantial possibility that such an assault will result if help is not called. It applies also when someone has been seriously injured in an accident or has suffered a heart attack.

The duty to notify does not apply when the harm is trivial or the risk of harm slight, or when the harm is wholly mental or spiritual. A witness is not required to give notice, therefore, of a car accident in which no one is hurt, or of a minor physical injury such as a broken finger, or if she believes that someone’s soul is in peril. Limiting the duty in this way keeps it from being excessively burdensome to the witness and ensures that it does not encourage people to meddle in the affairs of others when their help is not required.

B. Knows or Has Reason to Know

The duty to notify is also limited to situations in which the witness knows or has reason to know that the victim is in serious physical danger. This limitation prevents the statute from applying the duty to people who witness an ambiguous situation which, though it in fact involves a victim in serious physical danger, is not clear enough to lead a reasonable person in the witness’s position to know that the victim is in such danger. For purposes of this statute, having “reason to know” of the danger means being presented with clear and convincing evidence that someone is in serious physical danger.

One might argue that the statute is still overly inclusive because the objective standard of knowledge it employs would allow punishment of someone too stupid or unreasonable to realize

129. See supra notes 112-18 and accompanying text.
that he is witnessing someone in serious physical danger. It is not fair to apply a reasonable person test in the criminal law, one might claim, because punishment is legitimate only if the defendant’s subjective mental state is culpable.\textsuperscript{130}

This criticism has merit, but it raises a dilemma that is not unique to the duty to notify. The choice between a subjective standard and an objective standard often confronts the drafter of a criminal statute,\textsuperscript{131} and to a large extent requires a tradeoff between considerations of fairness on the one hand and the need to conserve scarce judicial resources on the other. Looking to the defendant’s subjective mental state lessens the possibility that someone could be convicted for being unreasonable rather than callous, but it also generally requires more extensive litigation to determine what that mental state was. This type of extensive litigation is probably necessary for serious crimes, because the punishment is severe, but it is not practical for minor offenses, for which the punishment is not severe, and for which the prosecution cannot afford to spend a great deal of time on the case.\textsuperscript{132}

In these less serious cases it seems preferable to rely on judicial discretion to reduce the possibility of unfair application. This Note chooses the objective standard, therefore, because the relatively light penalty the statute imposes does not merit the extensive litigation often required to determine a defendant’s subjective mental state. If a legislature believed it important to employ a subjective standard, however, it could easily do so without otherwise affecting the statute.

\section*{C. Witnesses the Peril}

The Model Statute requires that the defendant must have witnessed the danger in order to be prosecuted under the duty to notify. It is not enough that someone merely know of the danger; the person must also see the victim’s plight, or witness it in some other sensory manner, such as hearing the victim cry for help. The purpose of this requirement is to prevent the duty

\begin{footnotesize}
\begin{enumerate}
\item[(130)] In effect, the Model Statute presented here requires a \textit{mens rea} of negligence: the witness must have had reason to know of the victim’s peril and have failed nonetheless to notify. For a general discussion of negligence as \textit{mens rea}, see W. Lafave & A. Scott, \textit{supra} note 7, at 208-18; H. Hart, \textit{Punishment and Responsibility} 136-57 (1968).
\item[(131)] For example, the objective standard is often employed for certain types of driving offenses and for negligent homicide. See W. Lafave & A. Scott, \textit{supra} note 7, at 108.
\item[(132)] See G. Williams, \textit{supra} note 75, at 46-48; W. Lafave & A. Scott, \textit{supra} note 7, at 216-17.
\end{enumerate}
\end{footnotesize}
from extending to people who have only indirect evidence that someone is in danger.

\[ \textbf{D. Police Already Notified} \]

A person does not have to notify the police under the duty-to-notify statute presented here if that person knows that a police department or another suitable authority has already been notified. A passerby who witnesses a serious car accident, for example, need not provide notice if an ambulance is already on the scene. This limitation avoids needless repetition of notice.

\[ \textbf{E. Reasonable Effort} \]

The Model Statute requires only that the witness make a reasonable effort to notify, and it excuses those who witness someone in serious physical danger but cannot notify the police without extraordinary effort. This wording is, of course, flexible, and courts will have to work out its exact parameters on a case-by-case basis. Nevertheless, the Model Statute does not require one to give notice if one is camping many miles from the nearest phone or police station, nor does it require one to risk injury to oneself to give notice. The statute is designed to prevent outrageous failures to notify, not to compel acts of heroism.

The reasonableness limitation applies also to the immediacy with which notice must be given. Thus, an ambulance driver on an emergency run can wait until she gets back to the hospital before notifying police. Likewise, a witness who aids the victim personally, believing that notification would be too late to help, may wait until after the rescue to notify the police.\textsuperscript{133}

\textsuperscript{133} Many states have passed "Good Samaritan Laws" that grant immunity from tort liability to those who accidentally injure the victims of rescue attempts, unless such injury was recklessly or intentionally inflicted. See Note, \textit{Good Samaritan Statutes—Adrenalin for the "Good Samaritan,"} 13 De Paul L. Rev. 297 (1964). Basically this seems like a good idea insofar as it encourages people to get personally involved without actually requiring them to do so. Whether states grant such immunity or not, however, good-faith rescuers should not be punished for failing to give immediate notice if the reason for the failure was that they were busy aiding victims. Good-faith rescuers meet the statute's notice requirement, therefore, if they provide notice as soon as reasonably possible after the rescue attempt.
F. Appears Able to Notify

Finally, the duty to notify does not apply if the person in danger appears to be able to summon help without assistance. This limits the duty to cases in which the victim wants or would want help, were he cognizant of the danger. Such wording is necessary to ensure that the statute does not require people to meddle in the affairs of others if their help is not desired. It also makes the duty less burdensome to witnesses by eliminating the need for them to help those who can help themselves.

CONCLUSION

The duty to notify may strike some people as a rather radical idea because it is unfamiliar. This Note has attempted to dispel such skepticism, however, by arguing that the law's apparent indifference toward Bad Samaritanism is supported by neither reason nor sound policy. The model duty-to-notify statute presented here requires very little of people, especially when weighed against the benefits that should result from its enactment. Considering that the duty raises no significant theoretical or practical problems for the legal system, its enactment seems desirable. This Note therefore urges legislatures to adopt the duty to notify as a minimally burdensome tool for combating the needless injury and loss of life that result from Bad Samaritanism.

—Mark K. Osbeck