Let us take for granted that persons ought to provide easy rescues and other acts of aid for persons in grave peril when they can do so at minimal risk, cost, and inconvenience to themselves. The question that needs to be answered is whether this moral obligation ought to be enforced by the criminal law. In other words, should we follow the lead of a number of European countries and enact bad samaritan laws? In order to give a positive answer to this question, proponents of bad samaritan laws must overcome at least three sorts of obstacles. First, they must show the laws are morally legitimate in principle, that is, that the duty to aid others is a proper candidate for legal enforcement. Second, they must show that this duty to aid can be defined in a way that can be fairly enforced by the courts. Third, they must show that the benefits of the laws are worth their problems, risks and costs.

I will be addressing obstacles of all three sorts, but drawing my conclusions primarily from the third. I’ll be arguing that even if bad samaritan laws can be shown to be morally legitimate in principle and can be drafted in sufficiently precise terms, they are still not likely to do much good and won’t be worth their problems and costs. As a result, I’ll conclude, we ought to pursue the aim of the laws (i.e., getting people to aid others) in other, non-coercive ways and I’ll suggest a few.

In more detail, in section I, I will discuss three arguments in support of the moral legitimacy of bad samaritan laws. They focus on a citizen’s duty to the state, a potential victim’s right to be

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1 Many thanks to Michael Green, Dan Hefter, Vicki Igneski, Frances Kamm, Alex de Miranda, Janice Nadler, Jerry Postema, Arthur Ripstein, David Schmitz, Louis du Toit and Kit Wellman for their comments on an earlier draft of this manuscript. Additional and tremendous thanks to Kit Wellman and the Jean Beer Blumenfeld Center for Ethics for organizing and funding the conference at which this and the other manuscripts in the present volume were discussed.
rescued, and on the societal duty to provide a safety net for those in need. In section II, which focuses on problems of draftsmanship and enforcement, I will provide a brief discussion of traditional line-drawing problems and their solutions, and then focus on some lesser-discussed problems associated with assessments of risk. One of my primary aims is to expose the need to clarify whom we intend to cover under the heading "bad samaritan" and the difficulty of drafting and enforcing the laws in ways that would cover most of those individuals and not too many others. In section III, I will discuss the expected benefits of the laws in terms punishing the blameworthy, deterring future bad samaritans, and sending a symbolic statement about community and aid. I'll argue that given the laws as we currently envision them, these benefits are far less likely to materialize than proponents seem to believe, and that the steps needed to make them materialize will dramatically increase the number of problematic convictions. I will also suggest that, in the absence of efforts to change other parts of our law in ways that will help limit the occurrence of serious harm and death to individuals at minimal cost to the aider, our current efforts toward bad samaritan laws may appear more like psychological venting in response to a few dramatic cases than sincere efforts to effect a good.

Before turning to these matters, a few points of clarification are in order. First, when discussing the moral duty to aid others, "duty" will be used to cover the weak notion of something one ought to do – something required of decent human beings – as well as the stronger notion of something one is obliged to do or something that can be demanded as a matter of rights. In so doing I mean to leave open the questions of whether there is a moral right to be rescued and whether the duty to aid is best classified an imperfect duty, a perfect duty, or neither. Second, I will be concerned with the legal enforcement of the duty to aid only as it would be part of our crim-

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2 For example, I ought to respond politely when asked what time it is and ought to share my extra water with a thirsty hiker. For a discussion of the related notion of "suberogation" see Julia Driver, "The Suberogatory," Australasian Journal of Philosophy, 70, 1992.

3 Even if the duty to aid is a perfect duty, its legal enforcement is still open to debate, given that there are number of perfect duties not enforced by law. For related discussions, see Patricia Smith, Liberalism and Affirmative Obligation, Oxford University Press: New York, 1998, chapter 2, and Samuel Freeman,
inal law. I will not be addressing civil liability for failures to aid.4 Further, I will be concerned with criminal laws of the sort enacted by Vermont and Wisconsin – laws that oblige persons to provide easy rescues and other acts of aid for persons in grave peril, and not with the much less demanding laws that merely oblige persons to notify authorities of a crime in progress but never oblige persons to provide aid themselves. “Duty to Notify” laws have been enacted in Florida, Massachusetts, Ohio, Rhode Island and Washington and are able to avoid some of the problems that I’ll raise herein (though they are not problem free).5

Third, the duty to aid that would be enforced by bad samaritan laws does not rest on any special relationship between the agent and potential victim, such as that between mother and child, lifeguard and swimmer, etc., but instead on common humanity and immediate need.6 Duties resting on special relationships can oblige the agent to go to great lengths to aid the other, whereas the duties we are considering require only that the agents provide easy rescues and

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5 In Florida and Rhode Island, the duty to report is limited to specific kinds of criminal conduct, raising questions about why, for example, sexual assault needs to be reported but attempted murder does not. See David Biggs, “The Good Samaritan is Packing,” *University of Dayton Law Review*, vol. 22:2, 1997, 225–264, p. 230. Also, the threat of prosecution for failing to report may deter some initially reluctant witnesses from ever coming forward and may taint, in the eyes of the jury, the objectivity and credibility of the witnesses that do report. See Daniel Yeager, “A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers” (*Washington University Law Quarterly*, vol. 71, 1993, 1–58, p. 35) for comments from prosecutors who choose not to enforce such laws because they threaten the objectivity of potential witnesses.

6 Pat Smith argues that the presence of an emergency situation in which the potential victim is not in control of her welfare and the potential rescuer is in control, creates a sort of special relationship between them. Smith admits, however, that this is an atypical use of the notion of a special relationship because it lacks the voluntary undertaking on the part of at least one of the parties that is generally characteristic of special relationships (e.g., accepting a job as a lifeguard, taking a baby home from the hospital). Patricia Smith, *Liberalism and Affirmative Obligation*, p. 42.
other acts of aid when they can do so with minimal risk, cost, and inconvenience to themselves – or “minimal risk” for short. Indeed the potential rescuer is not really required to be a good samaritan at all, but only a minimally decent one. Fourth, I’ll be assuming that the omissions of the bad samaritan would not be the cause of the harm that ensues. Were they the cause, there would be no need for a special type of law nor a plausible basis for limiting the amount of effort, risk, or cost that could be required of the samaritan. Fifth, bad samaritan laws should not be confused with a very popular type of law that has come to be called “good samaritan” law. Instead of imposing liability for failing to aid, good samaritan laws provide a protection against liability for persons who non-negligently cause a harm in the course of providing aid. They thus encourage people to provide aid by removing one of the fears of getting involved – the fear of getting sued.

Finally, although I’ll ultimately be criticizing bad samaritan laws, I’ll not be claiming that their main problem, or even a significant problem, is that they constitute a significant threat to the cherished right of autonomy. I do cherish that right, but I grant that providing easy rescues and other acts of aid at minimal risk to oneself does not itself limit autonomy in any significant way. I mention this now to avoid future misunderstanding because a number of proponents of the laws write as if the main objection of the critics is that the laws constitute significant infringements of autonomy (though I’ve found few critics who actually make that claim). Instead, my focus will be on practical problems, or what Henderson has called “process constraints,” that arise when we try to implement laws that may be legitimate in theory.

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7 Judy Thomson is credited with coining the term (Thomson, “A Defense of Abortion,” Philosophy and Public Affairs, 1, 1971, 47–66). The good Samaritan of the Bible, recall, went way out of his way to help the stranger in need.

8 For example, Yeagher, a proponent of bad samaritan laws, states that he aims to “criticize the common notion that affirmative duties are intolerable because they threaten autonomy” (emphasis added). Yeager, “A Radical Community of Aid,” p. 8.

9 Henderson, op. cit.
I. MORAL LEGITIMACY

Let’s turn to the first of the three sorts of obstacles – that of establishing moral legitimacy. To say that bad samaritan laws are morally legitimate in principle is to say that enactment of the laws is consistent with the basic principles and commitments of the legal-political system in question. In other words, it says that the conduct of the bad samaritan is properly the law’s business. Of course, given the wide variety of views about the proper principles and commitments of a legal system, we shouldn’t be surprised by the wide variety of arguments supporting and criticizing the legitimacy of bad samaritan laws. Libertarians, for example, are not likely to be persuaded by any argument supporting the legitimacy of the laws since the conduct of the bad samaritan just isn’t the law’s business on their view. On the other hand, legal moralists, at least some communitarians, and others who have no principled objection to enforcing morality *per se* (*i.e.*, to prohibiting acts that are deemed immoral by the community’s standards but do not cause harm to others) have no trouble establishing the legitimacy of bad samaritan laws within their favored system. Since the failures of the bad samaritan are agreed to be immoral, their prohibition by the criminal law is a proper function of the state. It is beyond the scope of this paper to cover all of the arguments that lie between these extremes, but I will cover three rather different arguments in support of the laws and mention some of the challenges or limitations they face.

First, Steven Heyman argues that the “strongest basis for a legal duty to rescue is to be found not in morality but in the obligations of citizenship.”10 According to Heyman, “government is formed to protect its citizens against violence” and in exchange for this protection, citizens are obliged to “assist the government in enforcing the laws” against violence.11 Thus, on this view, our duty to aid is a duty

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10 Steven J. Heyman, “Foundations of the Duty to Rescue,” *Vanderbilt Law Review*, 47, 1994, 673–755, p. 679. Heyman also rejects the “common view that common law has never imposed liability either in tort or in criminal law for failures to rescue.” He argues that “although no general duty to rescue existed in private law, the common law often imposed positive duties as a matter of public law, including a duty to assist in preventing criminal violence,” p. 682.

11 Heyman, p. 679.
owed to the government, as opposed to the potential victim, and it is a duty we have in virtue of our status as citizens of a particular society.

As it stands, this defense could easily support the enactment of laws obliging citizens to notify the police of a crime in progress, thereby enabling the police to do the job for which they were specially trained. But it can’t support the enactment of laws requiring citizens to actually provide aid, nor laws requiring citizens to aid in non-crime situations. Heyman is aware of this problem and attempts to resolve it by expanding his defense to (a) cover duties to aid in non-crime situations, and (b) show that the duties are owed to other citizens as well as to the state. Stated briefly, he argues that the responsibility of government has expanded to cover the protection of citizens in non-crime situations as well as crime situations, and that, as a result, the citizen’s duty has expanded as well. In addition, he argues that social contract theory explains why the duty to aid is also owed to other citizens, since they initially contracted with each other to form the state. But Heyman’s arguments are not likely to be widely convincing. One problem is that even if the government’s role has evolved into doing more than providing protection against violence, we can’t infer from this that it ought to have so evolved nor, more significantly, that citizens have a duty to assist it in every function that it now covers. Providing education to minors is widely regarded as a proper function of government, but it doesn’t follow from this that every citizen has a duty to assist in this function other than by paying her taxes.

A second problem is that Heyman’s arguments presuppose particular conceptions of the social contract that critics of his view can reasonably reject. For example, he assumes that the hypothetical contracting agents would agree to a duty to do “whatever is reasonably necessary” to prevent harm to another, rather than agree only to create and fund agencies designed to prevent harm, and agree to have that agreement enforced by the criminal law instead of relying on the honor and goodness people. These assumptions would be plausible were we also assuming that people would not aid others without the threat of criminal punishment. Were that the case, our hypothetical contracting agents could be assumed to have agreed to
the laws because then the benefits would outweigh the burdens.\(^\text{12}\) But that *isn’t* the case. We have ample evidence that people are willing to aid others in the absence of a legal obligation to do so and sometimes in the presence of great risk to themselves. Thus, the crucial question isn’t whether it would be prudent or reasonable to agree to aid others when we can do so at minimal risk to ourselves. We can assume that it would be. Instead, the crucial question is whether, on the one hand, we’d be better off having that agreement enforced by the criminal law, with all moral costs associated with fairly interpreting and applying the laws (I’ll discuss a number of these later), all the societal costs in terms of the time and resources directed towards this as opposed to other, perhaps more serious crimes, and all the personal costs of time, money and emotional distress associated with defending oneself against a criminal charge even if one is ultimately acquitted, or, on the other hand, allow it to remain part of our moral obligations and left solely up to us to decide when the duty applies. Since neither option is clearly unreasonable, Heyman can’t legitimately *assume* that the social contractors would have agreed to bad samaritan laws. As a result, his arguments are unpersuasive.

A second defense of the moral legitimacy of bad samaritan laws avoids these problems by grounding the duty to aid not in obligations that citizens owe to their particular government, but instead in the potential victim’s *intrinsic right* to be rescued, a right the victim has in virtue of her humanity. According to this view, enactment of a legal duty to aid merely protects or enforces an individual’s pre-existing moral right in a way that is consistent with the liberal tradition. Pat Smith, for example, argues that

\(^{12}\) A number of proponents seem to reason this way. For example, D’Amato argues that bad samaritan laws may be grounded in self interest or “pure Hobbesian expediency,” with the benefits that one receives from the laws outweighing the burdens they impose (Anthony D. Damato, “The “Bad Samaritan” Paradigm,” *Nw. U. L. Rev.* vol. 70, 1975, p. 805). Samuel Freeman supports a similar view in “Criminal Liability and the Duty to Aid the Distressed (at 1477), and Jay Silver goes further by assuming that the laws will actually be effective in preventing deaths and that the “lives saved would justify any new incursions on individual liberty.” (Jay Silver, “The Duty to Rescue: A Reexamination and Proposal,” *Wis. & Mary L. Rev.* vol. 26, 1985, as discussed in John M. Alder, “Relying on the Reasonableness of Strangers,” *Wisconsin Law Rev.* Sept./Oct. 1991, p. 927.)
the foundation of the right to emergency aid is exactly the same as the foundation for negative rights not to be harmed, namely, the minimal requirements of justice to respect the intrinsic worth of all persons. Any argument that applies to negative rights also applies to the right to a reasonable (or at least a minimal) effort to provide critically needed emergency aid. All are based on and derived from the basic commitment to respect the intrinsic moral worth of all individuals that is widely recognized as the core of liberal individualism.13

In short, Smith argues that an individual’s right to be rescued is grounded in the same thing as her right not to be harmed, namely, her intrinsic worth as a human being. To fail to provide easy rescues is to act contrary to the liberal tradition by implying that the victim’s life is worthless, according to Smith.

Views such as Smith’s may be highly plausible to some and highly implausible others, given the controversy over the possibility of intrinsic positive rights. Joe Ellin challenges Smith’s view by arguing that the claim that an individual’s life has intrinsic worth does not entail that others are obliged to spend their own resources to protect it. “My failure to save you implies only that I do not think that the burden of saving you falls on me; it implies nothing of what I think about the value of your life. (If I did think your life were worthless, I would give myself the right to kill you, like an insect.)”14 Rights-based accounts of the duty to aid also suffer from a version of what I will call the free-rider problem. If my intrinsic worth as a human being is enough to give me a right to your help when I can’t save myself and you can save me (at no significant risk to yourself), then I may selfishly put myself in situations that oblige you to aid. Consider the following case:

Karen lives on the shores of Lake Michigan, in a condominium complex that shares a private beach with another complex. Karen’s favorite sport is windsurfing (also called sailboarding). Many days during the windsurfing season the wind blows off-shore, that is, from the shore toward the lake. Windsurfing on these days is especially fun for an intermediate sailor such as Karen, because the off-shore winds neutralize the waves that would otherwise make it

13 Smith, Liberalism and Affirmative Obligation, p. 39.
difficult to windsurf on Lake Michigan. However, windsurfing on these days is also dangerous because, after one is done sailing, the direction of the wind makes it very difficult to sail back to shore. (Thus, Karen is not at risk from the windsurfing itself, but from not being able to get back to shore and being blown farther and farther into Lake Michigan.) Karen knows this, but also knows that at least ten excellent windsurfers live in the condominium complex next door and that they have access to a rescue boat owned by their complex. Thus every weekend (or any other day that the beach is crowded), Karen goes windsurfing, confident that if she can’t make it back to shore on her own, others will be obliged to come rescue her before she drifts out to the center of Lake Michigan and either becomes exhausted and drowns, or dies from exposure during the night. And although Karen thanks the persons who interrupt their BBQ or other beach activities to drag out the rescue boat and come get her, she does so only to be neighborly. She knows (according the view we are considering) that she in fact has a right to their aid and she owes them no more of a thank you than she does for them not killing her.

Now it seems to me that there is something objectionable in Karen’s behavior and attitude and also that this intuition is difficult to explain if we agree that one’s intrinsic worth as a human being generates a right to easy rescues. On the one hand, what seems objectionable is not merely that Karen failed to appreciate the efforts that others made on her behalf but also, and primarily, that she relied on those efforts by taking their probability into account when deciding on her daily activities. In so doing, she took advantage of the good will of her neighbors and she shouldn’t have done that, or so our (my?) intuitions tell us. On the other hand, if Karen’s status as an intrinsically worthy human being in need give her a right to her neighbors’ aid, then why shouldn’t she rely on it and take it into account? After all, the aid is owed to her. Of course, each day she windsurfs she hopes she won’t get into trouble and need the assistance of others, but if she does, the aid she receives is her due – her right – and not a matter of good will, or something for which she owes thanks. Hence she has done nothing wrong, or so it also seems.
A proponent of the rights-based account of the duty to aid might respond that we could avoid the apparent conflict by claiming that the right to easy rescue arises only when the potential victim cannot save herself. (Smith makes this claim.\textsuperscript{15}) But this tack won’t work in the present case because Karen couldn’t save herself at the time the rescue was needed. Of course, she could have avoided getting into the dangerous situation by not sailing on the days of off-shore winds, or by sailing only at beaches with a paid rescue staff, but if avoidability precludes the right to aid, then it precludes it in the cases of the woman who was attacked while walking home alone from the theater late at night, the car-jacking victim who bought a known “hot” car, or the flood victim who built her house in a flood plain. Proponents of the rights-based defense of the duty to aid are not likely to claim that these victims had no right to be aided. Further, claiming that the existence of the right depends upon the avoidability of the risk undermines the claim that it rests on one’s intrinsic worth as a human being.

A second attempt to square the objectionableness of Karen’s conduct with the rights-based account of the duty to aid asserts that since the risk in the windsurfing case is slow in coming, it can be addressed by government agencies such as the Coast Guard, thereby freeing Karen’s neighbors of the duty to aid. But this method won’t work either because in the present case (which is a true case except that the windsurfer in question doesn’t think she has a right to be rescued), the Coast Guard doesn’t patrol much of the season, the cost of finding an individual after she had spent hours drifting on the lake is exorbitant, and the efforts are not guaranteed to be successful. Further, although the state could preempt the risk by providing all-season Coast Guard patrols of the entire lake, the cost of doing so would be too expensive for the benefit provided. It would be like placing a police officer on every corner and staffing numerous aid stations inside every national park.

More importantly, there are other problematic cases in which the risk is equally avoidable at the outset, but far more immediate when it occurs. Consider an exercise fanatic whose favorite sport is hiking up demanding mountain trails. On the weekends she likes to challenge herself by seeing how fast she can complete a rather popular

\textsuperscript{15} Smith, \textit{Liberalism and Affirmative Obligation}, p. 38.
but grueling hike. She knows that she ought to carry extra water with her, especially during the summer, but doesn’t want to because the extra weight will slow her down. She also knows that the trail is popular enough, and other people are careful enough, that she can be sure that if she becomes dangerously dehydrated and disoriented there will be other people on the trail who did carry extra water and that they will be obliged – as a matter of her right – to give it to her even if that means that they will have to abort the rest of their hike. (I’m assuming that cutting short an afternoon hike will not count as more than a minimal inconvenience.) In short, if persons have a right to aid, a right based merely on their status as intrinsically worthy human beings in need, then it is quite reasonable (at least on populated weekends), and should be morally unobjectionable, for this hiker to refrain from bringing extra water with her and from otherwise taking the kinds of precautions that others would take. And in this case, unlike the windsurfing case, the bystanders cannot count on the slow response of state-supported relief agencies because the risk of harm, when it sets in, from acute dehydration, heat prostration, and disorientation is extreme and must be countered quickly.

Other ways to avoid the conflict seem equally unsuccessful. For example, we might claim that persons who rely on the aid of others lack intrinsic worth. But that option avoids a problematic view by adopting an even more problematic one. Or we might claim that our intrinsic worth generates a right to aid only when the risk is accidental (and distinguish that from avoidability in terms of intentions). Although that might match our intuitions, it would be difficult to defend in any principled way. Would voiding the right be punishment for knowingly taking risks? If so, wouldn’t that encourage persons to enter activities blindly, in order to preserve their right to aid? Why should a windsurfer who doesn’t bother to think about whether she could get back to shore (or doesn’t bother to check her equipment to see whether it is about to break) have a right to aid while our risk-taking windsurfer does not?

One final option (as far as I can tell) is to avoid the conflict by denying that it is a real conflict. That is, one might claim both that one’s intrinsic worth as a human being generates a right to easy rescues and also that it is morally wrong to rely on this right and
that thanks are owed when it is respected. But this view, even if not inherently inconsistent, is at least quite odd. It significantly weakens the value of rights in general (they are not something on which we may rely) and undermines the notion of intrinsic worth that serves as the heart of the theory. I am not suggesting that one can never act wrongly in exercising one’s rights. One can, as when one exercises the right of free speech for the sole purpose of being cruel. But when it is wrong, there is a competing moral consideration that helps explain why it is wrong. In the cases of the windsurfer and hiker, the potential considerations all seem to boil down to the tautological claim that it is wrong to rely on one’s right to aid because it is wrong to rely on one’s right to aid. (Notice that the competing consideration can’t be the bystanders’ rights or liberty to enjoy their afternoon without having to rescue someone, because they don’t have this right or liberty if the potential victim has an intrinsic right against them to be rescued.) If this option is unacceptable, then we are back to the original problem of claiming either that the windsurfer and hiker did nothing wrong in their cases or that there is something problematic about claiming that one’s intrinsic worth as a human being gives one a right to easy rescues.

A third sort of argument supporting the legitimacy of bad samaritan laws side-steps the preceding problems by grounding the legal duty to aid on the moral duty of beneficence. On this view we might still speak of a so-called right of the victim to be aided, but that right would have been created by the societal decision to enforce the duty within specific boundaries (which are determined in part by the society’s ability to provide the good and the competing demands on its resources), and not be the source of the duty. It would thus be similar to individual’s right to a public education, welfare, free medical care or Coast Guard aid. In more detail, this view, which is supported by Feinberg and at one time Weinrib, holds that the legal duty to provide easy rescues and other acts of emergency aid is part of our already accepted societal duty to provide a safety net

\[16\] We can’t explain the case as a mere conflict of rights without committing ourselves to the silly view that in a shooting case, the victim’s right not to be killed was in conflict with the assailant’s right to put a bullet through her heart. If X has a right against Y that Y provide an easy rescue at time T, then Y is not at liberty, and certainly doesn’t have a right, to be eating lunch at T.
for those in need.\textsuperscript{17} Our taxes provide this safety net in numerous ways by funding fire departments, police departments, and various welfare programs. These coordinated efforts and social programs provide much of the needed aid and have the virtue of distributing the burden among us all. They are thus more efficient (due to their co-ordination) and more fair (due to the distribution of the burden) than if we each tried to fulfill the duty on our own. But they can’t do everything. Some perils, due to their natures as unpredictable emergencies near at hand, “simply cannot await assistance from the appropriate institutions,” and the duty to aid falls on the individual(s) who are in the position to provide that aid.\textsuperscript{18}

Underlying this view is the assumption that there is more to morality than that which can be demanded as a matter of intrinsic rights and their correlative duties. The view can thus be rejected by anyone who denies the assumption. But notice that rejecting the assumption commits one either to a very limited (some would say impoverished) view of morality, or to an overly broad and thereby virtually meaningless notion of rights: Either there is nothing wrong with purely cruel speech, for example, or persons have a right against everything that is deemed immoral and conflicts between rights are the norm. More serious objections come from those who maintain that although the general duty of beneficence accounts for the moral duty to aid others in emergency situations, it doesn’t account for the legitimacy of the legal duty to do so, given that the legal duty would interfere with our liberty in ways that the duty to fund social institutions does not. For example, opponents of bad samaritan laws may argue that the obligation to pay taxes is predictable, whereas the obligation to provide easy rescues is not, and that


\textsuperscript{18} The quote is from Weinrib, p. 292, as cited in Heyman, “Foundations of the Duty to Rescue,” p. 741. Heyman notes that his own view differs from the one under consideration in that, on his view but not the present one, the duty to aid is a duty of the community that is \textit{delegated} to individuals in emergency situations, as opposed to an individual duty that is most efficiently and fairly fulfilled through state-funded institutions.
the obligation to provide easy rescues compels us to perform particular positive acts unlike our more traditional criminal laws which only prohibit particular positive acts (and thereby leave us free to perform a whole range of other acts).

But these objections can be met. First, although the obliged acts constitute some interference with individual liberty, they would not constitute an undue interference, because, by definition, the duty is restricted to easy rescues with no significant risk to the agent and no obligation to continue the aid after the emergency has subsided (the state agencies can take over then). They are thus akin to paying a few additional tax dollars (indeed, it might be argued that requiring private citizens to provide the rescues as the need arises is less expensive for the citizens than requiring them to fund greatly expanded rescue forces that could provide the aid were they on the scene at the time). Thus, the obligation to fulfill these duties does not limit liberty in any significant way and is not more of an interference than are duties to alter one’s activities in order to avoid causing harm. Further, the fact that the obliged acts are positive or affirmative acts does not show that they are inconsistent with the basic principles of our legal system in general or the criminal law in particular. As Bruce Landesman notes, persons are obliged in other areas of the law to do minimal positive acts that aid others – even when the need for the acts “drops on us out of the blue.”

For example, they can be required to serve on a jury, testify in court, or assist victims of an accident in which they were involved even if the accident was not their fault. Thus, given that these affirmative duties have not given rise to a firestorm of objection, we shouldn’t object (at least not on the grounds being considered) to obligations that require other minimal positive acts, according to the response under consideration.

In addition, the “safety net” approach that derives from the duty of beneficence seems better able to accommodate our disapproval of the agents in the windsurfing and hiking cases than was the intrinsic-rights approach. Though the bystanders in those cases ought to provide the rescues on either approach, the safety net approach allows us to condemn the victim’s calculated and repeated reliance

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19 As noted in Feinberg, Harm to Others, p. 165. There are problems with this view but they are not relevant to our present concerns. See my “Liberalism, Bad Samaritan Law and Legal Paternalism,” Ethics, vol. 106, 1995, pp. 4–31.
on the aid of others as an *abuse* of the safety net, since reliance of the sort we are envisioning is contrary to the very idea of a safety net. And while refusal to provide the aid would be too great a punishment for this type of abuse (given that the consequence of refusal is death), other measures may be taken to limit its occurrence. For example, fines may be imposed on persons who recklessly endanger themselves to the point of needing aid in state parks and (or) the cost the rescue may be charged to the rescuee, as the Coast Guard sometimes does. In the case of the private beach, the members of the condominium complexes may vote to restrict the launching of water-craft by persons below a particular skill level and impose fines for violation. And although such measures are not strictly inconsistent with the rights-based account of the duty to aid, they are more difficult to justify on that account since their imposition suggests either that there is something wrong with relying on one’s rights or that the potential victims never had the right in these circumstances in the first place.\(^{20}\)

Clearly, there is much more to be said in the debate between the rights-based account and beneficence-based account of the duty to aid. Nothing in the preceding discussion is meant as a proof that there is no intrinsic right to be rescued, nor that the safety net,

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\(^{20}\) For a related problem, consider the person who, after receiving a publicly funded liver-transplant, regularly drinks alcohol and reasons that if his current liver fails, he’ll get on the list for a new one. If society’s duty to provide the transplants is grounded on his rights as an intrinsically worthy human being, then we have little basis for criticizing his behavior or for putting conditions or limits on the aid. After all, drinking alcohol doesn’t change one’s intrinsic worth. But if the duty to aid is grounded in beneficence, then we can more easily explain our negative judgments when the aid is abused or taken for granted and more easily account for the conditions we put on the aid in terms of competing demands on our resources.

Indeed, with respect to resources, it seems that if our intrinsic worth generates a right to easy rescues, then it should also generate a right that others make minimal efforts toward putting themselves in the position of being *able* to provide easy rescues, e.g., by learning CPR, contributing money toward a rescue boat, or spending a few minutes of their time at the beach looking for persons in need of rescue instead of reading. (After all, a child’s right against its custodial parents includes more than a right to be given food when food is available; it includes a right that the parents try to make it the case that food *is* available.) But no one seems to be advocating legal duties of this sort.
beneficence-oriented approach is problem free. But it is meant to show that there is at least one argument for the moral legitimacy of bad samaritan laws that is consistent with the basic principles and values that are already widely accepted as legitimate parts of our legal system. As such, I'll henceforth assume, at least for the sake of argument, that the laws are morally legitimate in principle within a system similar to ours.

II. DRAFTING AND ENFORCING THE LAWS

Of course, granting that bad samaritan laws are morally legitimate in principle is not the same thing as granting that the laws should in fact be enacted. It only entails that they are legitimate candidates for enactment. Proponents of the laws must still show that the laws can be drafted and enforced in sufficiently fair ways and also that their benefits are worth their problems and costs. Problems of the first remaining sort – ones focusing on fair draftsmanship and enforcement – arise from the fact that, although it is easy to say that people ought to provide easy rescues and other acts of aid when they can do so with minimal risk to themselves, and easy to say that this duty ought to be legally enforced, it is not easy to define just when this duty arises and what, exactly, it entails. What, for example, is an “easy” rescue, and when does the risk become more than “minimal”? Without this knowledge, it is difficult to determine who, in fact, broke the law. And if we can’t determine that fact fairly enough, then all our proclamations “There ought to be a law!” are for naught.

The most common challenges of this second sort tend to be presented in the form of line-drawing objections. That is, critics

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21 Indeed, I’ve elsewhere argued that the analogy between the affirmative duties required in other areas of the law, and those that would be created by bad samaritan laws is weak. See my “Liberalism, Bad Samaritan Law and Legal Paternalism,” p. 16.

22 They would be similar to protestations that persons, or even just children, ought not be able to access pornographic material on computers at public libraries. We can’t effectuate that desire until we explicate some relatively clear conception of what we mean by “pornography” (or, by analogy, “bad samaritan”) and devise a sufficiently accurate method for limiting access to much of that material (or subjecting the bad samaritan to prosecution) that doesn’t also limit access to too much other material (subject too many non-bad Samaritans to prosecution).
of the laws argue that it is impossible to draw a principled line that distinguishes conduct that may legitimately be required of the samaritan from conduct that may not. Without such a line, they contend, bad samaritan laws cannot be fairly drafted and enforced. Sometimes this challenge is presented as one of theory, focusing on the difficulty of deciding where to draw the line. For example, should we only require conduct that entails no risk for the samaritan, or is moderate risk or inconvenience OK? Should the samaritan only be obliged to prevent grave physical harm to the victim, or would moderate physical harm or serious emotional harm or even property loss give rise to the duty as well? Other times the challenge is presented as one of draftsmanship, focusing on how to define the line in a criminal statute. Should we use vague terms such as “minimal”, “easy”, and “serious”, or try to be more precise? And still other times it is presented as a challenge for the courts, focusing on how to enforce the line. Should juries be required to draw the line between minimal and slightly more than minimal risk? Although these different forms of the line-drawing objection are open to different responses, they share the same general claim that due to the practical difficulty of defining, drafting, or enforcing the line, significant moral and (or) legal problems will accompany the enactment of bad samaritan laws.  

For our purposes, there is no need to cover each of these traditional line-drawing objections and survey their responses. The line-drawing objections that surround bad samaritan laws are open to the same sorts of responses that are used to resolve them elsewhere. That is, proponents of the laws concede that there is no principled way to draw a precise line that distinguishes conduct that may legitimately be required of the samaritan from conduct that may not, nor is there way to define, within a criminal statute, exactly when the duty arises and when it would be violated. Proponents add, however, that the absence of a precise, clearly definable line doesn’t mean that we can’t tell the difference between conduct lying at the two ends of the continuum and acknowledge a gray area in between.

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23 I provide a detailed discussion of the various forms of the line-drawing objection and their responses in “Civic Virtue and the Legal Duty to Aid,” forthcoming in Civility and Its Discontents: Essays on Civic Virtue, Toleration, and Cultural Fragmentation, eds., Jonathan Schonsheck and Christine Sistare, University of Kansas Press, anticipated publication date, Fall 2001.
Thus, we can draft the laws using vague terms such as “minimal” or “reasonable” on the one hand, and “serious” or “grave” harm on the other, and rely on jurors to interpret those terms in the particular case. Further, we can adopt Feinberg’s proposal by which jurors would be instructed to vote for conviction only when aid clearly could have been provided to the victim at no more than minimal (or “reasonable”) risk to the samaritan, and vote for acquittal in any case falling in the gray area or beyond. This cautious approach would reduce the risk of prosecutorial abuse and of convicting persons who were not actually bad samaritans but merely “nonheroic” ones. And since jurors are expected to make judgments of degree in other areas of the criminal law (e.g., assessments of whether an accused suffered provocation that even a reasonable person could not bear, or whether the accused retreated far enough before responding with deadly force), bad samaritan laws should not be significantly more difficult to enforce than a variety of other laws (or so the defense claims).

The preceding method provides an adequate response to line-drawing and other objections that focus on judgments of degree (e.g., how much aid is required to prevent how much harm to the victim and how much risk to the samaritan precludes the duty). But it does not address a number of other, lesser discussed, non-degree problems that nonetheless must be addressed before bad samaritan

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24 Feinberg (Harm to Others, pp. 156–157). In more detail, he argues that we should “formulate bad samaritan statutes in relatively vague terms that allow juries the discretion to apply standards of reasonable danger, cost, and inconvenience.” But rather than requiring jurors to draw the line between reasonable and unreasonable aid (and thereby run the risk of improper conviction), he proposes that they draw the line between clearly reasonable and questionably reasonable aid. That is, we should:

divide up the spectrum of hypothetical cases into three segments: (1) clear cases of opportunity to rescue with no unreasonable risk, cost, or inconvenience whatever; (2) cases of opportunity to rescue but only at clearly unreasonable risk, cost, or inconvenience to the rescuer or others; and (3) everything in the vast no-man’s-land of uncertain cases in between the extremes. To err on the side of caution, we would hold no one in the uncertain category liable .... That would be to hold everyone liable who clearly deserves to be liable, while exempting all those who do not clearly deserve to be liable – both those who clearly deserve not to be liable, and those whose deserts are uncertain.
laws can be put into practice in a sufficiently fair manner. In the remainder of this section, I’ll present some of these problems as questions that arise in connection with assessments of minimal risk, and I’ll present the competing answers as dilemmas that must be resolved. It is important to note that my aim is merely to expose (a) the need to further clarify the class of persons we intend to hold criminally liable for failing to aid (i.e., who, more precisely, are the bad samaritans?), and (b) the difficulty of interpreting and enforcing the laws in ways that would capture most of the members of that class (in terms of making them subject to criminal prosecution), and not capture too many non-members. It is not to argue that these difficulties are unique to bad samaritan laws, nor necessarily fatal to any effort to fairly enforce them. Nor will I be arguing in favor of one resolution to a given dilemma over another (though in the next section I’ll argue that, depending upon the benefits we hope to achieve, we may be committed to one resolution over another). However, the fact that the forthcoming problems aren’t fatal doesn’t mean they can be ignored, and the fact that they aren’t unique to bad samaritan laws doesn’t mean that we can automatically apply whatever method of resolution we’ve adopted for them elsewhere to their presence here. In other words, we can’t say “Look, that isn’t a serious problem because we’ve already handled it with respect to negligence law,” for example.25

The reasons in support of the preceding point deserve elaboration. First, there may be differences between two types of laws, or their applications, such as differences arising from the inherent natures of causing harm and not preventing it, that preclude an automatic equal application. For example, consider a law against causing harm and the well established view that one may not justify or excuse a violation of this law on the ground that the act was mandated by one’s religion. It would be foolish to assume from this that one may not justify or excuse a failure to prevent an equivalent harm on a similar ground (suppose someone refused to donate critically needed blood because her religion prohibited such donation), because the act in the former case would impose one’s religious beliefs on others, and thus be contrary to a workable notion of

25 Thanks to Bill Edmundson and Michael Green for pointing out the need to explain why we need not treat laws against causing harm and laws against failing to prevent harm, nor treat violations thereof, in similar manners.
freedom of religion, in a way that the act in the latter case would not. (Other differences that can preclude equal application concern the presence of motives for the violations, the certainty that the harm will befall the victim, and the waiving of the duty in the presence of minimal as opposed to significant risk for the agent, among others.) The second reason for not ignoring a problem or assuming it isn’t serious just because it has been adequately addressed in other areas of the criminal law derives from the fact that there may be a need for, and (or) benefit from, one type of law that isn’t present in the case of another type of law. Such a difference can make it more reasonable to accept a less than ideal solution or an undesirable consequence in the one case than in the other because that solution or consequence is balanced by a greater benefit or rendered more tolerable by the greater need. This type of difference blocks a variety of apparently tempting *reductio* arguments, such as ones entailing that if X is a sufficient reason for not having bad samaritan laws (or if X is accepted as a legitimate excuse for violating a bad samaritan law), then it must also be a sufficient reason for rejecting (violating) another type of law; it isn’t a sufficient reason in the latter case, so it isn’t in the former. As indicated, the problems of the laws may be compensated by unequal benefits and needs, as is the case with both self-defense and negligence law. I’ll discuss the benefits of bad samaritan laws in the next section. For now, let’s return to the problems.

Even with Feinberg’s proposal in place, jurors could not determine whether any given individual was in fact a bad samaritan until they had some idea of the *types* of risks that they should take

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26 To object that the latter act does impose one’s religious beliefs on others because it has a consequence for the other is to render the notion of imposing virtually meaningless. Almost everything I do could thus be said to be imposing my views on others, leaving me with an intolerably small realm of freedom (as well as the need to find a new term for the traditional notion of imposing). My decision to send my child to a public school instead of a local religious school would count as imposing my beliefs on the members of the religious school because it left them with fewer tuition dollars than they would have had had I sent my child there.

27 I discussed these problems in more detail, and with a focus on their implications for traditional liberalism, in “Liberalism, Bad Samaritan Law and Legal Paternalism.” I need to repeat some of the general points here as a basis for the arguments in the next section.
into account when determining whether the risk to the samaritan was more than minimal. Physical risks to the samaritan are clearly relevant, but what about emotional, psychological, or even sentimental risks? Would a high probability of harm to these sorts of interests render the aid more than minimally risky for the samaritan, or should such risks be ignored? To put it in another way, if persons can’t be legally obliged to spend an additional $200 to save a life, or be obliged to donate blood or even bodily organs after they are no longer needed, should they be obliged to sacrifice a personal possession that, for whatever quirky reason, they regard as even more valuable? (Suppose that in order to provide the needed aid, the samaritan would have to get blood all over a sweater knitted his dead grandmother.28) And would the obligation to take these risks increase as the victim’s need became more critical, or decrease because then the aid would be less likely to succeed? What about risks to values? Should persons be legally required to provide aid when doing so threatens a religious commitment? For example, should aid be required if it obliges the samaritan to break a vow of silence, miss a scheduled prayer session, or summon traditional medical help when, for religious reasons, the samaritan believes that doing so will doom the victim? Should consideration be given only to the views of well established religions, or should atypical religious beliefs be given consideration as well? Further, should each juror be allowed to determine the importance of the thing risked by reference to her own values, or should general principles be provided to encourage consistency? The correct answers to these questions aren’t clear. What is clear is that, on the one hand, the more exceptions we make, and the more types of risks we take into account, the less likely we make it that anyone will satisfy the conditions of being a bad samaritan. On the other hand, were we to consider only physical risks to the samaritan, we wouldn’t do justice to the intuitive idea behind bad samaritan laws – that persons should be obliged to render aid only when they can do so at no significant cost to themselves – since many people regard non-physical risks, such as risks to their values and religious beliefs, as just as signi-

28 The important question here isn’t whether persons ought to provide the aid under such circumstances, but whether and on what ground this sort of risk can be deemed clearly reasonable, while risks of money and significant inconvenience be deemed not clearly reasonable (or more than minimally risky).
significant to their self-conception and well-being as risks of physical harm.

The preceding point about the importance of risks is supported by the fact that there is very little motive to be a bad samaritan. One rarely stands to gain anything by not aiding another and only stands to avoid losing something which, by definition, is of minimal significance to the samaritan. Further, there often is something to be gained by not being a bad samaritan. Normal socialization encourages people to thank others when aid is received, as well as to feel good about themselves when aid is given, regardless of whether gratitude is in fact received. Each of these stands in strong contrast to intentional acts of causing harm, since they are easily motivated by hopes for personal gain (e.g., from robbery, the release of anger, the removal of witness) or the retention of something significant (e.g., protecting oneself from attack), and the efforts people make to refrain from causing harm are not generally met by gratitude or personal reward. Together these points suggest that when people do refrain from aiding another, it may often be because they believed (perhaps incorrectly) that something of more than minimal significance was at stake, even if the risk wasn’t of physical harm.

A second problem that must be addressed before bad samaritan laws can fairly be put into practice focuses on probabilities of risks and arises from the fact that assessments of minimal risk are never linear judgments of degree but are always multi-value functions that combine assessments of the importance of the thing risked (e.g., life, limb, property) with assessments of the probability of the risk, and then sum a number of such judgments (since there is rarely, if ever, only one thing at risk). This raises questions about what we should do with respect to small probabilities of great harm. Would their presence render the needed conduct more than minimally risky for the samaritan?

In more detail, when we are judging, after the fact, whether the conduct needed to aid the victim would have been more than minimally risky for the samaritan?

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29 Differences are present even with respect to depraved individuals who want to see others suffer, since this desire is far less likely to be satisfied by failures to prevent harm than acts of causing harm. In the former case, the individual must wait to stumble upon situations in which she could aid but choose not to, while in the latter case she can create the situations to satisfy her desire. See also, Henderson, "Process Constraints in Tort Law," p. 940.
ally risky for the samaritan, it is tempting to focus only on the likely consequences to the samaritan. That is, we imagine what would have been likely to happen to the samaritan had she provided the needed aid, and make our judgments about whether those consequences would have been more than a minimal harm or cost to the samaritan. Were the samaritan likely to have been late to an appointment, get her clothes wet, or expose herself as a possible witness for a later trial, we would judge that the needed conduct was no more than minimally risky. Were she likely to have been assaulted, lose a limb, or get caught in the riptide herself, then the needed conduct clearly would have been more than minimally risky. But what about the less likely consequences, in particular, the small probabilities of great harms? Would the statistically unlikely but nonetheless possible risk of significant harm or death relieve the samaritan of her duty to aid, or would the fact that the probability is low oblige the samaritan, and ultimately the jurors, to ignore the risk?

To illustrate the problem, consider a woman driving on a rather deserted road who saw an apparently stranded motorist but didn’t stop to aid him. The motorist later died of a stroke, but not before he scribbled the woman’s license plate number and the words “bad samaritan” on a note pad. After being arrested for failing to aid, the woman claims that she didn’t stop to aid the motorist because she was worried that he might be faking his distress as a means to lure unsuspecting robbery (or rape or carjacking) victims. She admits that the statistical probability of this is low, but claims she was worried nonetheless. She adds that she would have called for help had she had a cell phone or seen a call box, but she didn’t, and that by the time she got home, her mind was on other things. Should she be found guilty?

When presented with such cases, some proponents of bad samaritan laws have responded that, obviously, samaritans should not be required to do things that increase the risk of harm to themselves or others. Yeager writes that an “easy rescue is one that involves no danger to the rescuer” and adds that “each of us should be permitted

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30 It won’t do to say that we should merely discount the size of the harm by the probability of its occurrence because that keeps the central question intact: Does a small risk of great harm render the needed conduct more than minimally risky or not? In other words, what probability of death or serious injury can we reasonably require people to incur in the course of aiding others?
to remain a live coward rather than a dead public servant.”

Alder argues that bad samaritan laws “should not require intervention that increases the risk to the intervening party.” Others maintain that the duty to aid stops at the first sign or brink of danger. But if we take such claims seriously, as requiring that samaritans are obliged to aid only when doing so involves no increased risk of harm, then not only would our driver be immune from prosecution but so would virtually everyone and the laws would be moot, since small risks of significant harm are everywhere. The very act of starting to aid someone creates liability for not continuing the aid until the emergency subsides or for not aiding appropriately. Alder himself discusses the case of a good samaritan who stopped after an “accident to pull some people from an overturned car that was spilling gasoline. When individuals involved in the crash were struck by another car, he was subsequently sued for a failure to put out flares.”

Even the simple act of notifying the police carries risks. Yeager discusses a case in which a citizen was “killed in retaliation for supplying information leading to the arrest of a dangerous fugitive and another in which two women were raped, beaten and robbed after they called the police to report an attack in progress in an apartment below them.” Believing that the police should have arrived by then, “they yelled down to the victim below, unfortunately alerting the attacker to their presence.”

I’m not suggesting that such risks are common nor that their presence should deter people from aiding. I mention them (along with a few cases forthcoming) to show that small risks of significant harm are virtually everywhere. Thus, if we want anyone to be subject to bad samaritan laws then we have to understand the laws as obliging persons to incur some increased risk of significant harm. But what that degree should be isn’t clear. A 10% risk is probably too great,

32 Alder, “The Reasonableness of Strangers,” p. 919. He adds that this is something that “should be easily and intuitively grasped.”
33 Alder, p. 878, discussing Stephan Braun, “Some Hero’s Welcome: Rescuers Sued,” L.A. Times, Nov. 2, 1990, at B1. Note that even if the suit were unsuccessful, being subjected to a civil trial and having to help prepare and pay for a defense, is more than a minimal harm to the defendant. Thus, the enactment of good samaritan laws will not completely remove this risk.
but what about a 5% or 1% risk? Risks that low would be clearly reasonable on a utilitarian calculus, but should 5 out of 100, or even 1 out of 100, samaritans be obliged to sacrifice her life or welfare in order to provide aid?\footnote{Indeed, a utilitarian calculus would probably support the imposition of even greater risks especially if Freeman is correct in claiming that “each of us is about as likely to benefit from this legal duty as be inconvenienced by it (Freeman, “Criminal Liability and the Duty to Aid the Distressed,” p. 1483.) Of course, it is important to separate the burdens and benefits of the legal duty from the burdens and benefits of the moral duty. If the legal duty doesn’t provide a significant balance of benefits over the moral duty, then it is not likely to be worth the time, money, and trouble.}{35} And if we lower the degree much further, it isn’t clear that people will be able to accurately distinguish between, say, a 1% risk that relieves them from the duty to aid and a 0.5% risk that does not (This is not a line-drawing problem focusing on judgments of degree but instead is a problem of not being able to determine, in any general way, the relevant probabilities in the situation at hand\footnote{For example, although I have been told that some persons feign injury as a means to lure victims for robberies and rapes, and told that this activity is likely to increase if we enact bad samaritan laws (see Alder, “The Reasonableness of Strangers,” p. 919), I have no idea as to what percentage of persons who appear to be injured are actually faking it. Thus, if I were told that small risks (e.g., 5%) of great harm relieve me of my duty to aid, but very small risks (e.g., 1%, or even 0.05%) do not, I would have difficulty determining whether I was obliged to aid in the motorist case.}{36}). What is clear is that, first, we need to have some general idea of what the degree is or else the laws will run afoul of the void for vagueness doctrine: Should persons be obliged to incur minuscule risks of significant harm, but not tiny risks, tiny risks but not minimal ones, minimal ones but not small ones?\footnote{For discussion of the doctrine as it relates to bad samaritan laws and misprision of felony laws see Susan J. Hoffman, “Statutes Establishing a Duty to Report Crimes of Render Assistance to Strangers: Making Apathy Criminal,” \textit{Kentucky Law Journal}, vol. 72, 1983–1984, 827–865, at 848.}{37} Second, the lower the risk we choose, the less likely we make it that anyone will count as being a bad samaritan, since tiny risks of significant harm are everywhere.\footnote{Even the bystanders in the Kitty Genovese case faced the tiny risk that the police would release their names to the public thus subjecting them to retaliation from the accused or his friends.}{38} Yet the higher the risk we choose, the more willing we need to be to consciously accept the
fact that some innocent people will die in the course of fulfilling their legal duty to aid.\textsuperscript{39} And third, when we are assessing small probabilities of great harm, as opposed to significant probabilities of great harm (as when we are assessing whether killing in self-defense is justified) our evidentiary problems increase.\textsuperscript{40}

It might be objected that we don’t have to worry about the above problems; all we really need to do is tell people that they have to be reasonable.\textsuperscript{41} But this response alters the dilemma without resolving it. People who sense danger in a particular situation, even if they know that the statistical probability of danger is low, think that they \textit{are} being reasonable when they don’t intervene in that particular case. But when their omissions are later assessed by a jury, their claimed perception of danger may seem like irrational paranoia (“you can’t worry about every little risk,” we can imagine jurors saying, “or else you’ll be paralyzed”) or worse, like fear feigned with the aim of escaping punishment. To see this, consider the following true case and then an adjusted version.

A particular woman regularly hangs out on a particular street corner in the nightlife area of Chicago. She usually sits up against

\textsuperscript{39} Obviously, people can die in their efforts to avoid causing harm as well. It is also true that the benefits of the laws might outweigh the increased risks to the samaritan (though this requires that the laws be effective). My point isn’t that the increased risk of harm shows that bad samaritan laws are inherently unfair or misguided. It is only that, if we want anyone to be subject to the laws, we need to acknowledge and accept the fact that some people will die in their efforts to uphold the law. We can’t pretend that bad samaritan laws are risk-free because they claim to oblige only minimal acts of aid.

\textsuperscript{40} This marks yet another difference between obligations to prevent harm, of which we are relieved when the risk to ourselves is more than minimal, and obligations not to cause harm, of which we are relieved (or violations justified) only if the risk to ourselves or others is great. Great risks of significant harm (or reasonable beliefs thereof) will tend to be accompanied by observable, explainable, concrete evidence (“He had a gun in his hand and it was cocked and aimed at me”) making it reasonable to believe that harm is likely in this particular case, in a way that small to tiny risks of harm (or reasonable beliefs thereof) will not (“I don’t know what it was, but there was just something creepy about the way he lay collapsed in the driver’s seat”).

\textsuperscript{41} For example, Alder writes: “People can understand a rule that says, “generally, you are expected to conduct yourself reasonably” more easily than they can understand ... a rule that requires one to rescue or protect but only where to do so would be ‘easy’” (“The Reasonableness of Strangers,” p. 920).
the wall of a building, offers to expose her breasts for money, utters obscenities, but is otherwise harmless. People who frequent the area have come to regard her as part of the local color. About four years ago, while the woman was engaging in her normal and somewhat annoying behavior, a passerby started to verbally harass her and, according to the reports, make gestures towards physical violence. Another passerby, a local who had apparently become accustomed to the woman’s behavior, tried to be a good samaritan and stepped in verbally to try to stop the harassment. Within a minute or two the harasser turned on the samaritan and shot and killed him.

Illinois does not have bad samaritan laws and the samaritan in the preceding case acted solely out of the goodness of his heart. But now suppose Illinois did have the laws, that the samaritan didn’t stop to aid, and that the street woman was ultimately brutally assaulted. In such case it would have been easy for jurors to say, after the fact, that the samaritan broke the law – that is, that he clearly could have aided the woman at no unreasonable cost to himself. After all, all it would have taken, our hindsight tells us, is that the samaritan shout “Hey Buddy, knock it off or I’m going to call the police” and perhaps stand by until the harassment subsided.42

But, obviously, our hindsight can be wrong. Acts that seem clearly reasonable on a statistical basis can include small risks of great harm. So what should jurors do when, in another case, it appears that the samaritan could have prevented the harm at no significant risk to herself (especially if they focus only on the likely consequences), yet the accused samaritan claims “I can’t explain it, but my intuitions told me that it would be just too risky to intervene in this particular case”? After all, women are often encouraged to trust their senses when it comes to avoiding danger. “Better to be safe than sorry,” they are told, even when being safe means being terribly rude to a innocent stranger or avoiding situations that, on a statistical basis, are extremely safe (e.g., stairwells of parking

42 It wouldn’t do to say that the passerby should have called the police without speaking up to the potential assailant. If Chicago police officers got phone calls every time a street person was verbally harassed they would have little time for other work. Further, even in the truly needed cases, the response time may be too slow for the police to prevent the harm.
garages and elevator rides with a single stranger).\textsuperscript{43} And since there is no way to clarify within the criminal law when this sense of danger is legitimate, nor to prove, after the fact, that one actually had it, we are left with a dilemma. If we accept this sort of defense, then virtually anyone could escape conviction.\textsuperscript{44} But if we don’t accept it, then we are telling people that, as a matter of law, they may not trust their own intuitions or sense of danger and must instead rely on statistical probability or, even worse, on jurors’ Monday morning quarterbacking sense of danger in the reported situation.

This brings up an additional question that will be useful in introducing the third set of problems. What about people who have experienced these atypical cases of significant harm? In future cases,

\textsuperscript{43} Our judgments of reasonableness are also complicated by the fact that assessments of risk must often be made very quickly by the samaritan. For example, many years ago, after I had been living in Sweden for about three months, I decided to leave a downtown gathering early on a Friday night and walk home. I took what had been my normal path through the back of the University and across a large open field with a winding path that had three foot embankments on the sides. I was about half way through the path, with the lights of the University fading far behind me and the lights of a city street about 300 yards ahead, when I stopped thinking about the gathering and realized that I had never taken that path at night before. I was alone, it was dark, the field seemed deserted and I was scared. But turning back wouldn’t have been any better. A few minutes later I saw a man walking a bit oddly in the opposite direction. He stayed on his side of the path until he was a few steps away, then he crossed over, put his hands on my shoulders and said something in Swedish that I didn’t understand. My recollection is that his tone wasn’t aggressive and his hands, though firm, were not tightly clutching. Still, I didn’t wait and ask him to repeat himself but instead knocked his hands off my shoulders and ran up the embankment and across the field not stopping until I was surrounded by the lights of the city. In retrospect, it is quite possible that I was a bad samaritan. Perhaps the man was having an internal attack of some sort and needed aid. Perhaps he was distressed and pleading for help for someone else in the field who needed aid. Perhaps he was just drunk and asking for money. I don’t know. I do think that if the man had been found dead and I’d been seen leaving the field and charged with failing to aid (after all, I didn’t even stop to look back), I may have had a difficult time convincing anyone that my fear was reasonable. Indeed, even I am not sure it was reasonable given my belief even then that Sweden had an exceptionally low assault rate.

\textsuperscript{44} Actually, this would be true only if we were consistent. But one problem with having bad samaritan laws with lots of case by case excuses or exceptions is the opportunity it affords for further racial, economic and even sexual discrimination, as I’ll later discuss.
should they be held to the same standards to which others are held, or should their emotional scarring exempt them from the duty to aid in cases with a small probability of great harm? Consider one more case. This one happened during the winter of 1999.

Erick was driving with his wife and twelve year old son to meet other family members for a ski trip in Mammoth, California. On a rather deserted, winding stretch of mountain highway, Erick and his family first heard a bang, noticed a large cloud of dust up ahead and then saw a car parked askew on the shoulder of the road. They drove on, assuming that the car had a flat tire. A few hundred yards farther up the road they saw a woman standing outside a damaged car, noticeably distraught, with her head in her hands. They decided to pull over to see if they could help. The woman started explaining, through her sobs, that someone had just hit her and tried to run her off the road, that she didn’t know who it was, that she had a restraining order against her husband, and that he might be crazy enough to hire someone to have done this. After a little while she calms down. In the meantime, another set of motorists pulls over to see if they can help and is told to go get the driver from the other car so that information for insurance companies could be exchanged. A bit later, the original driver, who ultimately turns out to be the woman’s husband, drives past the group, parks, and starts to walk, rather strangely, back towards them. When he gets within shoulder distance of Erick, who is in the process of saying “Hey buddy, we need your driver’s license number and insurance information,” the husband looks Erick in the eye and raises his arms to show him that he’s got a hunting knife in one hand and a gun, now cocked and aimed at the woman, in the other. Erick yells “Run!” to his family and the woman, but the husband is able to grab the woman and throw her to the ground. He begins to repeatedly bash her with his gun-filled hand and stab her with the other. Erick’s wife yells for him to get in the car, but he hesitates for a while, hoping to find a way to help the woman. Unfortunately, with the gun still in the assailant’s hand, it was no use. Erick then jumps in his car and they drive away, hoping to find a call box to call for help. (No one’s cellular phone was working in the mountain pass.) However, the assailant sees this, jumps in the woman’s car and starts to chase them, getting a good look at their license plate number in the process. Speeds
become terrifyingly excessive for a winding mountain road. Just as
the assailant moves into the other lane and starts to come up next to
Erick’s car in an apparent attempt to sideswipe them off the road,
Erick yells “Hold on!” to his family and he slams on the brakes.
The assailant rushes by them, having been unprepared for the stop,
slows down, but decides to continue on. Erick turns his car around
and drives back to the woman to see if they can help. But she lay
dead in a pool of blood. An officer from the forestry service arrives
shortly thereafter (apparently having been notified by the other set
of motorists who took off as soon as weapons were displayed) and
Erick and his family share all the information they can, which they
later repeat to the police. Throughout the subsequent long weekend,
Erick was able to deal logically with the minimal risk to which they
were exposed while the killer remained at large (they were, after all,
staying at a ski lodge and couldn’t be traced), but his wife and child
couldn’t. They didn’t find even partial peace until several days later
when a news report indicated that the killer had turned himself in.

Erick, who happens to be my brother, is not likely to be psycho-
logically scarred by this case. He has joked about having nine lives,
and this was neither his first nor his closest brush with death. But
the same isn’t true for his wife and child. They witnessed a brutal
murder up close and felt afraid for their own lives, all because they
stopped to help someone in a situation that initially seemed harm-
less. Thus, in future cases, they are likely to perceive more risk than
others would perceive in similar situations and be more afraid than
others would be to provide aid even in cases with the same perceived
risk. And who would blame them? Yet laws that hold people
up to jurors’ after-the-fact assessments of risk would make my
sister-in-law’s future timidity criminal: She must aid when others
would judge the degree of risk in the situation to be sufficiently
low.45

45 Frances Kamm, if I understood her correctly, suggested in a discussion that
persons such as my sister-in-law shouldn’t want to trust their own assessments of
risk since they know that their abilities to make such assessments may have been
compromised by the trauma. That may be. But it is worth noting that what we
view as compromised abilities may be viewed by the possessors as a heightened
sense of reality. Further, even if the samaritans granted that their abilities were
compromised, they still wouldn’t be able to determine when they had a duty to aid,
because their compromised abilities would prevent them from reliably predicting
Proponents of bad samaritan laws might respond that we could easily make exceptions for people like my sister-in-law and nephew. Any jury would be sympathetic to the effects of their harrowing experience. But such case-by-case exceptions would merely introduce other problems. What about exceptions for family and friends who, through a vivid imagination, are able to place themselves in the situation, imagine my brother and his family being shot or run off the mountain cliff, and who, as a result, received a similar psychological scarring, or even just a heightened sense of danger? (My nephew’s friends have all heard the story about how his dad – their little-league coach – almost got shot while trying to help a lady who died anyway.) Should they get exemptions too (and should it be only for roadside cases?), or should they be obliged to render aid even when they are terrified? And what about a stranger who, after being accused of violating a bad samaritan law in another case, claims that she read about my brother’s case in the newspaper and now is overly – perhaps even irrationally – scared to provide direct aid to strangers in need (though she claims that she would have called the police if she had had a cell phone)? “You never can tell,” she says. Would she be a bad samaritan?

Moreover, making exceptions on a case-by-case basis, unguided by general principles, leaves significant room for the effects of prejudice based on the assessor’s gender, racial, socio-economic and age-related stereo-types. Jurors, and even the prosecutor deciding whether to charge the samaritan, may be more likely to believe a woman who claims she was afraid to aid an apparently stranded motorist than a man making the same claim, even though bullets are gender neutral. Similarly, and regardless of the sex of the samaritan, jurors might be more likely to believe that the samaritan was reasonably afraid when apparent the victim was a young black man as opposed to a middle-aged white woman. And even when fear is not involved, our prejudices may show themselves when we decline to charge or convict persons who walk by a scruffily dressed person collapsed on the street, given that charges would have been brought had the victim been dressed in a business suit.

what others would judge, after the fact, to be more than minimally risky. Finally, it is one thing to say that persons should not want to trust their judgments of risk, and another to say that they should be criminally punished for doing so.
More generally, the preceding problems and questions expose the third main dilemma regarding assessments of risk. When determining whether the conduct needed to aid the victim would have been more than minimally risky, should jurors adopt the subjective perspective of the particular samaritan, taking into account all her thoughts, fears, values, and beliefs, however quirky they may be (e.g., suppose she believed that one could get AIDS from giving CPR)? Or should the jurors adopt the more objective perspective of the “reasonable person” and hold persons responsible for not acting in ways that reasonably prudent people would act? Proponents of bad samaritan laws strongly favor the latter option and note its use in other aspects of the law (e.g., negligence law). And its adoption is virtually essential if we want to retain a reasonable possibility of convicting persons for failing to aid because, were we to adopt the subjective standard, almost any accused bad samaritan could come up with some claim, value, or belief (fabricated or not) which, were it true, would show the needed conduct was more than minimally risky in her eyes. Yet even so, there is something unsettling about adopting the reasonable person perspective with respect to duties to aid. Persons who are exceptionally timid, persons who panic, persons who have false beliefs about the risks to themselves, and even persons who have false beliefs about the need for the rescue, may all be subject to punishment for failing to perform as our hypothetical reasonable person would perform. Yet punishing them would be problematic insofar as they lacked the callous disregard for the welfare of others that is characteristic of our paradigm bad samaritan and seems to be at the heart of moral culpability.

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46 For example, Rodriguez argues that “American courts should impose liability whenever they determine that a reasonable man under similar circumstances would have helped the person in danger.” (Teresita Rodriguez, “I am My Brother’s Keeper,” Boston College Law Review, vol. 26, 1985, 497–526, p. 525.) And Freeman, after discussing the use of the reasonable person standard in other areas of the law, argues that it is not “unprincipled to ask jurors to decide whether the legal duty to rescue has been violated, by considering what the reasonable person would do under the circumstances given her assessments of the risks, costs and inconvenience involved” (Freeman, “Criminal Liability” p. 1492).

47 As Pardun notes, prosecutors in the Northern Territory of Australia have the burden of proving beyond a reasonable doubt that the accused bad samaritan showed a callous disregard for the welfare of others. The term “callous” requires that “there be more than normal intent” and this “heightened intent is measured
McInnes notes in a different context, the person who unreasonably perceives a significant risk to herself when no such risk is present may be stupid, but she is no more blameworthy than a person who reasonably (but mistakenly) perceives such a risk.\(^48\) Thus, punishment in these cases would, in essence, be punishment for being atypical, especially when the samaritan was unable to determine ahead of time that her views were unlikely to be shared by others.

The preceding point suggests that the much earlier claim that bad samaritan laws involve no significant interference with autonomy needs to be clarified. The claim is clearly true if we adopt the subjective perspective of the samaritan because that perspective guarantees that the samaritan will not be obliged to sacrifice anything that she regards as significant. But the claim is at least less obviously true if we adopt the objective perspective since that perspective obliges people to act on others’ perceptions of risk and subjectively.” Pardun. p. 596. The inclusion of this burden in our laws would help alleviate some of the present problems, though it would also reduce the likelihood of convicting the truly bad samaritans since the passivity that is evidence for paralyzing panic or excessive fear may be just the same as for callous disregard, as I discuss shortly.

\(^{48}\) McInnes is focusing on the need to protect potential good samaritans from their unreasonable, mistaken beliefs that an emergency requiring intervention was in progress when in fact it wasn’t. (Mitchell McInnes, “Protecting the Good Samaritan: Defenses for the Rescuer in Anglo-Canadian Criminal Law,” Criminal Law Quarterly, vol. 36, 1994, pp. 331–371. See also Larry C. Wilson, “Good Samaritan,” McGill Law Journal, vol. 33, 1988, pp. 757–815.) Such protections would be especially important were we to enforce bad samaritan laws because the general threat of punishment for not intervening would have the result of encouraging people to intervene whenever the need for intervention was clear (or else risk punishment if one’s own uncertainty turned out not to be shared by others). But this would expose the samaritan to additional liability for assault, for example, when the samaritan intervened when intervention wasn’t necessary or welcome. Henderson cites a case in which a would-be good samaritan was sued after he “shot the plaintiff under the mistaken impression that such action was necessary to prevent the plaintiff from injuring the defendant’s father.” Henderson adds that matters are different in the case of negligently causing harm. If an agent isn’t sure whether her assessments of risk would expose her to liability because she isn’t sure how our hypothetical reasonable person would view the situation, erring on the side of excessive caution would not expose her to additional liability because the “would-be victims would have no legitimate ground for complaint” (Henderson, p. 933). The downside of the protection, of course, is that it would further encourage “officious intermeddlers.”
value even when the samaritan’s desired actions would not cause harm to others. It says that, when it comes to aiding others, persons may not make their own assessments of risk in a particular situation and then decide whether the accept it, but must instead guess what others will judge the risk to be and accept it if they also guess that others will judge it to be clearly reasonable.

Proponents of the objective standard might respond that we can avoid the preceding problems by drafting the bad samaritan laws with affirmative defenses that allow the accused samaritan to escape conviction if she could convince the jury that, for example, her perception of the risk was significantly different from that of the hypothetical reasonable person. But this merely postpones the problems. How can people prove to a jury that they were atypically afraid? Newspaper clippings and a police report might help my sister-in-law and nephew show that they were emotionally scarred, but would this be enough for the friends and loved ones, or even the stranger who only read about the case? And how could someone prove that she held a false belief (e.g., about the risks of getting AIDS from casual contact, the strength of an ocean current, the presence of water moccasins in a river, or the possibility of being sued if one tried to aid and failed), especially when the beliefs are, by definition, considered to be unreasonable? Subjecting people to criminal punishment for false beliefs that lead to a failure to prevent harm seems quite a bit different from the same finding in cases of causing harm. (Compare “I thought could get AIDS from mouth-to-mouth resuscitation” with “I didn’t think the gun was loaded,” or even “I didn’t want her to infect me with AIDS so I shot her.” The latter two expose a reckless indifference for the welfare of others and (or) a willingness to impose one’s beliefs on others in a way that the former does not.) Further, although we can never prove that a person had a particular mental state, at least in the case of commissions that cause a harm, we have some generally reliable (though not perfect)

49 Consider, for example, a person who sincerely believes that the scientists are wrong and that it is only a matter time before we discover that one can get AIDS from casual contact with an infected person. Requiring her to act contrary to this belief and provide, say, CPR to a stranger, is somewhat of an interference with her autonomy. Notice too that the same can’t be said about acts that cause harm (e.g., suppose she shot her neighbor in order to preclude contact with him) because such acts impose one’s beliefs on others and are not protected by the right of autonomy.
evidence that the person intended to do what she did, even if she didn’t intend its outcomes (suppose she aimed the gun and pulled the trigger without bothering to check whether it was loaded). But with omissions, the absence of action is as much a sign of an intention to let the harm occur as it is of daydreaming, paralyzing panic, excessive fear, and a false belief that no real harm is at stake. (Ellin raises the possibility that the flailing of the swimmer is misperceived as childhood horseplay, and Henderson discusses a case in which the backseat thrashing on lover’s lane was attributed by the samaritan to teenage hormones instead of attempted rape.50) Thus, affirmative defenses which place the burden of proof on the atypical samaritan may not provide her adequate protection from punishment in cases in which she was not morally culpable.51 It seems, then, that we are required to choose between the subjective and objective perspective when neither one seems ideal.52

In this section I’ve posed a series of dilemmas that arise in connection with assessments of risk (focusing on types, probabilities, and perspective) and I’ve argued that if we want to stand a reasonable chance of convicting the truly bad samaritans, we need

51 This can remain true even if we craft the laws with a variety of protections for our atypical samaritans. As long as the fines remain small to moderate or jail time is likely to be suspended, it will be prudent for the accused samaritan to plead guilty and avoid the expense and emotional turmoil of criminal proceedings.
52 The preceding discussion exposes additional grounds for treating laws against causing harm and laws against failing to prevent harm differently. The adoption of the subjective perspective in the former case could be exploited for personal gain in a way that it couldn’t in the latter case. That is, persons who want to harm another could claim they perceived a significant risk to themselves as well as take actions, prior to the harm, to make the claim seem believable. But since people stumble into situations in which their aid is needed, and since they rarely stand to profit from not aiding, the adoption of the subjective perspective in this case is less open to abuse and thus is less troubling. In addition, failures to prevent harm do not make the victim worse off than she would have been had the samaritan not been present, and do not preclude other people from providing the aid. In contrast, acts of causing harm do (tend) to make the person worse off and do preclude others from stopping the harm before it occurs (though others may still lessen its severity). For additional discussion of the objective versus subjective perspective especially as it relates to tort liability for failing to aid and negligently causing harm, see Henderson, pp. 931–932.
to draft and interpret the laws in ways that, by necessity, will include a variety of persons who do not fit our conception of true bad samaritans and thus were not in our initial target class. That is, each of the surveyed methods for excluding them (i.e., considering all types of risks, obliging aid only when it entails no increased risk of harm, and adopting the subjective perspective of the samaritan) would make it exceedingly easy for the truly bad samaritans to escape conviction.

Of course, proponents of the laws may respond that these problems aren't that serious or that they can be minimized with careful crafting of the laws, the use of a variety of additional legal distinctions, and proper instructions to the jury. They might also add that we can't expect perfection: If we are going to get the good of bad samaritan laws, then we need to be willing to draft and enforce the laws in ways that risk punishing a few samaritans who, due to atypical values, particular fears, general timidity, or ignorance, for example, weren't truly culpable. But why? What, in fact, is the good?

III. EXPECTED BENEFITS

Proponents of bad samaritan laws who are willing to accept the laws' imperfections need to believe that the benefits of the laws outweigh their risks and costs. But what are the benefits? Three potential ones come to mind, but none of them, I'll argue, is likely to be significant.

First, proponents of bad samaritan laws may hope to gain the good of punishing persons who show an outrageous disregard for the welfare of others – persons such as the apartment dwellers who heard Kitty Genovese's screams while she was being beaten to death but did not call the police, and persons such as David Cash. Cash, recall, is the friend of Jeremy Strohmeyer who watched Strohmeyer lure a seven year old girl into the restroom of a Nevada casino and begin to molest her. Cash didn't stay to watch the sexual assault and ultimate murder, but neither did he try to help the girl or notify authorities. Cash is even said to have bragged to others about his friendship with Strohmeyer. In response to this case, over 20,000 people signed a petition seeking to have Cash punished for his omis-
sion. But in the absence of a bad samaritan law, nothing could be done.

Notice, however, that even if bad samaritan laws had been in place in the states in which these attacks occurred, it is not clear that the bystanders would have been punished. The apartment dwellers in the Genovese case would probably not have confessed to hearing the screams had they known that doing so would subject them to criminal prosecution. Or they might have claimed that they thought that the screams were coming from a neighbor’s TV set. They might even have claimed that they were afraid that the assailant would somehow find out who called the police and put them at risk of retaliation. And David Cash, had he known about the laws, could have avoided liability by claiming that he was afraid his crazed friend would turn on him if he interfered. Such a fear isn’t patently unreasonable and would have shown Cash to be at more than minimal risk. He might also have avoided liability for failing to call the police on the ground that such notification would have exposed him to prosecution as an accomplice in the crime. All Strohmeyer had to do to support that charge was claim that Cash helped him lure the girl into the restroom or serve as a lookout. The fact that this risk is more than minimal has already been supported by the Supreme Court’s ruling in United States v. King stating that a privilege against reporting applies when reporting would lead to prosecution for accomplice liability, as well as an Ohio appellate court’s ruling that reversed a failure-to-report conviction on the ground that reporting “would have subjected the woman to prosecution under the state’s endangerment and welfare-fraud laws, and thus would violate her guarantee against self-incrimination.”53 In short, even if we have bad samaritan laws, we may not be able to gain the good of punishing many of the worst of the bad samaritans.54

53 United States v. King, 402 F.2D 694 (9th Cir. 1968), as cited in Yeager, p. 32. Yeager also mentions United States v. Trigilio, 255 F2d. 385 (2nd Cir. 1958) in which a “federal grand jury witness could claim privilege against self-incrimination for fear he might be charged with violating misprision of felony statute.”

54 I’m not claiming that all accused bad samaritans will be able to avoid conviction. Thus, there may be a retributive good to be gained from punishing at least a few bad samaritans. But we still need to decide whether this good is worth the
Referring to a second potential benefit, proponents of the laws might argue that even if many bad samaritans can escape punishment by feigning fear or ignorance or standing on their Fifth Amendment protections, the presence of the laws will still deter others from being bad samaritans. And although we may never be able to determine just how many omissions the laws deter, the fact (if it is a fact) that they will deter some is a benefit nonetheless.

But notice that this benefit, too, is both elusive and minuscule. Most of us don’t need the threat of criminal punishment to get us to aid others. We do so willingly, sometimes even at great risk to ourselves. Newspapers carry many more reports of people coming to the aid of others than they do of people standing by and callously watching harm befall others. Indeed, part of the shock in the latter cases comes from the fact that they are so rare. Thus, bad samaritan laws can’t deter the majority of us. Either we will already provide the aid and thus don’t need deterring, or we believe, perhaps mistakenly, that the duty to aid doesn’t apply to the present case because we lack the necessary skills, the risks are more than minimal, or we think that the victim is not really in jeopardy. As a result, the possible deterrent benefit of the laws is limited to the small minority of persons who, due either to a callous disregard for the welfare of others, to some psychological perversity, or to a dislike of the particular victim which makes the samaritan want to see the victim suffer, choose not to provide the minimal aid.

Yet even in this minority of cases – the only cases in which the laws have a chance of deterring – the laws as they are currently drafted are not likely to do much actual deterring. The small fines that now attach to violations (e.g., $100 in Vermont) won’t be enough to deter the bad samaritans who want to see the victim suffer. And although they may be able to deter the merely callous samaritans by having the inconvenience of the fine outweigh the inconvenience of aiding, this can only happen if the samaritan believes that she stands a reasonable chance of being arrested, prosecuted, and convicted. But the evidence thus far gives the bystander no reason to believe this. Though three states have had the laws for

 harms of punishing, or subjecting to legal prosecution, persons who weren’t truly culpable.

55 Yeager, p. 23.
BAD SAMARITAN LAWS: HARM, HELP, OR HYPE?

a cumulative total of over 50 years, the use of the laws has been far too infrequent to serve as a deterrent. Pardun reports that there have been “no known arrests or prosecutions” under Minnesota’s law, and apparently no successful prosecutions under Vermont’s law.\textsuperscript{56} In Wisconsin, the first use of the statute occurred eight years after its enactment. Although the conviction in that case survived appellate review (and the case appears to be the only one in the nation to have done so), the case is unlikely to serve as a deterrent in other cases due to its atypical nature.\textsuperscript{57} Briefly, Ms. LaPlante threw a party to which she invited friends that she knew might become violent with each other. A fight did break out on the front lawn and the victim was severely beaten. Ms. LaPlante was convicted for failing to aid the woman, but the case is curious because, unlike our typical bad samaritan, Ms. LaPlante helped create the peril and many other partygoers also stood by and did nothing but were not charged.\textsuperscript{58} Thus, its relevance to more typical bad samaritan cases is questionable at best.

Further, the lower the perceived probability of conviction, the greater the threatened punishment must be in order for it to be an effective deterrent.\textsuperscript{59} Thus, if deterrence is what we want, then, in comparison to the laws that are currently enacted, we need to dramatically increase the threatened punishment as well as the efforts made to impose it. We need to be willing to spend the resources needed to draft and enforce the laws, as well as to interpret and apply the laws in ways that don’t allow easy excuses. That is, we need to assess the risk from the objective “reasonable person” perspective and limit the types of risks that get taken into account. But of course, a prime consequence of this is a significant increase in the probability of convicting persons who were not truly bad samar-


\textsuperscript{57} Pardun, pp. 596–601.

\textsuperscript{58} Pardun, pp. 599–600.

\textsuperscript{59} Within limits. After a certain point, the probability of conviction is more important than the size of the threat. See Paul Robinson and John Darley, “The Utility of Desert,” Northwestern University Law Review, vol. 91, 1997, p. 472.
itans. Moreover, as we increase the size of the penalty, we increase the seriousness of these problematic convictions. Being subject to a $100 fine because one is timid, has atypical values, or misjudged the riskiness of a situation is one thing. Being subject to three years in prison for it is another. Further still, as these risks increase, society may be less and less willing to convict anyone of failing to aid, thereby precluding any deterrent effect.

At this point, proponents of the laws might respond that the important benefit of the laws lies not in their ability to actually deter a few would-be bad samaritans, but in the symbolic statement the laws make about the values and expectations of our society. Making the duty to aid part of our criminal law sends a strong message about what we stand for and what we as a society expect of our citizens. Thus, by expressing society’s moral condemnation of the acts of the bad samaritan, the laws help us internalize and reinforce the disposition to aid. (They can’t create the disposition, however.) Once this social norm is internalized, citizens won’t need the threat of punishment to get them to do the right thing. Thus we don’t need to worry about the problems that would arise were we attempting to defend bad samaritan laws on the basis of their deterrent effect. Robinson and Darley explain the underlying point in more detail as follows (though they are not focusing on bad samaritan laws):

Given the weak deterrent threat facing people, why do the vast majority still act in a way consistent with the law? ... More than because of the threat of legal punishment, people obey the law (1) because they fear the disapproval of their social group if they violate the law, and (2) because they generally see themselves as moral beings who want to do the right thing as they perceive it. Criminal law in particular can influence the norms that are held by the social group and that are internalized by the individual. Criminal law’s influence comes from being a societal mechanism by which the force of the social norm is realized and by which the force of internal moral principles is strengthened. That is, the law has no independent force, the way that social group norms and internalized norms do. It has power to the extent that it can amplify and sustain these two power sources.60

In short, proponents might argue that even if we were to draft the laws with broad safeguards against overzealous prosecution (e.g., by adopting the subject perspective of the agent when assessing risk,

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and considering all types of risk), as well as direct minimal efforts at enforcement and assign minimal punishments for violations, we could still gain a benefit from the laws – greater internalization of the duty to aid.

But as it stands, this view is misleading. First, while enacting the laws may help solidify the social norm and promote its internalization, enactment without serious and sincere efforts at enforcement can actually harm the norm by sending the message that we don’t really mean it – that we are just paying lip service to duty to aid. Feinberg gives the following analogy:

It is murder in Mississippi, as elsewhere, for a white man intentionally to kill a Negro; but if grand juries refuse to issue indictments or if trial juries refuse to convict, and this is well understood by most citizens, then it is in a purely formal and empty sense indeed that killings of Negroes by whites are illegal in Mississippi.61

Thus, by analogy, clear expression that the social group doesn’t take the duty to aid seriously may diminish the recognition of the duty in the very group that needed to have the norm more deeply internalized. They will thereby be left worse off than if the duty to aid were left solely within the moral arena with strong social sanctions given for violations. Further, purely symbolic laws (ones with no clear efforts at enforcement) diminish respect for the law in general by reinforcing the idea that we are only obliged to follow some of the laws.

Second, enacting the laws with the minimal penalties that we have now is also problematic. For again as Robinson and Darley argue, people are likely to attend to the comparative liabilities that are assigned by sentencing provisions of legal systems; people intuit that more morally serious offenses should command greater penalties. As Cook remarks, “The legislated (and actual) severity of penalty for a particular offense may influence the public’s feeling for the seriousness or moral repugnance of this offense.” In the long run, for those crimes in which “moral inhibition” plays an important role, announcing the high severity of punishment may be an important communication; more important that ensuring high probability of punishment.62

62 Robinson and Darley, p. 472.
Thus, current laws that assign the same penalty to a failure to save a life as for parking in a handicapped zone, not returning a library book on time and cross-country skiing without a pass, and less severe than for petty theft, don’t send the message that proponents are trying to send.\textsuperscript{63} In short, if bad samaritan laws are to achieve their desired symbolic benefit, then they must be drafted with far more severe punishments than they currently have and serious efforts need to be directed at their enforcement. But as already mentioned, the moral cost of these changes is an increase in amount of resources directed towards these laws (and away from other pursuits) and an increase in the number and significance of problematic convictions.

In summary, I have been arguing that even if bad samaritan laws can be shown to be morally legitimate in principle, and even if the laws can be drafted in sufficiently precise terms, it simply isn’t clear that the reasonably expected benefits of the laws are enough to override their problems, risks and costs. In turn, then, it isn’t clear that the proponents have met the third sort of challenge. Further, we shouldn’t forget that there may be other ways to gain the desired aim of the laws (\textit{i.e.}, an increase in the amount of aid provided) which do not face similar problems because they don’t oblige persons to ignore their own perceptions of risk in a particular case in favor of a societal, after-the-fact perception of risk. For example, if all we wanted were the symbolic statement, we could pass a sense of the Congress resolution or the state-level equivalent, stating that aid is what we expect of people. More seriously, if we really wanted to affect people’s attitudes, we could make active efforts to encourage, publicize and perhaps even reward acts of good samaritanism (or maybe even decent samaritanism). A reward system, which doesn’t have to be monetary and could focus on something as simple as “citizen of the month”, could send the same symbolic message about community and what we as a society value as would a prohibition-based system, and could do it without the moral problems and costs.\textsuperscript{64} We might even take some of the money we would have spent

\textsuperscript{63} Yeager, p. 23, citing a law in Minnesota that classifies the failure to render aid as a civil petty-misdemeanor the punishment for which is the same as that for cross-country skiing without a valid pass and failing to return a library book on time.

\textsuperscript{64} For an account of the aims and methods of a variety of reward systems, including the Carnegie Hero Fund Commission which has awarded more that
on developing and enforcing bad samaritan laws and spend it on the moral equivalent of the highly successful “Got Milk?” campaign (sort of a “Helped Anyone?” campaign). Even if it weren’t quite as successful in its symbolic effect (though it might be), it would have far fewer problems than the prohibition-based approach and thus be more successful, on balance, in instilling the message we want.

Of course, we may also be able to get some of the desired benefits by adopting the milder laws that merely oblige persons to notify authorities of a crime or peril in progress. The risks to the samaritan in such cases are almost always minimal, and thus there is less need to worry about the perspective from which the risk is assessed, the probabilities of the risks, and the types of risks that count. Thus it may be that the benefit of these laws are worth the efforts, problems and costs. But it does seem to me that in the course of pursuing this end, our primary focus ought to be on encouraging and facilitating people’s efforts to notify the authorities, and not on punishing those who don’t. For example, we could make it easier to notify the relevant authorities by placing call boxes more frequently along the highways, roads, subways, beaches and hiking trails. We might even pursue the possibility of making automobile manufacturers install emergency 911 buttons in every new vehicle. New satellite and cell technology makes this possible, and the button would provide immediate information about where the peril was perceived. It would provide aid for others the way that air bags provide (usually) aid for passengers. (Of course, we’d have to worry about the effects of the overly zealous intermeddler.)

But if we are really serious about getting people to save lives when they can do so at minimal risk, cost, and inconvenience to themselves, then one thing we ought to do, it seems to me, is to change our laws regarding organ donation. Instead of assuming that a person’s organs will not be donated unless the person (or family) consented to the donation, we ought to assume that, for adults, the organs will be donated unless the person (or family) registered dissent. The parallels between this and bad samaritan laws should be

7,000 medals for heroism and more than $19 million, see Yeager, pp. 11–12. (Yeager himself prefers punitive inducements over rewards and worries that the process of rewarding some heroes and not others will lead to post-rescue divisiveness and bitterness. He seems to ignore the fact that the process of sporadic and selective enforcement of bad samaritan laws may have the same result.)
obvious. Having a system of “presumed consent” to donation (with ample opportunity to dissent) would send a symbolic message about community and what we owe others that is similar to the hoped-for message of bad samaritan laws. And it would do so without the many of the problems of bad samaritan laws because in post-death organ donation cases, the risk, cost, and inconvenience to the samaritan-donor is minimal: He or she is dead, after-all, and has zero need for the organ. Further, we could limit the risk of mistakenly taking an organ from someone who had decided not to donate (as opposed to someone who just didn’t think about it) by using practical safeguards. For example, we could apply the law only to drivers over the age of 21 and provide information and forms for registering dissent at each stage of the application for and renewal of a driver’s license. Of course, there still would be a risk of taking an organ from someone who hadn’t actually chosen to aid, but proponents of bad samaritan laws should be willing to accept that risk in order to save a life. To put it in another way, the person who doesn’t consent to donating her organs – not because she has a religious or personal conviction that precludes it, or even conscious ambivalence – but because she hasn’t bothered to think seriously about it, seems to me to be a classic bad samaritan. Out of a callous disregard for the welfare of others, she omits to prevent a harm when she could do so at minimal risk, cost or inconvenience to herself. If we are unwilling to change the law regarding her behavior, then we should also be unwilling to change it for living bad samaritans.

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If coming from a proponent of bad samaritan laws, the standard objections to the proposed change in our organ-donation laws (e.g., objections based on autonomy or the sanctity, significance and/or inviolability of the body) seem disingenuous when the donors had ample opportunity to register their dissent. Taking their organs from them after they are dead is no more of a significant infringement of their autonomy than are laws requiring them to provide easy rescues while they are alive.