Guilty Bystanders?
On the Legitimacy of Duty
to Rescue Statutes

In most jurisdictions in the United States, if you fail to assist or obtain assistance for a stranger in grave peril when you could do so easily and without significant risk to yourself, your conduct does not constitute even a minor criminal offense. If the imperiled person dies and the death could have been prevented by a shouted warning, a phone call, or a tossed life preserver, and you failed to act out of callous indifference, or even malice, toward the victim, these facts are not sufficient to charge you with negligent homicide or any lesser offense, provided that the victim was a legal stranger, someone to whom you were not linked by any legal duty. This is so even if your failure to act was clearly monstrous from a moral point of view. The countries that belong to the Anglo-American legal tradition have gen-

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1. There are five exceptions. Vermont passed such a law in 1973 ("A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others" Stat. tit. 12, s. 519 [1973]). In response to public discussion of the 1983 New Bedford gang rape (during which numerous bar patrons failed to assist the victim), three other states passed laws imposing a duty to give some kind of emergency assistance: Minnesota (Stat. Ann. ss. 604.05, 609.02, West Supp. 1986); Massachusetts (Gen. Laws Ann. ch. 268, s. 40, West Supp. 1985), and Rhode Island (Gen. Laws ss. 11-37-3.1, 3.3, and 11-56-1). Wisconsin's statute requires one to provide or summon aid for crime victims exposed to bodily harm (Wis. Stat. Ann. s. 940.34[1],[2]).

erally been reluctant to impose criminal liability on "bad samaritans" who fail to take reasonable steps to give assistance when that assistance is morally required. In contrast, nearly all of the countries in Eastern and Western Europe have defined a legal duty to give reasonable emergency assistance and impose criminal penalties for its violation.  

The discrepancy between the Anglo-American and the European approaches has been remarked upon by journalists, legal scholars, moral philosophers, and the authors of a large number of notes and comments in legal journals, some of whom argue in support of the legislative introduction of a limited duty to rescue—that is, a duty to give reasonable emergency assistance to persons in grave and immediate peril when this assistance could be given easily, without risking harm to oneself and without neglecting one's other duties. Henceforth I will call statutes defining such a duty "bad-samaritan laws" and I will call the person who fails to act in such circumstances a "bad samaritan." (We can reserve the term "good-samaritan laws" to refer to restrictions on the civil liability of good samaritans if they unintentionally or negligently harm the victims they are trying to help.)  

A common diagnosis of the problem with the Anglo-American tradition is that it devotes excessive attention to citizens' rights, and in particular, to their negative right not to be harmed, and not enough to their civic duties, especially those easily discharged positive duties, like the duty to report an accident, that avert great harms at small cost to the actor. This diagnosis is informative, as far as it goes, but it fails to engage with the traditional argument against enacting bad-samaritan laws: that it is illegitimate to use the coercive power of the state to enforce positive duties of  


beneficence. Pointing out that many of our moral duties to confer benefits on others remain legally unenforced, opponents of such laws suggest that if failures to give emergency assistance constitute a genuine social problem, then the remedies should be educational, moral, and in general, hortatory, and should not involve criminal sanctions.

The locus classicus for this line of objection is Thomas Babington Macaulay’s discussion in Notes on the Indian Penal Code. He objects to the inevitable vagueness in the content of positive duties and concludes that “the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good.” The same line of reasoning is clearly stated in some of the older and perhaps deliberately provocative judicial opinions that assert the existence of a moral duty to prevent harm to a legal stranger just as strenuously as they assert the impossibility of imposing liability, civil or criminal, for a failure to do so. What sets the enforcement of positive duties outside the proper ambit of the criminal law, on this view, is the fact that the violation of a positive duty does not generally count as a case of causing harm. While the prohibition on causing harm is general in form, nearly self-evident in its warrant, and clear in its application, positive duties are hard to define, perhaps more a matter of beneficence than of justice, and, in any case, impossible to enforce. Furthermore, it is said, if bad-samaritan laws were justified on the ground that we have a moral duty to prevent harm when we can do so easily, then the same principle would justify the imposition of so many other positive duties that enforcing them all would involve too great an interference with personal liberty. Therefore, it is concluded, only specific positive duties that are grounded in special relationships between the persons involved are appropriately enforced with legal sanctions.


6. See, e.g., Union Pac. Ry. Co. v. Cappier, 66 Kan. 649, 72 P. 281, 282 (1903) (a trespassing youth had his arm and leg cut off by the wheel of a freight car, the railroad’s employees offered no assistance and left him bleeding by the side of the tracks): “For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure” (p. 653).

I will begin by criticizing a popular strategy for responding to this objection. Certain legal and philosophical commentators have argued that the bad samaritan’s failure to give assistance is, in fact, a violation of a negative duty, and so falls within the scope of the traditional justification for imposing criminal liability. This strategy manages to be conservative in its jurisprudence by being venturesome in its metaphysics: those who pursue it often adopt a skeptical stance toward the distinction between causing and allowing a harm—as is usually drawn—and argue for a more expansive construal of the concepts of causation and harm according to which bad samaritans do indeed cause harm to those they fail to help. I call this approach the causalist strategy for showing the legitimacy of bad-samaritan laws. It is important to keep in mind that the causalist makes a claim not only about the truth of the claim that omissions can be causes (henceforth, the negative-causation claim), but also about its significance. The causalist assumes that if it can be shown that the bad samaritan’s conduct makes the victim worse off, or that the bad samaritan causes harm to his victim, then this will show that the bad samaritan’s conduct links him to the resultant harm in a way that will justify imposing criminal sanctions. Thus, the causalist’s strategy is to assimilate the bad samaritan’s omission into a causal paradigm for explaining conduct and agency, and to appeal to certain features of this paradigm to justify liability.

In what follows, I will turn this strategy on its head: I argue that emphasizing—rather than minimizing—the moral and legal significance of the ordinary distinction between causing and allowing harm will allow a more convincing argument for the legitimacy of bad-samaritan laws to be constructed. I will examine two versions of the causalist justification of bad-samaritan laws, and I will raise objections to each (Sections I and II). These objections will be pressed into service in Section III to support a different strategy, one that is more expansive than the causalist strategy in its jurisprudence in that it argues for the legitimacy of bad-samaritan laws without categorizing the bad samaritan’s behavior as a case of causing harm. The duty to give emergency assistance is grounded, instead, in the state’s duty to protect the general welfare and in the reasonableness of the burden imposed on citizens who are “deputized” to report emergencies or to provide easily rendered assistance.

I will conclude by showing (in Section IV) that the causalist strategy, if it had succeeded, would have proved too much. It would not be able to explain why a failure to rescue should not count as a case of homicide by
omission whenever the death of the victim results. In fact, I will argue, standard accounts of "commission by omission" for various criminal offenses put into play a generalized version of the causalist strategy that shares its defects. As a result, there are two additional problems with the Anglo-American approach to liability for omissions that are as worrisome as its leniency toward bad samaritans—namely, its severity in convicting of manslaughter or murder those who fail to assist or rescue someone with whom they have a special legally recognized relationship, and its arbitrariness in imposing no criminal liability whatsoever on bad samaritans who are intimately involved with their victims if their relationship gives rise to no legal duty. The need for a criminal offense of lesser stringency that does not rely as heavily on the existence of other legal duties will provide an indirect argument for bad-samaritan laws: the point of passing them may lie as much in the need to provide an alternative to the charge of homicide by omission and, in some cases, a means of grounding such charges, as in its effect on the helpfulness of ordinary citizens.

I. A FAILURE TO PREVENT A HARM IS NOT AN INDISPENSABLE PART OF A SUFFICIENT CONDITION OF THAT HARM

One way to reach the conclusion that failing to prevent a harm can cause that harm is to argue that someone who fails to prevent a harm causes it if that person's omission to act was a counterfactual or "but for" condition of the harm—that is, if it is true that but for the omission, the harm would not have occurred. This approach is endorsed by some philosophers and by a large number of legal writers who discuss liability for omissions. In fact it is endorsed by the authors of the American Law Institute's Model Penal Code. According to Section 2.03 of the Code, "(1) Conduct is the cause of a result when: (a) it is an antecedent but for which the result in question


would not have occurred; and (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.” The code explicitly includes omissions in its definition of conduct in Section 2.01: “(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.” According to this approach, a failure to prevent a harm can count as a cause of the harm provided that the agent was physically capable of performing the omitted action, and that if he or she had performed that action, the harm would not have occurred.

The kind of counterfactual dependence described by the “but for” test is a notoriously broad and liberal test for identifying cases of causal dependence. It identifies any background or circumstantial factor without which the event would not have happened as a cause of that event, with the result that factors that merely delay an event, or affect its character in some minor way, may end up counting as causes of that event. Furthermore, if omissions are allowed to count as causes, then according to the “but for” test, anyone who could possibly have prevented some event will be a cause of it. It is not clear how to determine the size of this group; for example, is it everyone who could have traveled to a spot where a crisis requiring intervention occurred?

In response to such objections, some legal proponents of this view present the “but for” test as an analysis of factual causation, which provides only a weak necessary condition of liability, to be distinguished, in that regard, from the notion of proximate cause or legal cause, which is nearly equivalent to a finding of liability. They would claim that judgments about factual causation are prior to and independent of judgments about duties and obligations, while the proximate-cause inquiry is one that takes into account legal and other normative standards.\(^\text{10}\) Therefore, not all of the people who “caused” a death in virtue of the fact that they could have prevented it will be eligible for liability as a proximate cause of the death.

Some philosophically inclined partisans of the view that omissions can be causes claim that omissions can pass the stricter and therefore more useful test for factual causation that requires causes to be indispensable or necessary parts of a sufficient condition for their effects.\(^\text{11}\) A complete

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\(^{10}\) See, e.g., Leavens, “A Causation Approach to Criminal Omissions,” p. 564.

\(^{11}\) This analysis of causation has been defended by J. L. Mackie, “Causes and Conditions,” *American Philosophical Quarterly* 2 (1965): 245–64, and *The Cement of the Universe*
sufficient condition of some event E would include all of the relevant antecedent events, background circumstances, and laws of nature that must be described in a set of sentences that would logically entail a sentence asserting that E occurred. Any component of this condition that is indispensable, in the sense that without the sentence describing it, the sentences describing the other elements would not entail that E occurred, is a necessary part of a sufficient condition of E. Following Jonathan Bennett’s refinement of J. L. Mackie’s view, I will say that given L, the conjunction of all the laws of nature, the fact that P is a necessary or indispensable part of a sufficient condition of the fact that Q if and only if “there is a true R such that (P & R & L) entails Q, and (R & L) does not entail Q.” I will abbreviate this as the claim that P is an NS condition of Q.12

Joel Feinberg adopts this approach to justify the view that bad samaritans’ omissions cause the harms that they are failures to prevent.13 He discusses an example in which B has fallen into a river, while A watches nearby. Let us assume that B will not drown if and only if A attempts to throw him a life jacket. A decides, out of malice, not to throw the life jacket and B dies. Feinberg maintains that because (1) A was present in the actual circumstances and could have saved B if he had tried; (2) A’s omission to act was a necessary condition of B’s drowning; and (3) A’s omission to act, conjoined with the other circumstances, was sufficient for B’s drowning, it follows that (4) A’s omission to act “completed the sufficiency of a set of conditions which without it (given its necessity) would have been insufficient to produce that result” (pp. 173–74). In short, Feinberg infers that A’s omission was an indispensable part of a sufficient condition of B’s drowning because it was a necessary condition, in the circumstances, of the drowning.

Two objections commonly raised to this kind of argument fail to show what is wrong with it.14 It might be said that other conditions would have

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12. Bennett, Events and Their Names, p. 49. This account adopts the simplifying assumption that causal determinism is true.

13. Feinberg, Harm to Others, p. 173. Future references to Harm to Others will be given parenthetically within the text. See also Green, “Killing and Letting Die,” p. 202.

produced B's death quite on their own if A had not even existed, so, in the actual situation, A's omission could not be an NS condition of the drowning. This objection is vulnerable to the reply that A was in fact present, and that to assume that his actual presence and his ability to intervene could not be relevant to the outcome would be to assume that it would have occurred no matter what he did, which is patently false since, by hypothesis, A could have saved B.\textsuperscript{15} It might also be objected that even though A's intervention was a necessary condition of B's being saved (because, in the circumstances, nobody else could have saved him), this does not show that A's inaction was a necessary condition of B's drowning.\textsuperscript{16} But this is implausible. There is no getting around the fact that A's inaction is, in the circumstances, a necessary condition of B's drowning. We have assumed that if A had acted, if he had tried to throw a life jacket to B, then he would have succeeded in saving B, and in assuming this we have conceded that if B drowns, then A did not act.

It is consistent with the claim that A's inaction is a necessary condition of B's drowning that sufficient conditions of the drowning do not exist independently of A, but the former does not imply the latter as these objectors and their causalist opponents all assume. The real problem with Feinberg's argument is that it slides fallaciously from the claim that an omission is a necessary condition of some event to the conclusion that the omission must also be an NS condition of it. Consider a similar example and a parallel argument. Suppose that you were capable of preventing a room from becoming hot by turning on the air conditioner and that nobody else could have turned it on. Suppose also that you decided not to do so, the room became hot, and, in the circumstances, not turning on the air conditioner was enough to guarantee that the room would become hot. Therefore, three premises analogous to those in the original argument are all true: (1) you could have prevented the room from becoming hot by turning on the air conditioner; (2) your failure to turn on the air conditioner was a necessary condition of the room's becoming hot; (3) your failure to act, conjoined with the other circumstances was a sufficient condition of the room's becoming hot. But even if these premises are true, no sufficient condition of the room's being hot needs to include the fact that you failed to

\textsuperscript{15} This reply is given by Green in "Killing and Letting Die," p. 202, and by Feinberg in Harm to Others, p. 174.

turn on the air conditioner. This is because any set of sentences strong enough to entail that the room became hot must describe the air conditioner's state, but a description of the air conditioner's turned-off state would make otiose any mention of the fact that you did not turn it on. In fact such a description would make otiose any mention at all of your behavior.\textsuperscript{17}

The same strategy can be applied to the example used in Feinberg's argument. When we specify the facts of B's condition (say, his buoyancy, his location, his ineffectual thrashing, etc.) that are causally relevant to his drowning, these alone will entail that he has not been rescued from the water, and these, together with the laws of nature and sentences describing the other relevant background conditions will entail that B drowned. Therefore, not only is it true that there can be some sufficient condition of B's drowning that does not mention A's inaction, no sufficient condition of those events need mention the omission, and no sufficient condition of those events need even mention A's conduct. In principle, a logically sufficient condition can be created without mentioning the omitted act simply by specifying causally relevant positive facts that are incompatible with the occurrence of the omitted action.

It might be objected that this argument proves too much because it would make it hard to show that any causal factor described using ordinary idioms was really an indispensable part of a sufficient condition. If I assert that my swatting a fly was an NS condition of its death, it could always be objected that a description of the flyswatter's trajectory through space would make otiose any reference to my agency in moving the flyswatter. Similar arguments could make the nature of the flyswatter's causal contribution more precise; e.g., it could be argued that it is not the trajectory of the whole flyswatter that was indispensable, but only the trajectory of that small cross-section of the flyswatter that actually touched the fly. This kind of objection raises a problem for the NS account of causation in general, but no special problem for its particular application here. Because the events described in the objection are all clearly related by some kind of physical part-whole relation or logical determinate-determinable relation, a satisfactory reply to the objection could be based on the fact that these events

\textsuperscript{17} Frank E. Denton argues that an agent's omission is not an NS condition on the grounds that once the "actual antecedent condition of [the bad samaritan's] behavior is stated, it is superfluous to add" that he did not rescue the victim ("The Case Against a Duty to Rescue," \textit{Canadian Journal of Law and Jurisprudence} 4 (1991): 121–23). This view would imply, however, that the bad samaritan's positive behavior is an NS condition of the harm.
are not distinct, and so are not competitors.\textsuperscript{18} By contrast, my failure to turn on the air conditioner and the air conditioner's switched-off state are not related in either of these ways.

Some writers who grant that there are sufficient conditions of the harm independent of the omission have argued that causation by an omission should be analyzed as a case of causal overdetermination.\textsuperscript{19} That is, they claim that there can be a sufficient condition of which the omission is not an indispensable part because there are two distinct sufficient conditions for the result, and the omission is an indispensable part of only one of them. It is a tempting move, because if two factors causally overdetermine some result, then each, taken separately, is an indispensable part of a sufficient condition of that result that excludes the other. However, the objection raised above will block this strategy as well, since it shows that the agent's inaction is not an indispensable part of any sufficient condition of the result.

Traditionally, in law, to show that an agent’s conduct caused a harm is to show malfeasance, and an agent’s malfeasance grounds liability because it typically involves participation in the creation of harm, or at least in the creation of the risk of harm by the agent. Presumably, the more ultimate goal of those who argue that an omission can be an NS condition of some result in the course of presenting a causalist justification of bad samaritan laws is to demonstrate that because the omission was an indispensable part of the conditions that jointly gave rise to some harm, it played some role in the creation of that harm or added to the risk of harm in the circumstances. But the argument that I have considered failed to establish that omissions can be straightforward causes of this sort. The fact that an omission is a


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"but for" condition or a necessary condition of some result does not show that it is also an NS condition of that result. Since there are many kinds of noncausal counterfactual dependence, there is no reason to suppose that counterfactuals regarding omissions demonstrate causal dependence, as opposed to some other kind of dependence relation.20 For instance, when we consider what would have happened if someone had performed an omitted action, this question could quite plausibly be interpreted as one that inquires about the agent's abilities, and so perhaps about her causal powers, but not as one that establishes what the agent actually caused by failing to act. Therefore, even the weak claim that the omission contributed to the risk of harm is not supported by the kind of argument examined in this section.21

II. THE BAD SAMARITAN DOES NOT VIOLATE A NEGATIVE DUTY

Some who advance a causalist justification for bad-samaritan laws would claim that the NS account of causation captures a narrowly "scientific" and therefore inappropriate notion of causation. John Kleinig suggests that "many of those who want to deny causal status to omissions operate within a model of causation that has its home in 'scientific rationality' rather than the discourse appropriate to human interaction."22 In the same vein, one legal writer suggests that the alleged difficulties regarding negative causation raised in certain judicial decisions show "an unnecessary delicacy" in dealing with the issue.23 In some cases, the reasons offered by legal commentators in support of this view do not actually support the causalist strategy, because these commentators are working with a conclusory notion of causation according to which a finding of causation is tantamount to a finding of liability.24 Their version of the negative-causation thesis must therefore presuppose that liability for the bad samaritan's omission is justified on other grounds. At most, they might aim to show that liability for

omissions can be squared with the traditional assumption that causation is a necessary condition of liability, despite the differences between omissions and actions.

A somewhat similar view, one that also takes normative considerations into account when determining what counts as a cause, offers stronger support to the causalist strategy. According to this normative account of causation, facts about an agent’s legal and moral duties and about what is customary or expected within a certain context play a role in narrowing the concept of causation, so as to include less than the NS account would, for example, by denying the transitivity of causation, and also in broadening the ordinary concept of causation to include omissions as causes. Those who take this approach typically restrict the scope of negative causation to cases of negative agency, and in particular to cases in which an agent fails to perform some action which (1) she could have performed, (2) she was morally or legally required to perform, and (3) she realized that she was not performing.\(^{25}\) Therefore, many omissions that are “but for” conditions of some harm will not count as causes or causal conditions of it on this view.

These three conditions show that even if the extension of positive causation is understood to be partially determined by normative elements, negative causation is still quite different from positive causation. After all, conditions (1)–(3) have no counterparts in a normative account of positive causation. You need not have had the ability to refrain from an action in order for you to cause something by performing it, nor must you realize just what it is that you are doing, nor must you be misbehaving in any way. “I could not help it, I was shoved” and “I’m sorry, I didn’t see your foot there in the aisle” are uttered to rebut attributions of responsibility for what are admitted to be the causal consequences of actions. Perhaps for this reason the most plausible versions of a normative account of negative causation acknowledge that talk about negative causation is some kind of extension.

of causal language. For example, Hart and Honoré draw attention to “the very real analogies” between cases involving actions and omissions that justify “the extension of causal language” to describe the results of omissions, while Feinberg and Kleinig cite normative factors to justify the claim that failures to rescue may be causal factors even when they could not be appropriately described as causes of harm.

The view does seem to describe and justify a great deal of ordinary talk about causation by omissions. It also seems to cohere with commonsense judgments about cases of liability for failing to prevent a harm that are widely acknowledged to be justified: e.g., the judgment that failing to feed a dependent child is a way of killing it. More strikingly, it describes well our descriptive inclinations in unusual cases that we may not have considered before. Consider this pair of examples:

(1) A rock is rolling down a hill toward you. You notice that, downhill from you, a helpless baby lies in its path. It is clear to you that if you remain where you are, you will be severely injured, while if you step away you will no longer shield the child and it will be injured by the rock. You step away.

(2) The same as above except that you are sitting in your car in the rock’s path. You could avoid any risk to yourself by hopping out of the car while leaving it in position to shield the baby. You move your car away.26

The cases are interesting because the contrasts between action and omission, and between causing and allowing do not align themselves in the usual way. Moving yourself or your car out of the way of the rock is clearly an action, but in this context, it has what could be called “omissive significance” since it “contributes” to the child’s injury by removing an object that otherwise would have prevented the injury. Therefore, the extent of its contribution to the outcome is negative because it fails to prevent it. Correlatively, the alternative, not getting out of the way, would be an omission, but it seems to have positive causal significance in that it prevents the injury.

Many people would say that if you move yourself out of harm’s way in case (1) you do not cause injury to the child, nor is your action a causal factor of the child’s injury, but that in case (2) moving your car does cause injury or is a causal factor of the child’s injury. Since the cases are similar

26. Case (2) is based on an example given by Christopher Boorse and Roy A. Sorensen in “Ducking Harm,” *Journal of Philosophy* 85 (1988): 115–134. They maintain that you “can be convicted of murder or manslaughter in any American court" in case (2) (p. 127).
except in their moral characteristics, what lies behind this judgment must be the assumption that there is a moral duty to risk damage to your car to protect the child, and a consequent expectation that you will do so, but that there is no duty for you to risk injury to yourself—hence, moving your body out of the way does not cause the child to be injured and is not a case of causing the child's death.

The important underlying issue in the debate about the legitimacy of bad-samaritan laws is whether liability for omissions can be accommodated within a causal paradigm for justifying liability in order to answer the traditional objection that a failure to prevent a harm is merely a failure to confer a benefit upon someone, and that the criminal law must restrict itself to enforcing negative duties (at least between strangers). It is important to engage this issue directly in order to advance the discussion of bad samaritan laws beyond debates about the proper analysis of ordinary causal idioms. The debate about negative causation is in many cases a distraction from the main issue, carried out for rhetorical effect. After all, on one hand, we could accept the negative-causation claim, justified through appeals to normative considerations, without believing that it plays any role in justifying criminal liability for omissions. A great many people will call an omission a cause as a mere façon de parler, without attributing the same significance to the claim as to a claim about positive causation. (This could be called the “Abe Lincoln approach” to negative causation. Lincoln asked, “If you call a tail a leg, how many legs has a dog?” and answered, “Four, calling a tail a leg don’t make it a leg.”) On the other hand, those who want to resist liability for omissions harp on the fact that omissions are not really causes, thereby neglecting the question of whether they are enough like causes to have liability justified according to the same paradigm. In order to assess the causalist strategy without getting tangled up in trying to distinguish “Abe Lincoln” uses of causal language in talking about negative agency and merely conclusory notions of cause from claims about negative causation that are meant to have force as justifications of bad samaritan laws, I will formulate a weaker version of the causalist position according to which the bad samaritan’s wrongful failure to prevent a harm may or may not be a “genuine” cause of that harm, but has, in any case, some important features in common with causal agency that distinguish it from the mere failure to confer a benefit. This will also serve the purpose of expository economy since these distinctions are not always carefully drawn in discussions of this issue.
According to this weakened version of the causalist strategy, imposing criminal liability on bad samaritans can be justified by appealing to the fact that their omissions can be treated as causes or function as if they were causes for the purposes of explaining and justifying the imposition of liability. In particular, according to this view, omissions that meet conditions (1) through (4) below can fit into a causal paradigm for explaining liability, because they make the victim worse off, and thereby harm him, and so are not mere failures to confer a benefit.27

An agent's failure to perform some act A in order to prevent some harm H made the victim of H worse off and so harmed the victim if the agent:

(1) could have done A.
(2) could have prevented H by doing A.
(3) was morally required to try to prevent H by doing A.
(4) was aware of the circumstances that gave rise to this requirement.

Two quite plausible lines of reasoning lend support to this view. First, some who support the extension of liability for omissions propose that some more general notion like control replace causation as a necessary condition of liability. For example, Douglas Husak suggests that since causation does not usually ground criminal liability in cases in which the agent had no control over his actions, it should be the notion of control rather than causation that is taken to ground liability.28 Those who fail to prevent a harm that they could have prevented clearly satisfy this condition. But the notion of control (which is captured by conditions [1] and [2]) is too weak to play the same kind of justificatory role as ordinary positive causation. Many people who have control over some outcome in that they could have prevented it do not seem to be fair candidates for liability. But according to the weak causalist position formulated above, it is not only the bad samaritan’s ability to act, but also her moral duty to act and her awareness of the circumstances that give rise to this duty, that pick her out from all the other agents whose conduct was a “but for” condition of the victim’s harm, and so justify


attributing the result to her agency in particular. For example, Kleinig argues that failing to aid when there is a moral duty to do so "is harm-exacerbating rather than harm-initiating. It is harm-exacerbating, because in a situation in which aid to F was readily available, my not rendering it has effectively made F worse off. Even if the gravity of F's situation is not increased, I have prolonged it." Thus, conditions (3) and (4) distinguish the bad samaritan's failure from the failures of others, and so explain why her failure is not a mere failure to confer a benefit.

There is a second line of reasoning that supports the weak causalist position. There are many criminal offenses that do not involve causing harm to a victim. Unsuccessful murder attempts, tax fraud, tax evasion, driving under the influence of alcohol, and conspiracy to commit a crime can all constitute criminal offenses, yet the justification for imposing liability in these cases must appeal to something other than causation—to the creation of a risk of harm in some cases, to the violation of a statutory obligation justified by the collective good in others. But it could be argued that when the justification for imposing criminal liability for some kind of conduct rests upon the occurrence of harm to an identifiable victim, as in the case of the bad samaritan, the justification for imposing liability must appeal, at least, to something that is like causation in that it links the agent with a consequence. According to the weak causalist position, the bad samaritan harms the victim or at least violates a negative duty not to act in a way that is to someone's detriment. Concerning an example involving a severely injured motorist, A. D. Woozley argues:

Doing nothing to help the injured motorist is doing what will, in Salmon's terminology, operate to his prejudice. We have to distinguish the case where, if nothing is done, things will get worse for him from the case where they will not; and it is in the first case that the Good Samaritan problem clearly arises. So, if there is to be a legal duty, it will be a negative duty: the duty not to do something, whether by act or omission, by doing which one allows things to get worse for the victim.29


30. Woozley, "A Duty to Rescue: Some Thoughts on Criminal Liability," p. 1296. However, Woozley does not think that this would be a case of causing harm (p. 1298).
In a similar vein, John Harris suggests that the negative duty not to injure others can be described in two ways, in the active voice and in the passive, and that the latter form of the duty is violated by the bad Samaritan’s omission; it is “the duty not to injure anyone by failing to perform actions which we could perform and which, if performed would prevent the injury from occurring.”31

Thus, an essential ingredient of the weak causalist strategy is the claim that although negative agency is not exactly like positive causal agency, it can link agents to harms just as causation does. Many writers seem to assume that this is the only strategy that could justify bad Samaritan laws. For example, when Kleinig raises the issue “whether failures to act can be so related to harms that it is appropriate to contemplate criminal liability for these failures” he labels this question as one that concerns “the causal significance of failures to act.”32 It is this assumption that I will try to undermine in what follows. Often it is not stated explicitly because it is taken to be obvious that liability for omissions is liability for their consequences and that since the bad Samaritan is responsible not just for his conduct, but also for its consequence, the harm or worsened condition of the victim can be attributed to him.

Obviously, it is fallacious to argue from the fact that the victim is worse off than he would have been if he had been rescued to the conclusion that the agent who fails to rescue him actually makes him worse off. If A withholds some entirely gratuitous benefit from B, then B is worse off than he would have been if he had received the benefit. But that does not show that A worsens B’s condition; A merely fails to improve it. Kleinig’s claim that the harm is exacerbated rather than initiated because it is prolonged is unconvincing for similar reasons, as is Woizley’s claim that if one allows the victim’s condition to worsen, one has made him worse off. It is worse for the harm to be prolonged than for it to be prevented, and it is worse for his condition to decline than to remain stable, but it does not follow that the bad Samaritan worsens the condition of his victim. After all, if someone failed to interfere to cut short a pleasant experience, this would be better for its subject, but that does not mean that the person who failed to interfere has put the subject of the pleasurable experience in an improved condition,

nor would we say that she had improved the experience by prolonging it. Similarly, if one failed to interrupt a pleasant experience that was getting even more pleasant, it does not follow that one has improved the experience. Note that this is so even if the one who does not interrupt would have been morally entitled to do so.

In his argument for the claim that the bad samaritan harms his victim and makes him worse off, Joel Feinberg suggests the metaphor of a graph that plots the trajectory of gains or losses or the improved or worsened condition of some interest. Thus, to make someone worse off is to set his interests at some point below a baseline. As Feinberg recognizes, the question whether the bad samaritan makes his victim worse off will turn on how one identifies the appropriate baseline for assessing the impact of the bad samaritan’s failure on the victim’s interests. If the baseline is the victim’s condition when the bad samaritan comes upon him, then a bad samaritan who fails to help does not seem to make the victim worse off. Feinberg argues, however, that “where there is a duty to aid B, then failure to assist B back to the status quo ante” would be to harm him in the sense of setting back his interest to a point below his normal baseline (pp. 139–43). So, according to Feinberg, it is not the victim’s actual condition that provides the baseline for distinguishing failures to advance an interest from setbacks to that interest. Rather, it is his normal condition, the condition from which he departed when he became imperiled. Feinberg argues that only when the benefit that could be conferred would be something gratuitous that produces a “net gain” from the point of view of the person’s normal baseline would it be correct to describe the withholding of it as a mere failure to benefit. For example, a governor who did not grant clemency to a prisoner would not have made him worse off (p. 141).33

If B is entitled to something and so deserves to receive it, there is a sense in which his moral interests are insulted if you don’t give it to him or help him get it (supposing that you can). Not only have his interests not received a certain kind of respect, but he has not received what is his due. One could even say that B’s interest in being treated fairly has been set back and that, in a derivative sense, this interest has been “harmed” by your callousness. But this kind of mistreatment, which harms an interest by dooming it to nonfulfilment, does not imply that a person has been

harmed or made worse off.\textsuperscript{34} If it did, it would obliterate the distinction between harming and benefiting that Feinberg’s causalist strategy seeks to maintain, in some form, while extending the ordinary notion of harm.

Feinberg’s view leads to other complications. Consider a case of “undermanned rescue”: two people, A and B, need rescuing and at most one of them could be saved by Z, the only potential rescuer present. A and B have an equal claim on Z. If A is rescued and B is not, then since they could not both be rescued, it seems that B was not treated wrongfully, however unhappy he and his survivors might be about Z’s decision. It follows, according to Feinberg’s view, that B was not made worse off by Z’s failure to save him because Z did not wrong him. On the other hand, if neither A nor B had been rescued by Z, then should we say that Z treats both of them wrongfully and so makes them both worse off? Feinberg claims, about such a case, that Z would violate the rights of both A and B if he saved neither of them because their right to be rescued is simply the right that Z save as many of them as he could without unreasonable risk to himself (pp. 145–46). Therefore, on Feinberg’s view, both would be wronged. It is strange to characterize the right violated here in such extrinsic terms.\textsuperscript{35} Still, if we follow Feinberg here, for the moment, and grant that Z treats them both wrongfully in this case, it still will not follow that he makes them both worse off. To make them both worse off he must have had the ability to make them both better off, but he does not have that ability.

Feinberg argues that if A and B are babies and Z’s failure is the result of morally culpable indifference, there is a victim in this kind of case (though an indeterminate one, because we cannot say which baby would have been saved if Z had acted rightly), and Z could fairly be charged with homicide. If Feinberg would also say that Z makes \textit{either} A or B worse off, though it is not determinate which, then he is committed to the view that a person who knows everything about how his interests are faring and everything about the moral duties of others and himself still might not know whether a particular action makes him worse off. But this seems absurd. It is the way

\textsuperscript{34} It is exactly the claim criticized here that Feinberg invokes to explain the possibility of posthumous harm. \textit{See Harm to Others}, pp. 79–94.

\textsuperscript{35} As Thomson observes: “A further objection to so using the term ‘right’ that from the fact that A ought to do a thing for B, it follows that B has a right against A that A do it for him, is that it is going to make the question of whether or not a man has a right to a thing turn on how easy it is to provide him with it; and this seems not merely unfortunate, but morally unacceptable” (“A Defense of Abortion” in \textit{Rights, Restitution, and Risk}, W. Parent, ed. [Cambridge, Mass.: Harvard University Press, 1986], pp. 13–14).
in which the ability condition for making someone worse off interacts with the duty condition that leads to this result. This suggests that there is considerable conceptual strain involved in moving from the claim that the bad samaritan should have acted to the stronger claim that her failure to do so harmed the potential recipient of her assistance by making him worse off.\textsuperscript{36}

Feinberg interprets the fact that the victim is entitled to the samaritan's assistance as proof that the victim has a right to be rescued, and in characterizing the right involved as a right to have a certain action performed by another, the violation of which harms the victim, Feinberg analogizes this right to paradigm cases of negative rights that are correlative to negative duties. For example, the right not to be harmed is, roughly, the right, against others, that they not harm you. But a negative right not to be harmed (correlative to a negative duty not to harm) expresses a distinct kind of claim from this alleged right to be rescued (correlative to a duty to rescue). If, for example, you divert a threat that originally threatened A and B onto B alone though you could have saved both A and B, then you rescue A and ensure that B will be harmed and so harm him. Compare this to a situation in which you rescue A from a threat that endangers both A and B equally when you could have rescued both of them. Your choice to save only A ensures that B will not be saved by you, but it is not an action that would ordinarily be said to harm B, and this seems to make a moral difference. In the second case, you have not violated B's negative right not to be harmed, though you have violated his positive right to be rescued. In the first case, you have harmed B as well as neglected him. Both actions are wrongful and both ensure B's death, but the first is clearly worse. The weak causalist view, applied to these cases, would prevent us from distinguishing between the first and the second cases in this way—that is, on the grounds that the first involved a violation of a negative duty while the second did not. Both would involve violations of negative duties on this view. But since the weak causalist strategy seeks to maintain the distinction between negative and positive duties in order to show that the bad samaritan's conduct violates a negative and not merely a positive duty, it seems that the strategy, applied in such cases, would be self-defeating: it would undermine the distinction that it meant only to redraw.

I conclude, then, that there is no good reason to accept the weak causalist view. If we reject the weak causalist's claim that a bad Samaritan makes her victim worse off and violates a negative right of the victim's, does it follow that we must accept the opponent's claim that the bad Samaritan's conduct is a mere failure to confer a benefit? No. For even if we reject the view that a victim has a right to be rescued (whether negative or positive), as long as we maintain that the bad Samaritan has a duty to act, and that the victim has a right to her own life, we need not characterize the bad Samaritan's failure as a mere failure to benefit. Someone in grave peril of losing her life is threatened with losing something to which she has an independent right, and an act of rescue would involve restoring it to her, so the benefit that the good Samaritan confers is certainly not a gratuitous one. This way of describing the situation also yields a more plausible description of the case of undermanned rescue in which $Z$ could rescue $A$ or $B$ but not both. If $Z$ rescues $B$ and not $A$, $A$ does not relinquish her right to her life simply because $Z$ was not able to protect it, nor is it a right that is hypothetical in content—the right that others assist her if they can. Therefore, $Z$'s failure to rescue $A$ infringes this right, though not wrongfully.

The right of $A$'s that plays a role in grounding $Z$'s duty is a right to life, not a right to conduct on the part of others. Therefore, more needs to be said to explain the ground of $Z$'s duty to rescue $A$. After all, we do not think that agents have a general duty to save lives whenever and however it would be possible to do so. In the next section I will argue that it is more reasonable to characterize the source of a potential rescuer's duty to act as society's interest that tragic losses of life not be incurred when small and unburdensome efforts could have prevented them, and the interest of each individual that there be laws requiring action in such circumstances. Thus, the rationale for the law concerns a reasonable way of distributing the benefits and burdens of easily accomplished harm prevention onto all and so is not grounded in either negative or positive individual rights.

III. The Forms of Legitimacy

Feinberg describes his project in *Harm to Others* as an exploration and partial defense of John Stuart Mill's famous claim that "the only purpose for

which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." Yet Feinberg’s formulation of the harm principle differs from Mill’s in two important respects. First, Feinberg’s harm principle has a very different form: “The need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion” (p. 11). Whereas Mill presents a necessary but not sufficient condition of legitimacy for criminalizing conduct, Feinberg’s principle is meant to provide a prima facie reason for criminalization and so is, in one sense stronger. In another respect, Feinberg’s harm principle is weaker: it does not constitute even a necessary condition of legitimacy. Feinberg argues that profound offense can ground criminalization, and he defines the form of liberalism that he wants to defend as the claim that either the harm principle or the offense principle is satisfied by all legitimate statutes.

Second, Feinberg builds more into the concept of harm than the term carries in Mill’s usage and in some of its ordinary uses. Feinberg identifies two distinct concepts of harm in our ordinary thought: harm that consists in wrongdoing someone and harm that consists in a setback to somebody’s interests. He explicates the notion of harm that is needed to formulate the harm principle by describing it as the overlap between these two senses: harm is the wrongful setting back of an interest. Conduct is wrongful by this standard when it is, all things considered, wrongful: A’s action harms B only when A’s acting in that manner is morally indefensible—that is, neither excusable nor justifiable (pp. 105–6). Setting back an interest involves impairing the condition of something in which the agent has an interest. Since Feinberg’s principle cites the goal of preventing harmful conduct as what gives legitimacy to the statutes and penal sanctions that fall within its scope, the prevention of harm caused by natural forces like earthquakes and tornadoes, as well as by accidents, does not fall within its purview. Mill, in contrast, clearly meant to include such things as acts of rescue as relevant forms of harm prevention in his version of the harm principle. He observed that “there are also many positive acts for the benefit of others which he may rightfully be compelled to perform . . . . such as saving a fellow creature’s life or interposing to protect the defenseless against ill usage—things which whenever it is obviously a man’s duty to do he may rightfully be made responsible to society for not doing.”

39. Ibid., pp. 10–11. If we assume that the distinction drawn by Mill in chapter 5 of Utilitarianism between perfect duties of justice (which involve a corresponding right) and
Feinberg interprets the harm principle as setting limits only on the
criminalization of behavior, while Mill addresses a more general topic: the
extent to which society may justifiably interfere, through the law or other
forms of social pressure, with individual freedom. As a result, Feinberg is
on firmer ground in ruling out moralism as a ground of interference. Moral-
ism’s credentials look stronger when the issue is informal social coercion,
in particular the legitimacy of influencing behavior through the expression
of opinion, simply because it is hard to distinguish freedom of expression in
condemning something from undue interference with individual conduct.
Feinberg formulates the principle of legal moralism as follows: “It is always
a good and relevant reason in support of penal legislation that it is reason-
ably necessary to prevent inherently immoral conduct whether or not such
conduct is harmful or offensive to anyone” (p. 12).

Feinberg’s causalist approach to bad samaritanism is part of the larger
project of investigating whether the concept of harm can ground a unified
account of statutory legitimacy. For example, Feinberg offers, independ-
ently of the arguments so far considered, an account of harm that was in
part designed to accommodate the judgment that a person can be harmed
posthumously. This is not to discredit Feinberg’s method. He quite sensi-
bly aims to treat the legitimacy of criminalizing certain acts as a fixed point
in our moral perspectives and he tries to develop an account of harm that
would explain and justify these judgments. Feinberg’s considered view is
that some form of the causalist strategy succeeds (he gives a wide variety of
arguments for such a position, not all of which have been discussed here),
and that bad-samaritan laws fall within the scope of the harm principle as
he interprets it. To dissipate any residual skepticism concerning his strat-
egy, Feinberg attempts to show that the alternatives to it will be incompat-
gle with liberalism. He remarks that if failing to rescue someone does not
count as a case of causing harm, then

either we must leave bad samaritan statutes unsupported by any liberty-
limiting principle other than legal moralism, and hence without liberal
credentials, or else we shall have to supplement the harm principle with
an additional liberty-limiting provision, holding now that it is a good
reason for a criminal statute that it is needed to prevent persons either

imperfect duties of beneficence (which do not) is meant to be an exhaustive one, then this
passage suggests that Mill would allow that the victim had a right to be rescued and that some
acts of beneficence are the fulfilment of perfect duties of justice. (I thank the Editors for
raising this issue.)
from harming one another or (what is different) from allowing harm to others that they could prevent.

Regarding this newly expanded version of the harm principle, he worries that it “might lead us, on other issues, where we are sure we have no right to go” (p. 128).

It is not clear that Feinberg’s preferred causalist approach avoids the defects of these two alternatives. As we saw, his argument for the weak causalist position turned on the claim that A’s failure to assist B makes B worse off and so harms him only if A has a moral duty to assist B. Therefore, the argument for the conclusion that the bad samaritan violates a negative duty depended on the fact that her action is morally wrong. But then, has Feinberg really escaped what is objectionable about legal moralism if the existence of a moral duty to perform an act of rescue plays a crucial role in determining that a bad samaritan’s victim was made worse off by his omission? For the same reason, the argument that Feinberg uses would show the legitimacy of legally enforcing a broad range of positive duties to aid and assist those in need, almost as broad as those that the supplemented principle would cover. If Feinberg’s arguments succeed at all, they would also show that any immoral failure to prevent injury can be subject to criminalization as a cause of that harm. Therefore, Feinberg’s harm principle combined with the causalist strategy might also lead us, on other issues, where we are sure that we have no right to go.

The expanded or supplemented version of the harm principle that Feinberg considers and rejects is parallel in form to his harm principle. According to the additional disjunct that covers the prevention of harm: “it is always a good reason for a criminal statute that it is needed to prevent persons from allowing harm to others that they could prevent.” Because it claims that the prevention of harm is a consideration that always provides a prima facie reason for criminalizing whatever conduct falls within its scope, it is alarmingly general in form. This fact suggests that the relationship between the harm principle and the specific statutes that fall under it does not provide a good general model for demonstrating the legitimacy of a statute. The general negative duty not to harm others provides the ground and the justification for enforcing more specific duties—for example, the duty not to harm others by robbing them—that fall within its scope. In contrast, the general positive duty to prevent harm is not an especially stringent one. The more specific positive duty to give emergency assis-
tance to a person in grave peril when one can do so easily is more stringent because it is more specific. Hence, the legitimacy of enforcing this more specific duty cannot be explained simply by appealing to the legitimacy of enforcing the more general duty that comprehends it.

We can see then that the form that Feinberg envisions for the extension of the harm principle that would cover the prevention of harm is inappropriate; the principle that he suggests expresses a defeasible presumption in favor of legitimacy that is overly strong when applied to positive duties.40 (The same complaint could be made about the way in which legal moralism is formulated, but I will not pursue that issue here.) Feinberg distinguishes between legitimating some legislatively imposed prohibition from a moral perspective and justifying that legislation by attesting to its wisdom, effectiveness, and practicality. But this distinction between what a legislature is morally entitled to do and what it would be wise for it to do may be a clear one only for prohibitions of acts that cause harm. The legitimacy of introducing legislation to enforce a positive duty seems to depend more heavily on matters involving circumstances, cost, effort, and likely consequences, since the presumption against criminalizing the breach of such duties is in part based on the consequences of enforcing these potentially more invasive legal requirements.

There are two features that make the duty to perform easy rescues so morally stringent and should therefore play some role in an argument to show the legitimacy of enforcing it. The first is the connection between the good samaritan’s duty to obtain assistance and organized police and emergency services. The community undertakes to protect property against damage by fire, but it would be impractical for communities to appoint fire monitors with contractual duties to alert the fire department if they see smoke or flames. Rather, this is left to citizens. One’s duty to report a fire is a public duty, just as the firefighter is carrying out his duty to the commu-

40. Mill himself noted that there may be a presumption for criminalizing any behavior that causes harm, but for positive duties to prevent harm it would be more accurate to say that there is a presumption against legally enforcing them because of the greater interference with personal liberty that is involved. In On Liberty he remarked that, “A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury,” though he conceded that the latter “requires a much more cautious exercise of compulsion than the former. To make anyone answerable for doing evil to others is the rule; to make him answerable for not preventing evil is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception,” p. 11.
nity that employs him, rather than a duty to the individual whose property needs protection. The state has a duty to protect the general welfare, and one way of carrying out this duty is to “deputize” citizens to function as part of a monitoring system and, in circumstances in which assistance can be easily provided, as surrogates for professional rescuers. The fact that there is no plausible alternative to this approach that could cover as wide a range of emergencies plays an important role in justifying the imposition of this burden on citizens. The provision of food to the hungry and housing for the homeless is no less important for human survival, but it is less reasonable to argue that deputizing ordinary citizens is the best or the only way to meet this need.

A second point, equally important, is that a duty to give emergency assistance constitutes a reasonable and not excessively burdensome interference with individual liberty because it applies only to cases in which a fairly small effort is able to avert a very great harm and the threat arises out of exceptional circumstances. From the perspective of the citizen affected by such a statute, the chances that one will be inconvenienced by this duty are small, while the nature of the hazard—death or injury—that assistance would avert is very great. Would the imposition of such a duty discourage people from frequenting beaches and mountain trails, places that hold greater dangers and so increase the chance that one will be called upon to offer assistance? It is hard to see why it should, since those available as rescuers are, at the same time, offered protection as potential rescuees; their own security is enhanced if they have reason to believe that others will rescue them if they are imperiled.

These two points, that a duty to give emergency assistance can be viewed as a way of deputizing citizens to serve as reporters of emergencies and as providers of easily given assistance, and that each citizen can see the bargain between potential inconvenience and potential rescue as one that he or she has good reason to strike, should play an important role in showing the legitimacy of bad-samaritan laws by showing that the interference with individual liberty is justifiable. In fact, the failure to enact statutes that would create a general duty to give emergency assistance can make citizens as a whole worse off than they would have been under an alternative regime by increasing the risk of unremedied harm.

41. W. M. Landes and R. A. Posner suggest that imposing tort liability on those who fail to rescue would have this effect (“Salvors, Finders, Good Samaritans, and Other Rescuers,” Journal of Legal Studies 7 [1978]: 83).
For what, exactly, is a bad samaritan liable under the kind of statute that is advocated here? When moral philosophers discuss "responsibility for failures to prevent harm," they tend to blur the distinction between responsibility for the conduct that constitutes the failure and responsibility for the harm itself. This distinction is drawn more sharply within the criminal law: there are two quite different ways in which an omission can give rise to criminal liability. A *conduct offense* is defined in terms of the legal duty that is breached, rather than in terms of its consequences—typically it is a failure to carry out some statutorily specified activity, e.g., failing to file a tax return, neglecting to care for a dependent child, and failing to report a communicable disease. All of these will count as offenses even if no harm results. There is also commission by omission of a *result offense*, an offense that is defined as the bringing about of some harmful result. An example is involuntary manslaughter committed by starving a dependent child.42

The rationale that I have sketched would favor defining the failure to rescue as a conduct offense: the breach of the duty to take reasonable steps to give emergency assistance. This is weaker than the duty to prevent harm or injury, the duty that proponents of the causalist strategy seem to have in mind. As I will explain in the next section, this way of defining the offense would help justify the claim that a failure to give reasonable assistance to a stranger in peril need not give rise to liability for homicide if the victim dies. It also implies that the duty to give assistance can be breached even if the harm does not occur. This is widely regarded as a desirable feature of the existing European43 and U.S. duty to rescue statutes, but it is not clear that those who adopt the causalist strategy for justifying liability can give a coherent rationale for it.44

This line of justification claims that neither a negative right not to be
harmed or made worse off nor a positive right to be rescued is violated by the bad samaritan. Rather, the bad samaritan violates a positive duty grounded in a public duty. Some have objected to the introduction of a legal duty to rescue on the grounds that it would automatically force non-rescuers to compensate someone whom they could have rescued for the damages that a rescue effort would have prevented. Given the number of writers who adopt a causalist strategy and call for an extension of civil liability for bad samaritans and advocate permitting tort actions against them, this is a reasonable concern. The strategy of justification that I have advocated here does not imply that civil liability would be appropriate in every case for two reasons. First, I have argued that it is a matter of public interest that rescue be undertaken, and so involves a public duty; it is not just a private matter between the bad samaritan and the person in danger. Civil liability (liability to an individual in a private suit for damages) and criminal liability (liability to society or the state) can be concurrent, but they involve distinct breaches of different kinds of duties. If the duty to rescue is construed as a public duty, owed to society, to be enforced by criminal sanction rather than by private claim, the compensation issue does not have to be settled in order to justify the good-samaritan law. Second, requiring that bad samaritans be liable in tort to compensate victims is problematic, I would venture, because it seems to presuppose a causalist account of the offense of failing to rescue, and it is not clear that


anything sufficiently like a causal link exists to tie a bad samaritan’s conduct to the victim’s harm. The failure of even the weak causalist strategy suggests that the requisite tie to the harm cannot be established as a matter of course. Furthermore, if the causalist strategy had succeeded it could not provide principled grounds to block an extension of civil liability to bad samaritans in every case in which preventable harm occurs. This is another sense in which the causalist strategy would prove too much.

IV. FAILURE TO RESCUE AND HOMICIDE BY OMISSION

Not all of the opposition to bad-samaritan laws is motivated by doubts about the legitimacy of the legislative introduction of such statutes. There are good reasons for skepticism about the effectiveness of such laws as an inducement to good behavior and good reasons to consider what other, perhaps unintended, consequences would follow if such laws were enforced. Here is a sampling of questions that could be raised:

(1) People do come to the aid of those in peril already; is it likely that someone who was unmoved by the moral reasons to go to someone’s assistance would be motivated by the existence of criminal penalties?

(2) Would citizens have fair warning of their legal duties if such laws were passed? Few residents of Massachusetts seem to be aware of the 1984 law, passed because of the New Bedford gang rape, that requires them to report crimes to the proper authorities.

(3) In the famous Kitty Genovese case, bystanders explained their reluctance to get involved by citing the possibility of retaliation against witnesses to crime. Similarly unwelcome indirect results might be more widespread if a duty to report crimes was introduced. Witnesses to a crime who had not assisted the victim in any way might be unwilling to come forward later to assist prosecutors since to do so they would incriminate themselves as bad samaritans.\(^\text{47}\)

(4) How much personal danger should a bystander be willing to risk in carrying out his legal duty? This is not an easy matter to gauge in a society in which easily concealed handguns are in general circulation.

(5) Would such laws complicate and destabilize a moral consensus that distinguishes active and passive euthanasia and, in some circumstances, tolerates the latter on the grounds that not interfering and allowing some-

\(^{47}\) Seagraves poses this question in “The Duty to Rescue in California,” pp. 1283–84.
one to die can be permissible even though causing that person's death would not.  

Even if all these doubts could be allayed, one might oppose advocating such laws simply because there are more pressing matters for our legislatures and criminal justice system to address.

These are questions that deserve more attention than they have received. However, the critique of the causalist strategy presented above lays the groundwork for a powerful indirect argument for the wisdom of introducing bad-samaritan laws. Those who take the causalist approach to justifying such laws fault the current Anglo-American approach for its leniency. But they fail to note the more alarming fact that it can be too severe toward failures to rescue in cases in which there is some special relationship between the parties. Current American legal practice recognizes the possibility of criminally negligent nonfeasance only if the parties involved are related as parent and child, husband and wife, or by certain other familial or contractual obligations. As a result, those who fail to rescue or assist someone with whom they have a special relationship, one that gives rise to other legal duties, can be convicted of murder or, more commonly, manslaughter if the victim dies. If A is B's spouse, parent, or guardian, and A fails to assist B with the result that B dies, A's conduct could count as homicide. However, if A and B are not linked by one of these special relationships, but are not strangers to each other either, the very same conduct would give rise to no criminal liability whatsoever.

48. I thank Amelie Rorty for drawing my attention to this possibility.

49. Cornell v. State, 159 Fla. 687, 32 So.2d 610 (1947) (an inebriated grandmother allowed a grandchild in her care to smother, and was convicted of manslaughter by gross negligence); People v. Burden 72 Cal.App.3d 603 (1977) (a father charged with second-degree murder for allowing his five-month old son to die of malnutrition; the child's mother was mentally retarded and resisted the father's involvement with the child); Bradley v. State, 79 Sup.Ct. Fla. 651, 84 So. 677 (1920) (Bradley, a Christian Scientist, failed to take his severely burned daughter to a doctor; his manslaughter conviction was reversed on the grounds that his negligence did not cause the death of the child); Commonwealth v. Konz, Pa. Super., 402 A.2d 692, (1979) (diabetic Reverend Konz wanted to forego insulin and rely on the Lord's healing, his wife and a student who failed to summon medical assistance were charged with involuntary manslaughter); Rex v. Russell, Supr. Ct. Victoria F.C. 1932, 1933 V.L.R. 59 (an Australian case: Russell's wife wheeled a perambulator containing their two young sons into a swimming pool, drowning them and herself; defendant dived in four times but failed to save them and was convicted of three counts of manslaughter).

Some critics of the current approach to liability for failures to give assistance rightly point out that the gap between homicide liability and no liability whatsoever is too large and its ground, the existence of a special relationship, seems to lead to incommensurate and therefore arbitrary results. But they do not typically acknowledge that both of these outcomes can be disproportionate. The bad samaritan who stands in no special relationship should not escape liability altogether, but when there is some kind of relationship between the person in peril and the potential rescuer, it is unclear why that fact should be taken to be enough to justify the causal judgment implicit in the charge of homicide. Under some of the European regimes, such cases would count as violations of the statute that requires emergency assistance and so as lesser offenses. In fact, French and Belgian courts have refused to recognize the possibility of liability for commission by omission of result crimes.51

Attending to what is problematic about the charge of homicide, especially manslaughter, when it is committed by omission allows us to take a new perspective on the causalist position regarding bad-samaritan laws. In fact it suggests a problem with any version of this position, and not only the particular formulations that I have examined above. The causalist position, if it was established, would prove too much. If we were to accept that bad samaritans *cause* the harm that they fail to avert and that this kind of causation shares characteristics with positive causation that play a central

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role in justifying imposing criminal liability, then we would be unable to explain why every morally culpable failure to rescue should not constitute a case of homicide if the victim dies.\(^{52}\) An acceptable strategy for justifying bad-samaritan laws must cohere with as well as explain the distinction between the offense of failing to give emergency assistance and the more serious offense of negligent homicide, committed by omission. In addition, a full account of the grounds of liability for failures to prevent harm should explain what else it is that must be established to justify a charge of homicide by omission.

I argued in the previous section that failure to rescue should be construed as a conduct offense rather than as a result offense. But that alone does not solve the problem of distinguishing the offense from homicide by omission in those cases in which the victim dies. Commission by omission of a result offense is typically defined partly in terms of a breach of duty.\(^{53}\) Thus, the breach of a legal duty, if it is a "but for" condition of some harmful result, and if other elements of the offense, including mens rea, are satisfied, can constitute the commission by omission of the crime that consists in causing that result. This widely accepted account of commission by omission provides a recipe of substitutions for the usual elements in the definition of a criminal offense: an omission that is the breach of a legal duty can count as conduct, and a "but for" connection between the omission and the harm can count as causation. To some extent, this is a generalized form of the causalist strategy. In this case it is applied to offense definitions rather than to the legitimation of statutes, but in both contexts it seeks to justify criminal liability for omissions by fitting them into a causal paradigm. Because of this recipe, the problem of distinguishing failure to


53. “There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one is held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so excluded the helpless person as to prevent others from rendering aid,” Jones v. United States, 308 F.2d 310 (1962).
rescue from manslaughter could arise as a genuine legal problem (and not only as the source of a rhetorical question posed to embarrass proponents of the causalist strategy) if bad-samaritan laws were passed. Since the bad samaritan’s behavior would then constitute the breach of a legal duty, if the bad samaritan showed callous indifference to the danger posed to human life and the victim died, the necessary ingredients of manslaughter by omission would be present, according to the standard approach to omissions liability.

One writer endorses the view that the violation of the duty to rescue will ground a charge of manslaughter if the victim’s death results from the bad samaritan’s failure to offer assistance. But that seems too harsh, especially in light of the fact that a bad samaritan’s “indifference” could be a manifestation of confusion or indecision rather than the indifference involved in reckless or negligent action. On the other hand, it could simply be stipulated that the breach of the duty to rescue does not ground homicide liability. But that approach is too sweeping in that it implies that homicide by omission could never be committed by a person who stood in no special relationship to the victim. After all, the goal of many writers who support the legislative introduction of a general duty to rescue has been to eliminate the requirement that some special relationship exist between the potential rescuer and the victim in order to ground criminal liability. The arbitrariness of the current approach rests on the fact that someone who fails to obtain medical assistance for someone with whom he or she is intimately involved—a man and his weekend paramour, a woman who had cared for two of her neighbor’s children for all of their young lives—can evade criminal liability for allowing the victim’s death if there was no legal duty breached and hence no “independent illegality” in his or her conduct. What is objectionable is not that a bad-samaritan law could sometimes

56. Robinson, commenting on the modest penalties involved in existing U.S. duty to rescue statutes, suggests that “the penalties provided by these statutes may not be their most significant effect; their greatest effect may be their creation of a duty to act, which may then provide the basis for omission liability for a more serious offense (such as homicide liability for a death that results because of the failure to assist),” Fundamentals of Criminal Law, p. 154.
57. People v. Beardsley.
ground homicide liability. That might, on some occasions, be an appropriate result. Rather, it is the prospect that it would do so whenever a death occurred as the result of a bystander’s inexcusable indifference.

A full demarcation of the grounds for the more serious charge of homicide by omission would require careful scrutiny of the causalist elements in the standard recipe for commission by omission. Two, in particular, reveal the awkwardness of applying a causal paradigm to describe and define liability for omissions. First, it can be difficult in some cases to establish whether a death would not have occurred if a potential rescuer had fulfilled his or her duty to act. It is not enough to show that the potential rescuer could have acted in a way that would have saved the victim’s life. The more specific question is whether any conduct that would have satisfied this duty would also have prevented the death. There is, consequently, an inherent evidential problem in establishing this surrogate for the causal element of homicide offenses. Second, the phrases used to define the mens rea element of a homicide offense sometimes presuppose that the conduct toward which the agent’s attitude is manifested consists of positive agency. The notion of recklessness is an obvious example since it is an attitude toward conduct that creates a risk of harm to others. Less obviously, if the distinction between the “culpable neglect” that defines involuntary manslaughter and the “wanton disregard for human life” that defines second-degree murder can turn on the degree of probability that the agent’s conduct would result in death, then this distinction will make less sense for omissions than for actions.59

A substantial consideration that supports introducing a statutory duty to rescue, one to be balanced against the practical considerations that oppose it, is the fact that however the elements of homicide by omission would best be defined, they will often be hard to establish satisfactorily in a court of law. It is not only that evidence and witnesses may be hard to come by to substantiate a case; there is the more fundamental problem that in evaluating omisive behavior, it may be hard to know how to characterize the scope of the agent’s duty to act, the agent’s abilities, and, perhaps more

59. Consider the finding in People v. Burden that jury instructions that posed the question “whether defendant’s omission to provide food for his child was ‘aggravated, culpable, gross, or reckless’ neglect ‘incompatible with a proper regard for human life’ (involuntary manslaughter) or involved such a high degree of probability that it would result in death that it constituted ‘a wanton disregard for human life’ making it second degree murder” correctly stated the law (72 Cal.App.3d 615, App., 140 Cal.Rptr. 289). This decision upheld Burden’s conviction for second-degree murder.
Guilty Bystanders?
On the Legitimacy of Duty to Rescue Statutes

importantly, the agent's state of mind, in order to justify the charge. With
duty to rescue statutes in force, prosecutors confronted with someone who
had failed to give assistance to a person with whom he or she had some
kind of relationship would not have to face a choice between allowing that
person to escape criminal liability altogether, or prosecuting him or her for
homicide by omission. In addition, especially horrific failures to give assis-
tance to someone toward whom the agent had no special legal duties could
constitute a case of homicide by omission. It is ironic that those who adopt
the causalist strategy and argue so vigorously for a departure from the
excessively lenient common-law approach to bad samaritanism, end up,
because of the nature of the justification they offer, depriving themselves of
the resources needed to criticize the more fundamental problem with the
Anglo-American approach, namely, the larger pattern of defects, including
excessive severity as well as excessive leniency, that results from the pre-
sumption that liability for omissions is best explained and justified by
fitting omissions into a causal paradigm.