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SOME BRIEF THOUGHTS (MOSTLY NEGATIVE) ABOUT "BAD SAMARITAN" LAWS

Joshua Dressler*

I. "SOULLESS INDIVIDUALS" IN OUR MIDST?

In 1997, seventeen-year-old Jeremy Strohmeyer entered a Las Vegas casino restroom holding the hand of seven-year-old Sherrice Iverson. He apparently raped and murdered the little girl in a restroom stall.¹ While these horrendous crimes were being committed, Strohmeyer's high school buddy, David Cash, entered the restroom and discovered the crimes in progress.² Cash reportedly entered the restroom a few minutes after Strohmeyer went in, peered over the wall of a bathroom stall, and observed his friend with his hand over Sherrice Iverson's mouth, muffling her cries for help.³ Cash left the restroom but failed to report the ongoing incident to a security guard or to the police.⁴ Cash's inaction was awful enough, but then he spoke to reporters and gave listeners a

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1. Strohmeyer pleaded guilty to the offenses, but has since sought to vacate his plea on the ground that he was coerced by his attorney into the decision. See *Man Who Confessed to Casino Killing Now Wants Trial*, SACRAMENTO BEE, Nov. 17, 1999, at A3. His present defense team now suggests that there is reasonable doubt as to his guilt. They claim there is evidence that points to his friend David Cash as the actual killer. See *Dad's New Testimony May Change Murder Case*, SACRAMENTO BEE, Feb. 5, 2000, at A4. This essay assumes that the crimes occurred as the media reported the facts and as Strohmeyer originally confessed.

2. See *Teen Admits Killing Young Girl in Casino: Callous Words from Killer's Friend*, NEWSDAY, Sept. 9, 1998, at A15.

3. See *id.*

4. According to Cash, he told Strohmeyer to let her go before he walked out. See *id.*

chance to look into his mind, heart, and soul:

It's a very tragic event, okay? But the simple fact remains I do not know this little girl. I do not know starving children in Panama. I do not know people that die of disease in Egypt. The only person I knew in this event was Jeremy Strohmeyer, and I know as his best friend that he had potential. . . . I'm sad that I lost a best friend. . . . I'm not going to lose sleep over somebody else's problem.⁵

Even read today, Cash's cold, remorseless words are shocking and infuriating. We are understandably affronted by his self-centeredness, and his narrow and skewed view of his moral duties to his "fellow man." Cash told a reporter that he did not report his friend's actions because, in a touching display of compassion, he "didn't want to be the person who takes away his [Strohmeyer's] last day, his last night of freedom."⁶ Cash, it seems,⁷ believes he does not owe anything to anybody except (perhaps) loyalty to his high school buddy who "only" committed crimes upon a young "stranger."⁸

Thankfully, this type of story is uncommon, but unfortunately it is not unique. Almost four decades ago, Kitty Genovese—a young Queens, New York woman—cried for help for more than half an hour outside an apartment building as her assailant attacked her, fled, and then returned to kill her.⁹ According to reports at the time,¹⁰ as many as thirty-eight persons heard her pleas from the safety of their resi-

5. Lynda Gorov, *Outrage Follows Cold Reply to Killing*, BOSTON GLOBE, Aug. 9, 1998, at A1.

6. Hugo Martin, *Petitioners Reacting to Girl's Death*, L.A. TIMES, Aug. 22, 1998, at B1.

7. "It seems" is added because our first and second impressions of an incident or a person frequently prove to be wrong or, at least, exaggerated. Indeed, as developed later, this is one reason to fear Bad Samaritan legislation generally. See *infra* text accompanying notes 51–54. Perhaps what happened in the Las Vegas restroom is far more complicated than we now appreciate. Perhaps David Cash's after-the-fact media rationalizations obscure from our view, and even from his, deeply hidden feelings of guilt. For purposes of this essay, therefore, the "David Cash" discussed is the symbol of Bad Samaritanism that he represents, and not the person himself.

8. In view of the fact that Strohmeyer's lawyers now may want to pin the crime on Cash, see *supra* note 1, Cash's "good-heartedness" to Strohmeyer may have been a bad idea.

9. See Rosanna Cavallaro, *Police and Thieves*, 96 MICH. L. REV. 1435, 1437 (1998) (reviewing H. RICHARD UVILLER, *THE FLAWED PROSECUTION OF CRIME IN AMERICA* (1996)).

10. Recent claims by some of the Genovese bystanders contradict the published reports at the time of the incident. See *infra* note 53.

dences, but did nothing to help her.¹¹

The Genovese tragedy has not been forgotten. As recently as 1986, one judge recounted the Genovese facts and asked rhetorically: "Why did those good persons not come forth to aid Kitty, a fellow human being, who was then being mauled by nothing less than a rabies-infected animal, who was then disguised as a human being?"¹² There may be a relatively benign answer to the judge's rhetorical question in the Genovese case,¹³ but the Las Vegas incident leaves us today with no simple or obviously reassuring explanation. Cash's response in that casino bathroom reminds us that there are those in our midst who live a life of "soulless individualism,"¹⁴ who feel few or no communal connections with the rest of humanity. If such a person possesses a moral center at all, it is an exceedingly constricted one.

What is to be done with persons like David Cash? He violated no Nevada criminal law when he purportedly left Sherrice Iverson in the clutches of Strohmeyer. But if some legislators get their way, future David Cashes will not get away so easily.¹⁵ Legislators of all political stripes may find it

11. The Genovese incident is chronicled in ABRAHAM M. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964).

12. Hughes v. Texas, 719 S.W.2d 560, 565 (Tex. Crim. App. 1986) (Teague, J., concurring).

13. See *infra* note 53 and accompanying text.

14. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 2 (1993).

15. In response to the Iverson tragedy, and within hours of the opening of the 1999-2000 legislative session in California (the home state of David Cash), three bills were introduced to impose criminal sanctions on those who fail to report assaults they have witnessed. See Robert Salladay, *Legislators Introduce Crime-Reporting Bill; Reaction to Rape, Murder of Child*, S.F. EXAMINER, Dec. 9, 1998, at A4. The legislature passed one bill, authored by state senator Tom Hayden, but Governor Gray Davis vetoed it. The bill would have required any person who witnessed the actual commission of a murder or rape of a minor (fourteen years of age or younger) to notify law enforcement "as soon as reasonably possible." S.B. 80, 1999-2000 Reg. Sess. (Cal. 1999).

The Hayden bill is not "Bad Samaritan" legislation of the sort this essay discusses, since it would not have expressly compelled a crime witness to come to the aid of another, but would simply have required that he expeditiously report the crime to authorities. The law would have codified and expanded upon the common law offense of misprision, which is "the concealment of a felony of which a man knows, but never assented to." 4 WILLIAM BLACKSTONE, COMMENTARIES *121 (1769). The offense of misprision has been characterized as anachronistic and is "in virtual desuetude." Yeager, *supra* note 14, at 30. Enforced strictly, the Hayden bill would have required persons to report offenses committed by family members and might even have compelled accom-

hard to resist the opportunity to enact Bad Samaritan ("BS")¹⁶ criminal laws. After all, who would possibly want to defend the "soulless" David Cashes or "rabies-infected animal[s] . . . disguised as . . . human being[s]"¹⁷ of this world?

I, too, have no intention of defending the indefensible. As a Jew, I have grown up in a culture that values community and believes that human relationships (and relationships with God) involve stringent obligations to others. It is a culture that does not glorify self-centered rights.¹⁸ But it is pre-

plices to incriminate themselves, both reasons to reject the legislation.

Iverson's murder *did* result in enactment of crime-reporting legislation in Nevada. That state narrowly amended its law to authorize, subject to certain exceptions, misdemeanor punishment of any person who "knows or has reasonable cause to believe that another person has committed a violent or sexual offense against a child who is 12 years of age or younger," who fails to "[r]eport the commission of the . . . offense . . . to a law enforcement agency . . . as soon as reasonably practicable but not later than 24 hours after" the person learns of the crime. The law bars prosecution of the "omitter" unless there is "a judgment of conviction against a culpable actor" for the violent or sexual offense (or some other offense related to it). NEV. REV. STAT. § 202.885(1) (1999). And, unlike the vetoed Hayden bill, the crime-reporting duty in Nevada does not apply, *inter alia*, to minors under the age of 16, relatives of the victim or perpetrator, and persons who have reasonable cause to believe that reporting the incident would place that individual, a relative, or anyone living in the household, at risk of "substantial bodily harm." *Id.* Apparently, an accomplice in the commission of the unreported offense is not covered by the law; it is intended only to encompass innocent parties who become aware of the actions of a culpable party. *See id.* § 202.885(3)(d).

16. The term "Bad Samaritan" is used to distinguish such penal laws, which make it an offense *not* to assist persons in peril, from civil statutes that provide at least limited tort immunity to Good Samaritans who *do* come to the aid of strangers in peril. This term also excludes statutes that compel witnesses to report crimes to authorities *after* the offense has been committed. Some (but not all) of the concerns about BS laws also apply to such crime-reporting offenses, which may themselves be criticized on independent grounds. *See supra* note 15.

17. *See supra* text accompanying note 12.

18. "[C]lassic Jewish ethics is emphatically social. People are not created isolates but as members of families, neighborhoods, and peoples." EUGENE R. BOROWITZ, *LIBERAL JUDAISM* 391 (1984). Specifically, *Leviticus* 19:18-19 teaches that one should "love your fellow as yourself," which has been interpreted to mean that "[m]an is duty bound to improve the world, and in a sense, 'complete' the work of Creation." NOSSON SCHERMAN, *THE CHUMASH* 662 (4th ed. 1995). We fulfill this commandment "in ways that are possible," such as by "[a]ssisting [others] physically, even in matters that are not very difficult." *Id.* As is developed in this essay, the purpose of BS laws is to compel persons to act to make the world better by helping others in grave jeopardy, an expectation well in line with *Leviticus* and the Jewish duty not to withdraw from the community. The issue here is whether this Biblical obligation should be incorporated into state penal codes.

cisely because the case for punishing people like Cash seems so obvious and so comforting to our psyche—it allows us to express our moral revulsion and, perhaps less charitably, feel morally superior—that we should hesitate long and hard before enacting BS legislation. Although such laws *are* morally defensible, there are also powerful reasons for rejecting them.

II. PRESENT-DAY LAW

Current law is fairly clear, so it should not detain us long.¹⁹ The general rule is that a person is not criminally responsible for what he fails to do. The law punishes people for their actions, but not for their non-actions. Stated another way, the law punishes people for their wrongdoings, and not for their wrongful *not*-doings.²⁰ A “not-doing”²¹ may be a moral wrong, but a not-doing is not (usually) a legal wrong.²²

However, there are two categories of exceptions to this general rule. The first category is “commission by omission”²³ liability: a person may be punished for a crime of commission (e.g., murder or manslaughter) if she has a duty to act, breaches that duty, and otherwise satisfies the elements of the offense. In limited circumstances, a person’s failure to act—an omission—constitutes a breach of a common law duty to act. Such a duty exists when: (a) there is a special relationship between the ommitter and the victim, such as a parent

19. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 86–91 (2d ed. 1995) (summarizing omission law).

20. The coined term “not-doing” is preferable to “non-action” for reasons discussed later. See *infra* note 22.

21. A.P. Simester, *Why Omissions Are Special*, 1 LEGAL THEORY 311, 313 (1995).

22. The line between action and non-action is not always as clear-cut as the text might suggest. Suppose that a doctor turns off the respirator on her comatose patient in order to let the patient die. Do we characterize this as an action (the voluntary act of turning off the switch on the respirator) or as a non-action (the failure to provide medical treatment)? Courts increasingly treat it as the latter. See, e.g., *Barber v. Superior Court*, 195 Cal. Rptr. 484, 490 (Ct. App. 1983).

The term “not-doing” may be preferable to “non-action” because it helps explain difficult cases, such as the latter one. A doctor who turns off a respirator *does* act thereby, but isn’t the real issue—the focus of our attention—what she is *not doing* thereby, namely, not providing medical treatment? Or, consider one who sits for a portrait. See Simester, *supra* note 21, at 313. We are dealing here with a non-action—passively sitting still—but isn’t this really a doing, rather than a not-doing?

23. George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1448–49 (1994).

and her child; (b) there is a contract (express or implied) to act, such as when a doctor agrees to care for her patient; (c) a person creates a risk of harm to another person or property and then fails to act to prevent the harm from occurring;²⁴ and (d) a person who has no original duty to act voluntarily comes to the aid of one in peril, but then omits further aid and, as a result of the omission, puts the at-risk individual in a worse position than if no assistance had been undertaken.²⁵

In these four circumstances, a person who fails to act is responsible for the ensuing harm if her failure to act *causes* the harm,²⁶ and if she possesses the *mens rea*, or culpable state of mind, required in the definition of the offense. For example, if a babysitter's ward stops breathing, and the sitter does nothing to help the child, she may be convicted of some form of criminal homicide, assuming the child's life would have been saved by prompt action and the sitter acted with *mens rea*. If she observed the child in peril and wanted him to die, she is guilty of murder. If she negligently failed to observe the child's condition, she is guilty of involuntary manslaughter or negligent homicide.

The second category of omission liability involves special statutory-duty legislation. For example, a federal statute requires persons to pay taxes on income by a specified date.²⁷ Failure to do so constitutes a special failure-to-act offense. Similarly, states routinely impose a statutory duty on parents to furnish necessary food and shelter to their minor children.²⁸ The latter offense does not require proof that the parent's omission caused any subsequent harm, because the parent is

24. See *Regina v. Miller*, [1983] 1 All E.R. 987 (*D* is guilty of arson, even if he accidentally starts a fire if, thereafter, he fails to take steps to extinguish the blaze because of a newly formed intent to have the property destroyed).

25. For example, suppose that *D*, a Good Samaritan, observes *V*, a young child, drowning in shallow water in the ocean. *X* is about to jump in to rescue *V*, and *Y* is about to alert a nearby lifeguard, but both desist when *D* cries out to them, "don't worry, I've got it," and dives in to save *V*. Before reaching *V*, *D* changes his mind and turns back. *V* drowns. *D* could be held responsible for *V*'s death because he left *V* in a more perilous situation than if he had done nothing at all. However, if *D* had been alone on the beach when it happened, and thus nobody was dissuaded from helping, *D* could turn back without criminal responsibility.

26. Can an omission—doing nothing—ever cause ensuing harm? See *infra* note 41.

27. See 26 U.S.C. § 7203 (1999).

28. See, e.g., CAL. PENAL CODE § 270 (West 1999).

not being charged with criminal homicide on commission-by-omission principles. The parent is being prosecuted for merely violating a statutory duty to act.²⁹

BS laws, when enacted, come within this statutory-duty category. Barring special facts, a bystander has no common law duty to aid a stranger. Therefore, even if a bystander's failure to act causes³⁰ a stranger's death, she is not guilty of murder or manslaughter. However, the bystander may be guilty of a special offense—typically a misdemeanor—for failing to come to the assistance of the imperiled individual. For example, Vermont law provides that: "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 . . . give reasonable assistance to the exposed person unless that assistance or care is being provided by others."³¹ Such laws—statutes that create a duty to act and punish people for breaching that duty—are the focus of this essay.

III. WHY WE DON'T (USUALLY) PUNISH "SOULLESS INDIVIDUALS"

A. *Commission-by-Omission Liability*

Should legislatures expand commission-by-omission liability beyond its current scope and/or enact BS legislation? Although the focus of this essay is on the latter form of legislation, some brief observations about commission-by-omission liability may be instructive. *Expansion* of this category of criminal liability would be troubling, not only for most of the reasons that BS legislation is questionable,³² but because there are troubling features of commission-by-omission liability *even in its present narrow form*.

Suppose that Alice stands impassively by while boyfriend Bob beats her daughter Carla to death. Based on the parent-child special relationship, Alice had a duty to try to prevent Carla's death. Since she made no effort to save her daughter,

29. Of course, if the minor child *does* die, the parent *could* potentially be prosecuted for criminal homicide according to commission-by-omission principles.

30. *But see infra* note 41.

31. VT. STAT. ANN. tit. 12, § 519(a) (1967).

32. *See discussion infra* Part III.B.2.

Alice may be convicted (along with Bob) of some form of criminal homicide.³³ Yet, as much as Alice may deserve moral condemnation, the commission-by-omission rule is troubling. First, there is a legality concern.³⁴ The ordinary homicide statute defines the *actus reus* of the offense as “the *killing* of a human being by another human being.” It strains the use of the English language to say that Alice killed Carla. Alice *permitted* Bob to kill Carla, but she performed no killing act herself. Nonetheless, courts are usually willing to ignore such statutory construction (and legality) problems in homicide³⁵ and other³⁶ prosecutions, and permit conviction.

More fundamentally, characterizing Alice as a killer—thereby equating her passivity with Bob’s homicidal behavior—undermines the concept of individual responsibility and authorship of conduct.³⁷ Alice’s moral guilt for failing to prevent harm to her child is not as great as Bob’s responsibility for directly killing Carla, yet this is what the commission-by-omission rule suggests. Alice’s liability, if any, should be for violation of some less serious and narrowly defined statute that compels parents to act to protect the well-being of their children. Alice should be guilty, if you will, of being a bad parent,³⁸ not of being a killer. That label belongs exclusively to Bob.

33. Alice may be guilty *directly* on the basis of her omission (commission-by-omission liability) or, perhaps, *indirectly* on complicity grounds as Bob’s accomplice. In the latter case, however, she could only be convicted if her failure to act was with the “purpose of promoting or facilitating the commission” of the murder. MODEL PENAL CODE § 2.06(3)(a)(iii) (1953). For purposes of current analysis, this essay assumes that Alice is being prosecuted directly, most likely for negligently or recklessly failing to protect Carla’s life.

34. See Fletcher, *supra* note 23, at 1447–49.

35. See, e.g., Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) (quoting People v. Beardsley, 113 N.W. 1128, 1129 (Mich. 1907)) (“[U]nder some circumstances the omission of a duty owed by one individual to another, where the omission results in the death of the one to whom the duty is owed, will make the other chargeable with manslaughter.”).

36. See, e.g., Degren v. Maryland, 722 A.2d 887 (Md. 1999) (affirming the conviction of a parent for sexual abuse by failing to prevent the abuse by another).

37. See Simester, *supra* note 21, at 329. Kitty Genovese’s sister made the same point: “We don’t blame the people who were there that night and might have heard her crying. Only one person killed my sister,” and that was Winston Moseley, the attacker. Joe Sexton, *Reviving Kitty Genovese Case, and Its Passions*, N.Y. TIMES, July 25, 1995, at B1.

38. But her punishment for being a bad parent raises other objections. See *infra* notes 46–50 and accompanying text.

Commission-by-omission liability is morally troubling because it equates positive duties with negative ones. If Bob and Alice are both considered murderers—one for what he did, and one for what she did not do—this means that the law makes positive duties (the duty to act to make the world better) as demanding as negative obligations (the duty not to actively make the world worse). Yet equating these duties runs counter to society's understanding of the moral equation.³⁹ Most of us would consider it improper for *A* to yank a rope away from *B*, who is trying to climb to safety on a cliff, even if *A*'s purpose for killing *B* is to rescue *C* and *D*, who also need the rope to avoid death on the same cliff.⁴⁰ Indeed, it would be wrong (although understandable) for *A* to pull the rope from *B*, even if *C* and *D* are members of her own family. In short, the negative duty not to kill supersedes the positive duty to aid.

There are other troubling aspects of commission-by-omission liability, but they are beyond the scope of this essay.⁴¹ This essay now addresses statutes that impose a duty to come to the aid of strangers, the violation of which duty results in punishment, not for the resulting harm, but instead

39. See MICHAEL MOORE, ACT AND CRIME 25, 58–59 (1993).

40. See *id.* at 25.

41. A lingering metaphysical issue in commission-by-omission cases is whether non-action is ever the *cause* of harm, a conclusion we must reach if a person is going to be convicted of an offense, such as murder or manslaughter, for failing to act. The question inevitably is: How can nothing be the cause of something? If nothing *can* be the cause of something, then isn't *everyone* causally responsible for every "something" that occurs?

For example, did the people who heard Genovese's cries *cause* her to die? Isn't the only true cause the person who attacked her? But, *if* it is true that each neighbor's omission *was* a cause of Genovese's death in Queens, New York, isn't everyone else *in the world* also a cause of her death, since their not-doings had as much (or little) impact on the outcome? We can draw a distinction between those who heard Genovese's screams and those who did not: this distinction may be relevant in determining that some people, but not others, owed a duty to Genovese, or that some persons, but not others, had a culpable state of mind regarding her death. But, in terms of causation, it would seem that no distinction can be drawn between those who heard her pleas and did nothing and those who did not hear her cries and also did nothing. For debate on the questions of causation in this context, see John Harris, *The Marxist Conception of Violence*, 4 PHIL. & PUB. AFF. 192 (1975) (arguing for causal responsibility) and Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980) (criticizing the causation claim); see also H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 48 (2d ed. 1985) (concluding that some non-actions are causes because they represent an unexpected "deviation from a system or routine").

for failing to be a Good Samaritan.

B. *Bad Samaritan Laws*

1. *Justifying Bad Samaritan Laws*

The best (and perhaps the only decent) argument for BS legislation is retributive in nature. There are two types of retributivists,⁴² both of whom could justify such laws. First, culpability-retributivists believe that punishment is deserved if a person behaves in a morally culpable manner. Imagine Blind Person ("BP") about to step off the curb and into the street just as a fast-moving truck with an unobservant driver approaches. Bystander, a foot away from BP, sees this occurring and can save BP from probable death or serious injury by the simple act of putting his arm out and pulling BP back from the precipice. Bystander does not help, however, because he hates disabled persons and wants BP to die.

In this situation, culpability-based retributivists can justify punishment. The decision by Bystander to let BP take what may be a fatal step into the road is a case of *willed* non-motion. The decision *not* to act is as much a matter of free choice as would be a decision to shove BP into the road. Further, based on the facts stated, the reason for Bystander's decision is to see BP harmed. For culpability-retributivists, it does not matter whether actual harm befalls BP; it is enough that Bystander wants it to happen.⁴³

There is a second school of retributive thought, harm-retributivism, which presents a somewhat more difficult problem here. Harm-retributivists would only punish those persons who, with the requisite culpability, cause social harm. However, BS laws punish the non-actor for precisely that—not acting—and *not for the ensuing harm*. Since the statutory issue, therefore, is not what happens to BP in the road, only for what *might* happen, one must discover some social harm in Bystander's non-action—while BP is standing on the sidewalk—to justify retributive punishment.

The key inquiry under harm-retributivism is the defini-

42. See Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 734-35 (1988).

43. See MOORE, *supra* note 39, at 56.

tion of "social harm." "Social harm" is the "negation, endangering, or destruction of an individual, group, or state interest, which [is] deemed socially valuable."⁴⁴ This definition explains why punishment of inchoate conduct is permissible: the endangerment of a socially valuable interest constitutes harm, and Bystander's non-action is as much a criminal attempt to cause⁴⁵ harm by non-motion as the act of pushing BP into the street. Thus, to a harm-retributivist, Bystander's punishment may be justified.

2. *Refuting the Justifications for Bad Samaritan Laws*

Although these retributive arguments support punishment of a Bad Samaritan, there are significant reasons—some retributive-based, some utilitarian, and some founded in political theory—that should give responsible lawmakers considerable pause before endorsing general duty-to-aid legislation.

Criticisms of BS laws begin with legalist concerns with retributive overtones. First, why is the offense called a "Bad Samaritan" law? The name suggests, I think, that we punish the bystander for being a bad person, i.e., for his "selfishness, callousness, or whatever it was"⁴⁶ that caused him not to come to the aid of a person in need. However, the criminal law should not be (and, ordinarily, is not) used that way: criminal law punishes individuals for their culpable acts (or, perhaps here, culpable *non*-acts), but not generally for bad character.⁴⁷ As mortals, we lack the capacity to evaluate another's soul.⁴⁸ It is wrongful conduct, and not an individual's status as a bad person or even an individual's bad thoughts,⁴⁹ that justify

44. Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 413 (1965).

45. This assumes that one can cause harm by non-action. See *supra* note 41.

46. A.D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1279 (1983).

47. See MOORE, *supra* note 39, at 54 ("Our criminal law thus rightly shies away from punishing bad character . . ."); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 694–98 (1988) (arguing that bad character is neither a sufficient nor necessary condition for punishment).

48. That is even so regarding David Cash. See *supra* note 7.

49. See *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982) ("The reach of the criminal law has long been limited by the principle that no one is punish-

criminal intervention. BS laws may violate this principle. At a minimum, there is a serious risk that juries will inadvertently punish people for being (or seeming to be) evil or "soulless,"⁵⁰ rather than for what occurred on a specific occasion. One need only consider David Cash and the public's intense feelings of disgust and anger toward him to appreciate why jurors might convict Bad Samaritans less on the basis of the "technicalities" of a statute, and more on the basis of character evaluation.

Second, for retributivists, punishment of an innocent person is always morally wrong, and the risk of false positives—punishing an innocent person—is especially high with BS laws. Consider, for example, the Vermont BS law.⁵¹ To be guilty of this crime the bystander must "know" that another is at risk of "grave physical harm," and must give "reasonable assistance" if he can do so "without danger or peril to himself." If any one of these elements is lacking, the bystander is innocent and, therefore, in a society committed to the principle of legality, does not deserve punishment.

Notice the inherent problem of punishing people for not-doings rather than wrongdoings. When a person points a loaded gun at another and intentionally pulls the trigger, it is reasonable to infer that the actor intended to cause harm. His *mens rea* is obvious. It is far harder to determine why a person does *not* act. Return to the Bystander and Blind Person example. The facts stated that Bystander knew what was going on and wanted harm to occur. In the real world, however, it would be exceedingly difficult to reliably determine Bystander's potential guilt. How do we know Bystander realized what was about to happen? Did he see BP? Did he realize BP was about to walk into the street? Did Bystander see the truck? Did he realize the truck driver was not paying attention? Beyond that, *why* did Bystander not act? Maybe he froze up, maybe he didn't think fast enough, or maybe (reasonably or unreasonably⁵²) he believed that helping BP

able for his thoughts.").

50. Yeager, *supra* note 14, at 2.

51. See *supra* note 31 and accompanying text.

52. It is not clear from the Vermont statute whether a person who fails to act as the result of a genuine, but unreasonable, concern for his own safety is liable. One fair reading is that the element of knowledge ("know that another is exposed to grave physical harm") does not apply to the element of assistance ("shall, to the extent that the same can be rendered without danger or peril to

would jeopardize *his own* safety.

For that matter, why did the Genovese bystanders hear the woman scream but fail to act, if in fact that was the case?⁵³ Is it at least possible that some of the bystanders did not know she was in dire jeopardy? A person who wakes up from a sleep often fails to appreciate her surroundings. Also, perhaps some of them—even *all* of them—believed that someone else had already called the police.⁵⁴ It may be that, despite the condemnation directed at the Genovese bystanders, few, if any, of them were guilty of Bad Samaritanism. In view of the inherent ambiguities in such circumstances, if juries take their duties seriously—including the presumption of innocence—few, if any, BS convictions will result. If emotions and bad character attributions rule the day, however, innocent persons will be improperly convicted.

Third, the threat of convicting innocent persons points to a related danger. BS statutes are so rubbery in their drafting that they grant police and prosecutors too much discretion to determine whether and whom to prosecute.⁵⁵ The due process

himself"). It is interesting to observe, however, that such a person is not a Bad Samaritan, only an overly fearful one.

53. Several residents of the building where Genovese was murdered now maintain that her screams "were not that easy to hear and that . . . some people did call for help or seek to find out what was going on." Sexton, *supra* note 37, at B1. Also, according to a shop owner near where the killing occurred, "[t]he media never took into consideration the noise from the [nearby] bar, that we had a different clientele then They only showed one side." *Id.* Of course, these remarks may be no more than *post hoc* rationalizations, but perhaps they are correct.

54. *See id.* Social science studies also suggest that a person is less likely to act in an emergency situation if he is with others than if he is alone; he is likely to interpret others' passivity as evidence of a lack of true danger. *See* Bibb Latane & John M. Darley, *Group Inhibition of Bystander Intervention in Emergencies*, 10 J. PERSONALITY & SOC. PSYCHOL. 215 (1968) (a male college undergraduate who finds himself alone in a smoke-filled room was seven and a half times more likely to report the smoke than if he was in the presence of others who did nothing). This finding led Professor Leo Katz to observe that "[i]f Kitty Genovese failed to receive help, it was because, being part of a large group, nobody felt responsible." LEO KATZ, *BAD ACTS AND GUILTY MINDS* 150 (1987). Of course, David Cash has no such excuse for *his* passivity.

55. "Those who advocate [BS legislation] bear the heavy burden of formulating defensible and workable criteria for the imposition of duties to act." Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 L.Q. REV. 424, 431 (1989). Yet, scholars who advocate such laws often punt when it comes to bearing that burden. *See, e.g.,* Woosley, *supra* note 46, at 1299 ("What seems to lie behind the objection [to BS laws] is a fear of vagueness, that we cannot put limits on the scope of a duty to aid. But we can; that is what skilled legisla-

clause prohibits the enforcement of penal laws that "fail[] to establish guidelines to prevent 'arbitrary and discriminatory enforcement' of the law."⁵⁶ However, even if the issue is seen as a non-constitutional matter, it is difficult to see how a prosecutor can fairly determine when charges are proper.

Again, the distinction between actions and non-actions demonstrates the vagueness problem. BS laws compel people to make the world (or, at least, a small part of it) better, rather than punish actors for actively making it worse. In the latter case, the identifiable conduct of the accused, and the demonstrable harm caused by those actions, serve to single out the actor as a plausible candidate for prosecution. With laws that punish for nothing, rather than something, there is a need for alternative objective criteria. At least with commission-by-omission liability, there *are* identifiable criteria, such as the status relationship of the parties, contractual understandings, or the suspect's personal connection to the emergency by having created the initial risk.⁵⁷ In contrast, with BS laws, which impose a duty to aid strangers (potentially, anyone), criminal responsibility is based on imprecise factors (e.g., the duty to provide "reasonable assistance") and nearly unknowable circumstances (e.g., that the stranger is exposed to "grave" physical harm, and that assistance can be rendered without *any* "danger or peril" to the actor or others).⁵⁸

As the Genovese case demonstrates,⁵⁹ these omission criteria are far less helpful in determining whether and against

tive draftsmen are paid for . . .").

56. *City of Chicago v. Morales*, 527 U.S. 41 (1999) (O'Connor, J., concurring) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

57. See *supra* notes 23-25 and accompanying text.

58. In reality, there is always *some* danger in providing "reasonable assistance" to a person in peril. The simple act of Bystander pulling BP away from the road, see *supra* Part III.B.1, could cause Bystander to have a heart attack, even though he does not know that he has a heart condition; or he might lose his balance, fall to the ground and break his nose. Or, suppose that a person can save the life of a stabbing victim by applying pressure to a wound for one minute while paramedics arrive, but fails to do so because there is one chance in a million that the victim has AIDS, and there is one chance in a billion that the bystander could contract AIDS from the blood contact. See H.M. Malm, *Liberalism, Bad Samaritan Law, and Legal Paternalism*, 106 ETHICS 4, 13 (1995). Since there is never true risk-free assistance, either no bystander is ever truly guilty of the offense, or police, prosecutors, and juries will apply potentially inconsistent or arbitrary "reasonable risk" standards.

59. See *supra* note 53.

whom a prosecution should be initiated than are identifiable acts of commission. There is a significant risk with BS laws that the decision to prosecute will be based on a prosecutor's perceived need to respond to public outrage, which in turn, may be based less on the merits of the case and more on media coverage (which, in turn, may be founded on inappropriate factors, such as race, background, or even the physical attractiveness of the victim and/or the supposed poor character of the bystander). Not only may persons guilty of Bad Samaritanism avoid conviction because of selective enforcement, but the process may result in prosecution of persons who, upon cooler reflection, we might realize are innocent of wrongful not-doing.

There are also utilitarian reasons to question the wisdom of BS legislation. First, if such laws are taken seriously, the costs of investigating and potentially prosecuting bystanders might be prohibitive. Imagine the investigation necessary to decide whether to prosecute any of the Genovese bystanders⁶⁰ and, if the decision were to proceed, to determine which of them to prosecute. Second, to the extent that BS statutes are narrowly drafted to reduce the risk of unfairness, prosecutions are likely to be rare (and convictions even rarer⁶¹). Therefore, it is unlikely that the threat of punishment will have the desired effect of inducing bystanders to help persons in peril. The muted threat of a misdemeanor conviction is less likely to promote good behavior than the threat of public scorn that follows the publicity of such cases, or a Samaritan's own conscience.

Third, to the extent that such laws do, in fact, compel "Good Samaritanism,"⁶² there is a risk that the Samaritan will hurt the person she is trying to assist,⁶³ hurt others in the process,⁶⁴ or unforeseeably harm herself.⁶⁵ Fourth, since BS

60. Indeed, imagine the difficulty even determining who the Genovese bystanders *were*. Presumably the police would have had to interrogate everyone living or working in the vicinity at the time of the assault.

61. See *supra* notes 54–55 and accompanying text; see also *supra* note 58.

62. Ironically, a person who only acts out of compulsion is not really a Good Samaritan at all. The true Good Samaritan acts because it is right to help others, not because it is compelled. BS laws, therefore, simply make a person behave *as if* he were a Good Samaritan. See Woosley, *supra* note 46, at 1292.

63. For example, the bystander may move an injured person in a manner that aggravates the injuries.

64. For example, a bystander may aid an apparent mugging victim, who actually is a wrongdoer being subdued by an undercover police officer.

statutes are not linked to any prevention-of-harm causal requirement (i.e., it is not necessary to successfully prevent the threatened harm from occurring; it is enough to give it "the old college try"), the costs of such laws may easily outweigh their limited practical benefits. Even supporters of BS legislation concede that the law only helps at the boundaries.⁶⁶

There is one final reason to question the wisdom of BS statutes. Not only are positive duties morally less powerful than negative ones,⁶⁷ but they also restrict human liberty to a greater degree.⁶⁸ A penal law that *prohibits* a person from doing X (e.g., unjustifiably killing another person) permits that individual to do anything other than X (assuming no other negative duty). In contrast, a law that *requires* a person to do Y (e.g., help a bystander) bars that person from doing anything other than Y. The edict that "no student may laugh aloud at a fellow student's silly answers to a professor's questions" only marginally restricts a student's autonomy—she can silently laugh at her colleague, sleep through the answer, or walk out of the room to protest the student's stupidity, just to name a few examples. However, a rule requiring a student to "provide reasonable assistance to a fellow student in jeopardy of offering a silly answer to a professor's question," not only is less precise, but also prevents students from doing anything other than help.⁶⁹

What is the significance of this point? It is that the United States is a country that highly values individual liberty:

Each person is regarded as an autonomous being, responsible for his or her own conduct. One aim of the law is to maximize individual liberty, so as to allow each individual to pursue a conception of the good life with as few constraints as possible. Constraints there must be, of course,

65. Although BS laws supposedly only apply if the bystander can assist at no risk to herself, *see supra* note 58, there will always be cases in which the bystander intervenes, incorrectly believing that she can do so at no risk to herself.

66. *See Yeager, supra* note 14, at 29.

67. *See supra* notes 39–40 and accompanying text.

68. *See Simester, supra* note 21, at 324 ("[T]he law *prima facie* places a greater restraint upon the autonomy of its subjects when its proscribes a not-doing than it does when it proscribes a doing.").

69. Or, to paraphrase another, "compare a law that banishes a person *to* Kansas from one that banishes a person *from* Kansas." *Id.* at 324 (emphasis added) (quoting another author who used Liechtenstein, rather than Kansas, to make the same point).

in modern society: but freedom of action should be curtailed only so far as is necessary to restrain individuals from causing injury or loss to others.⁷⁰

Few people, except the most ardent libertarians, accept the latter statement in full. The point, however, is that in a society that generally values personal autonomy, we need to be exceptionally cautious about enacting laws that *compel* us to benefit others, rather than passing laws that simply require us not to harm others. The issue here, after all, is whether *criminal* law (as distinguished from tort law and religious, educational, and family institutions) should try to compel Good Samaritanism. Traditionally, Anglo-American criminal law sets only minimalist goals. The penal law does not seek to punish every morally bad act that we commit (aren't we glad of that?), and it leaves to other institutions the effort "to purify thoughts and perfect character."⁷¹

Of course, there are circumstances in which the moral duty to act outweighs the interest in preserving liberty.⁷² That is why we properly tax ourselves to help the destitute and, accordingly, why we use the criminal law to compel persons to pay their taxes. This is why we properly punish parents for failing to provide food and shelter to their minor children. And, it could reasonably be argued, BS legislation is another one of those circumstances in which the moral duty to act should trump our concern for liberty.⁷³ This essay does

70. Ashworth, *supra* note 55, at 427 (but ultimately rejecting this argument).

71. United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) ("[T]he proper use of the criminal law in a society such as ours is to prevent harmful conduct for the protection of the law abiding, rather than to purify thoughts and perfect character.").

72. Michael Moore puts it this way: the criminal law punishes omissions when they "violate our [moral] duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails." MOORE, *supra* note 39, at 59.

73. There are other autonomy concerns not considered in this essay. Suppose a bystander can save a stabbing victim's life by applying a tourniquet to the victim's arm. Professor Malm asks this question: "[W]ould the near certainty of irreparable damage to an objectively worthless but subjectively prized possession (e.g., blood stains on a sweater sewn by one's dead grandmother) count as a relevant risk [that would justify the bystander refusing to help]?" Malm, *supra* note 58, at 17. With the typical BS law, which requires a person to act if she can do so at no risk to her own *physical* safety, it would seem that the bystander must sacrifice the sweater. Most people would agree with that outcome, but it should be observed that a criminal law that compels a person to damage something personally priceless of this sort—it could instead be a

not rule out such a conclusion. But, in view of all of the other concerns expressed—some principled, some practical—it is far from self-evident that the enactment of such laws would enhance any state's penal code.

IV. CLOSING REFLECTIONS

The public call for BS legislation in response to the Sherice Iverson case is understandable. Just as there are efforts to abolish the insanity defense after high-publicity insanity acquittals,⁷⁴ and suggestions for changes in criminal trial procedures when juries reach unpopular verdicts,⁷⁵ it is hardly surprising that public outrage with David Cash would focus on the fact that there were no Nevada criminal laws for which he could be prosecuted.

Picasso original, a drawing by the bystander's six-year-old son, or a stray cat—in order to benefit another has denied the bystander a chance to pursue *her* conception of the good life. If the criminal law can be used *this* way, there is no principled reason why a legislature cannot also decide that bystanders have an obligation to help another person save *his* grandmother's priceless sweater, Picasso painting, six-year-old child's drawing, or stray cat. Although such slippery-slope arguments usually seem fanciful at the outset—and thus we may be lulled into taking the first step down the slope—it is precisely for that reason that it best to consider what limits can *assuredly* be set on BS legislation before we enact such laws.

74. After the 1982 insanity acquittal of John Hinckley for the attempted assassination of President Ronald Reagan, a number of states abolished the insanity defense. See, e.g., IDAHO CODE § 18-207(a) (1987); KAN. STAT. ANN. § 22-3220 (1996); MONT. CODE ANN. §§ 46-14-102, 46-14-214, 46-14-301 (1992); UTAH CODE ANN. § 76-2-305 (1990). Other statutes narrowed the defense of insanity and/or shifted the burden of proof to the defendant. See, e.g., 18 U.S.C. § 7 (1992) (the Insanity Defense Reform Act of 1984 narrowed the defense and allocated to the defendant the burden of proving the defense by clear and convincing evidence).

75. Almost immediately after O.J. Simpson's murder acquittal, there were calls for new rules "limiting 'political messages' in closing arguments and banning TV cameras from criminal trials," as well as concern from the criminal defense bar that other proposals, such as a rule eliminating California's verdict-unanimity requirement, would be enacted. See Bill Kisliuk & Howard Mintz, *Defense Bar Dreading a Simpson Backlash*, NEW JERSEY LAW J., Oct. 16, 1995, at 22; see also Michael D. Harris, *Law and Order Initiative Gets Goldman's Aid*, L.A. DAILY J., Nov. 17, 1995, at 2 (reporting that a proposed state ballot initiative to allow 10-2 jury verdicts was "spawned in part" by the Simpson trial, with Fred Goldman, the father of one of Simpson's alleged victims, launching the campaign). Similarly, after Dan White, the assassin of San Francisco Mayor George Moscone and Supervisor Harvey Milk, secured a "lenient" verdict of manslaughter, California abolished the diminished capacity defense. See CAL. PENAL CODE § 28(b) (1981). See generally Glenn F. Bunting, *Need Seen for Psychiatric Testimony*, L.A. TIMES, Oct. 21, 1985, Pt. 2, at 2.

Would the public (and, therefore, legislative) interest in BS legislation have been so great if Cash had not spoken to the press, or if he had told the press in a convincing manner how deeply remorseful he was for his moral lapses? To a great extent, current discussion appears to be more centered on what Cash *did*—talk so brazenly to the media—than on what he did *not* do in those few seconds in the restroom. The public response is, to a considerable degree, directed at Cash's apparent character flaws: we want him to pay for being such an apparent⁷⁶ moral monster. Since Cash will not be punished, many want to pass legislation to punish any future David Cashes.

This essay attempts to show that, although commission-by-omission liability is extremely questionable, BS laws can be justified on retributive grounds. However, there are special problems with punishing people for not-doings, particularly in the absence of traditional, objective duty-triggering criteria. There are legality concerns, retributive reasons to worry about punishing innocent persons, and substantial utilitarian objections to such laws. Finally, there are reasons founded on the concept of individual freedom that counsel against expanding the law in this direction.

It is difficult to believe that a person who talks like David Cash should be left untouched by the criminal law. However, the criminal law cannot make people virtuous, and it should not be used to punish everyone who acts—much less, not acts—immorally. It certainly should not be used to punish people for being less than they should be.

It is worth remembering that the criminal law is not a cure for all of our problems.

76. See *supra* note 7.
