

ESSAY

Duties to Rescue and the Anticooperative Effects of Law

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The Good Samaritan rescues the crime victim or at least promptly reports the crime¹ to the police; the Bad Samaritan stands idly by. Discussions about laws that require bystanders to help crime victims or report the crimes² generally divide people into these two groups. Surely it would be good, the argument goes, to pressure Bad Samaritans into acting Good.

But real people aren't neatly divisible into these two internally homogeneous categories. Rather, Samaritans come in at least five different stripes:

The Good Samaritan helps the victim by calling the police. He might even help by physically interceding while the crime is happening, but this is almost never required, even under laws that require "assistance" and not just "report-[ing]"; these laws explicitly do not mandate any intercession that would pose "danger or peril to [s]elf or others."³ Duty-to-rescue and duty-to-report laws are therefore interchangeable for my analysis.

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1. I focus here—as do most duty-to-rescue/report statutes—only on crime victims, not victims of accidents or natural disasters. See *infra* note 24.

2. See MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990) ("Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable."); HAW. REV. STAT. § 663-1.6 (1993) (applying to all crimes in which the victim suffers "serious physical harm"); OHIO REV. CODE ANN. § 2921.22 (West 1997) ("No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities."); VT. STAT. ANN. tit. 12, § 519 (1973) (applying to all situations where "another is exposed to grave physical harm" and requiring "reasonable assistance" rather than just reporting to the authorities); *State v. Miccichi*, No. 86AP08066, 1987 WL 14481, at *2 (Ohio Ct. App. July 20, 1987) (interpreting the Ohio statute as requiring a report within a "reasonable time"); see also FLA. STAT. ch. 794.027 (1993); MASS. GEN. LAWS ANN. ch. 269, § 18; MINN. STAT. § 604A.01 (1996); 1999 Nev. Stat. 631 (codified in scattered sections of the Nevada statutory code); R.I. GEN. LAWS §§ 11-1-5.1, 11-56-1 (1994); WASH. REV. CODE § 9.69.100(1) (1998); WIS. STAT. § 940.34 (1995-96); H.R. 4531, S. 2452, 105th Cong. (1998) (proposing that federal funds be withdrawn from any state that does not impose a duty to report on people who witness sexual abuse of a child); S. 80, 1999-2000 Sess. (Cal. 1999) (proposing duty to report limited to certain serious crimes against children age 14 and younger); A.B. 2517, 208th Leg. (N.J. 1998) (proposing more general duty to report).

3. MASS. GEN. LAWS ANN. ch. 268, § 40; see also statutes cited *supra* note 2; *State v. Joyce*, 433 A.2d 271, 273 (Vt. 1981) (dictum) (duty-to-rescue law "does not create a duty to intervene in a fight"); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 24 (1993) ("None of the easy-rescue states would require individual

The Hopelessly Bad Samaritan refuses to help—perhaps because of loyalty to the criminal, unreasonable fear of retaliation, or callousness coupled with a perceived improbability of being identified and prosecuted even if a duty-to-rescue/report law exists—and can't be budged from this by conscience, threat of punishment, or the law's normative force.⁴

The Legally Swayable Samaritan would be Bad in the absence of the duty-to-rescue/report law, but would be swayed by such a law's coercive or normative effect.

The Delayed Samaritan initially does nothing—because of loyalty, panic, hurry, fear, or uncertainty—but later changes his mind (perhaps prompted by a day's contemplation or by hearing that the police are looking for information about the crime) and wants to report what he saw.

The Passive Samaritan never reports the crime, but when the police come to his door looking for witnesses, he is willing—because of remorse, a felt duty to answer questions, fear of lying to the police, or just the natural tendency to respond to questions asked by those in authority—to tell them what he saw.

This typology tells us two things. First, and most obvious, duty-to-rescue/report laws by definition won't do much about the Hopelessly Bad Samaritan. The laws will affect those who are Bad enough that they act wrongly on their own, but are nonetheless so sensitive to the law's normative effect that they are Legally Swayable to being Good. Some people will fall into this category, but I doubt many will: Those who don't respond to the social norm of helping people in distress—at least by calling 911—probably aren't likely to be swayed by the normative effect of a new duty-to-rescue/report law. The law's coercive force, moreover, will be rather low, because the witnesses know they're unlikely to be conclusively identified if they just stay quiet. This suggests that the laws will do relatively little good, something the laws' supporters do not deny; the laws, they often agree, will influence only a few people, but they argue that even this small benefit is justification enough.⁵

The trouble, though, is that as to the Delayed Samaritan and the Passive Samaritan—two groups usually forgotten in the outrage at the genuinely Bad—the laws may actually be counterproductive.⁶ Imagine a person who sees a

bystanders in [the context of a rape in progress] to do anything more than make a phone call.”) I also assume, as have others, that duty-to-rescue laws implicitly impose a duty to report, because one way of assisting a crime victim (especially when direct assistance is dangerous) is to promptly call the police. In any event, the points I make in this article apply equally to both duty-to-rescue and duty-to-report laws.

4. By “normative force,” I mean the law's capacity to mold people's moral norms and to lead them to act in certain ways because they have been influenced to think that those ways are right.

5. See, e.g., Yeager, *supra* note 3, at 56-57 (acknowledging that “widespread adoption of rescue and reporting laws may not significantly change the behavior of bystanders when another person is in distress,” but arguing that it may sometimes “tip the balance toward the desired action” and concluding that this marginal benefit is enough to justify the law).

6. I set aside in this article the moral debates about whether a duty to rescue or report would impose an impermissible burden on individual liberty; these matters have been adequately discussed elsewhere. Compare, e.g., Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (supporting such duties), A.D. Woolzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69

neighbor seriously abusing the neighbor's child. Though the Good Samaritan would intervene or at least call the authorities, some otherwise decent people fail to do this. Some might be afraid, reasonably or not, that the abusive parent will physically hurt them if they intercede. Others may wrongly feel a sense of loyalty to their neighbor or wrongly conclude that it's none of their business. Others may misperceive the magnitude of the abuse, thinking that it might be permissible parental discipline; people are often reluctant to get the police involved unless they're sure that a serious crime is taking place. Still others may be paralyzed with indecision.

These are generally unworthy responses, but fortunately, after reflection or after observing other events, some witnesses may change their minds. A gnawing conscience may move them to call the police a day later. Witnessing a second (or tenth) incident of abuse may finally drive them to action. Seeing the child the next day with a black eye may convince them that the abuse was serious and that they are morally obligated to act to stop it. And even if they don't come forward on their own, a visit from the police or from child welfare officials investigating the matter may prompt them to disclose what they saw, thus helping save the child from further abuse.

People who react this way may still be morally culpable for their initial failure to aid or to report, but the more practically important fact is that the legal system—and the victim and possible future victims—can nonetheless use their belated help. Delayed Samaritanism and Passive Samaritanism aren't as good as Good Samaritanism, but they are much better than nothing, and shouldn't be discouraged.

Under a duty-to-rescue/report law, though, both the Delayed and the Passive Samaritans in such a situation have already committed a crime by not helping or responding "as soon as reasonably practicable."⁷ By the time the remorse sets

VA. L. REV. 1273 (1983) (same), and Yeager, *supra* note 3 (same), with ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974) (arguing that the state "may not use its coercive apparatus for the purpose of getting some citizens to aid others"), Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 197-204 (1973) (same), and George Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 548 (1987) (describing Kant's view as being opposed to a legally enforceable duty to rescue).

I do think that failing to rescue or to report ought not be considered harming another, because it generally leaves the victim in the same position in which he would have been had the bystander not existed; I therefore believe people should be presumptively free from a duty to rescue or report. Cf. RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY* 51-68 (1980) (defending this position in more detail). On the other hand, a duty to tell the police about crimes is not far removed from the traditionally accepted duty to testify in court when subpoenaed. The fact that we consider the duty to testify to be a permissible—even a generally uncontroversial—violation of personal liberty suggests that duties to report might likewise be permissible infringements. I therefore think that, viewed from a purely moral perspective, as opposed to the pragmatic one I take in this article, a duty to report (though not a duty to rescue) poses a genuinely close question about ordered liberty.

7. MASS. GEN. LAWS ANN. ch. 268, §40; see also statutes cited *supra* note 2. I assume here that the state duty-to-report law covers serious child abuse; some laws do and some do not. Compare, e.g., HAW. REV. STAT. § 663-1.6 (1993) (covering all "crime[s]" that cause "serious physical harm"), and WASH. REV. CODE § 9.69.100(1)(c) (1998) (specifically covering "[a]n assault of a child that appears reasonably likely to cause substantial bodily harm"), with, e.g., MASS. GEN. LAWS ANN. ch. 268, § 40, ch. 269, § 18 (covering only "aggravated rape, rape, murder, manslaughter or armed robbery" and bazing).

in, the Delayed and Passive Samaritans are legally guilty,⁸ and either volunteering or honestly answering police questions will incriminate them.

The Delayed and Passive Samaritans therefore have a choice: continue to keep quiet and likely never be conclusively found out to have been a witness,⁹ or speak up and risk a criminal prosecution or perhaps a civil lawsuit¹⁰ for their initial failure to act. When silence or “I didn’t see anything, officer” is legally cheap and volunteering information risks even a modest legal cost, many will stay mum.¹¹ The same can happen in many other situations, for instance when a person sees a robbery or killing outside her window and at first doesn’t report the crime (out of fear for her family, indecision, or a habit of mistrusting the police), or when a frat boy sees a friend raping an unconscious girl and initially keeps quiet out of misguided loyalty.

Thus, in trying to achieve a procooperative effect, duty-to-rescue/report laws may inadvertently cause an anticooperative effect. Instead of inducing cooperation with the social goal of helping crime victims, the laws may deter Delayed Samaritans and Passive Samaritans from coming forward or truthfully answering police inquiries.¹² Some Delayed and Passive Samaritans could act on their

8. If the Samaritan was honestly mistaken about the character of what he saw—for instance, if he honestly had not recognized that the child was “exposed to grave physical harm,” e.g., VT. STAT. ANN. tit. 12, § 519 (1998)—then he might not be guilty of failure to report, but he might still be concerned that the police might assume the contrary; his going to the police and admitting he was a witness would thus lead to the risk of legal jeopardy. Likewise, the Samaritan might not be guilty if he at first honestly (but incorrectly) thought that reporting the crime would expose him to “danger or peril,” *id.*, but here too he might be concerned that the police wouldn’t believe that he was indeed scared. This would be especially likely if the law puts the burden on the bystander to prove that he felt a risk of harm, *see, e.g.*, MINN. STAT. ANN. § 609.662 subd. 4 (West 1998) (defining risk of harm as an affirmative defense), or that the perception of risk was reasonable, *see, e.g., id.*

9. Cases such as the notorious New Bedford rape (dramatized in the movie *The Accused*), in which dozens of people stood by clearly seeing a rape but doing nothing, might fit this mold; but my suspicion is that these are likely a small fraction of all failure-to-rescue/report cases.

10. *See Sabia v. State*, 669 A.2d 1187, 1194-95 (Vt. 1995) (indirectly suggesting that state duty-to-rescue law may impose tort liability for violation of the duty); Heyman, *supra* note 6, at 707 (urging such a tort regime); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 438-40 (1985) (same); Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983) (same). Compare Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT’L REV. L. & ECON. 141 (1995) (arguing that a general tort law duty to rescue may be economically efficient), with WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 142-48 (1987) (taking the opposite view).

11. It would be great to have some empirical data on how large this effect would be, but I don’t think any such data is available. The few American duty-to-rescue laws are heavily under-used and largely unknown by the public, but even if they were more common it would be hard to gather data on behavior (unknown witnesses’ failure to go to the police) that by definition does not come to light. I am also unaware of any data about the effects of the European laws and am in any event skeptical that any such data would tell us much about what effect such laws would have in American culture.

12. This is of course different from another perverse effect of duty-to-rescue/report laws that some have discussed—the risk that potential rescuers would avoid places where they think they will likely be called on to perform a rescue. Compare LANDES & POSNER, *supra* note 10, at 143-46 (stressing the significance of this risk), with Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 889-90 (1986)

remorse while minimizing their legal exposure, by calling in an anonymous tip, but such tips are much less useful to the police than are witnesses who actually come forward; and some risk-averse witnesses might be reluctant even to call in an anonymous tip, fearing that it won't stay anonymous.

There will, of course, be no anticooperative effect when people do not know about the duty to rescue or to report.¹³ Similarly, some who know about the law won't think much about it in making their decisions, so the risk of punishment will not deter them from coming forward belatedly. But ignorance of, or lack of concern for, the duty-to-report/rescue law would equally weaken the law's intended procooperative effect: People who don't know or don't care about the law will not be influenced by it to promptly help a victim or report a crime.

Some witnesses may assume prosecutors will decline to prosecute them for the initial failure to help so long as they come forward with help later. But not all Delayed or Passive Samaritans will have such faith in prosecutorial mercy, given that they know their actions were less than noble and that their own skins are at stake.¹⁴ Even a small chance of being prosecuted¹⁵ may be enough to scare off many witnesses who, by hypothesis, aren't public-spirited Good Samaritans in any event. (Conversely, if one defends the duty-to-rescue/report laws by stressing that people will expect them to remain unenforced, then one must also acknowledge that the laws will have very little coercive or normative effect.)

In some cases, prosecutors could avoid the anticooperative effect by offering an important witness immunity from prosecution for failure to aid or report, but this will work only for witnesses whom the prosecutor already knows to be important. Many witnesses may never come to the prosecutor's attention precisely because they keep quiet to avoid any risk of prosecution. A prosecutor's grant of immunity also wouldn't protect witnesses from possible civil liability, if the duty-to-rescue/report regime allows such liability.¹⁶ To many, the risks of talking and implicitly admitting to conduct that could lose them their savings and homes would exceed the risk of silence.

(expressing doubt that the risk will be that significant). Though these two pieces don't discuss the anticooperative effect discussed here, their general analyses of the duty to rescue/report are classics in the field.

13. I suspect that eventually many people will learn about this duty, probably through media coverage of high profile prosecutions for failure to rescue or report.

14. Though the Massachusetts, Minnesota, and Vermont statutes impose only small fines, the other laws authorize jail time. *See* statutes cited *supra* note 2; *cf.* *State v. Miccichi*, No. 86AP08066, 1987 WL 14481, at *2-3 (Ohio Ct. App. July 20, 1987) (sentencing a pharmacist to 30 days in jail for failing to report a theft of drugs from his pharmacy; the earlier theft came to the attention of the police only when the pharmacist promptly reported a later theft).

15. Indeed, prosecutions under these laws have seemingly been very rare. *See, e.g., Yeager, supra* note 3, at 34 ("Scant trial and appellate court precedents indicate that [recent duty-to-rescue/report laws] have been symbolic at most."); *id.* at 8 n.37 ("In written response to a questionnaire that I sent to 387 prosecutors in the eight states that impose duties to render easy aid or duties to report serious crimes, none of the 139 prosecutors who responded could recall filing a complaint under the relevant statute.") (citation omitted).

16. *See supra* note 10.

Moreover, a witness who testifies under grant of immunity would tend to be somewhat less credible to the jury than a witness who, in the absence of a duty-to-rescue/report law, testifies without need for immunity. (“Isn’t it true, Mr. Witness, that the prosecution has agreed to drop criminal charges against you in exchange for your testimony against the defendant?”) Duty-to-rescue/report laws may sometimes give prosecutors extra leverage over witnesses: If the prosecutor can prove that a reluctant witness saw the crime but failed to promptly help or report, the prosecutor can use this to induce cooperation even from an otherwise Hopelessly Bad Samaritan. But I suspect there will be few such cases relative to the others I describe, because unless the witness belatedly comes forward, failure-to-rescue/report cases will usually be hard to make stick. Too often there will be uncertainty about whether the witness was really at the scene, whether he really knew there was a crime in progress, and possibly whether he was afraid of retaliation by the criminal.¹⁷ This is especially so because other witnesses who could shed light on these questions may themselves be guilty of failing to promptly report and therefore be reluctant to come forward. Sometimes, the victim or someone else can identify the witness and testify that the witness must have known what was going on; but often the witness will only be put in legal jeopardy if he goes to the police and admits he was a witness, which is why the Delayed and Passive Samaritans are particularly likely to be scared off by such laws.

This anticooperative effect could be diminished by changing the statutes themselves to provide defenses for Delayed or Passive Samaritans, but to be useful, these defenses would have to be extremely broad. For instance, just categorically exempting anyone who tardily comes forward with information will encourage the cooperation of the Delayed Samaritans but will provide no safe harbor for the Passive Samaritans, who will still be deterred from answering questions when the police come around.

My colleague Peter Arenella suggests a broader “second chance” defense that would exempt from liability anyone who either volunteers information or responds to police questions, which would, in effect, change the law from a duty-to-rescue/report to something that will in practice more resemble a “duty to cooperate.”¹⁸ But such a law would differ considerably from the duty-to-rescue/report laws that have been enacted and proposed so far; in fact, it wouldn’t be terribly different from the situation today, where prosecutors may (at least in theory) use subpoenas and the threat of contempt prosecution to require witnesses to say what they saw.¹⁹

This anticooperative effect should give us real reason to worry. The duty-to-

17. See, e.g., statutes cited *supra* note 2.

18. Peter Arenella, Taking Moral Agency Seriously (unpublished manuscript, on file with author) (work in progress).

19. For the same reason, such a revised law should arouse less libertarian opposition than do orthodox duty-to-rescue/report laws—the burden it imposes on private liberty is not much greater than that imposed by the general duty to testify when subpoenaed.

rescue/report laws' positive effect, as I argue above, is likely to be quite modest—few people, I think, expect the contrary. But the anticooperative effect could be quite substantial, probably more than enough to outweigh whatever practical benefit the laws may provide. Delayed reports, though less valuable than rescues and prompt reports, are important crime-solving tools, and anything that deters such reports can't be taken lightly. At the very least, supporters of duty-to-rescue/report laws must confront this anticooperative effect in making their arguments, something they have not done so far.

One could argue, as a purely moral matter, that failure to rescue or report is so wrong that it deserves criminal punishment, but even if this were so, this misconduct does not seem so grievous that it demands punishment even when the punishment interferes with solving other crimes. And the lack of prosecutions under the existing duty-to-rescue/report laws suggests that, at least in prosecutors' minds, such failures to rescue or report are not loudly crying for retribution. The practical costs created by the anticooperative effect seem to me quite adequate to outweigh any retributive benefits of the law.

Duty-to-rescue/report laws focus on a particular event—the bystander witnessing a crime—and use criminal law to try to change bystanders' behavior during that event. But citizens have a continuous relationship to the legal system, a relationship from which the system can benefit on many occasions. Making the legal system into the citizens' adversary, rather than their protector and servant, jeopardizes this relationship and can deprive the legal system of the citizens' assistance.²⁰

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This analysis does not show that all duties to rescue or report are unjustified. In fact, it helps explain why some such narrow duties may be sensible while other, broader ones are counterproductive.²¹

Consider doctors' duty to report to the police any gunshot or stab wounds they treat.²² Doctors who fail to comply with this duty are more likely to be found out than the typical witness would be. There will often be records that describe the treatment and other hospital personnel who will testify about it. Doctors would also usually know that failing to report puts their fates in the hands of the patient, and patients who ask that the doctor not report such a wound will often be rather unreliable characters. If the patient does turn out to be a criminal, he may well implicate the doctor if he is eventually captured and

20. I don't want to overstate the importance of the anticooperative effect; in many situations, it is not a powerful consideration. We are perfectly right, for instance, to persecute those who murder or rape or steal, even though this alienates them from the justice system: First, the harm of not punishing these crimes would easily outweigh the harm of this alienation, and, second, the people who commit these crimes are probably morally corrupt enough that they cannot be expected to much help the legal system anyway. I argue only that in some contexts, especially where a proposed new law would do relatively little good, the law's anticooperative effect may be enough to tilt the scales against it.

21. I don't claim that this is the reasoning historically used to determine when such duties should be imposed, only that it can be used to support some such decisions.

22. *See, e.g.*, CAL. PENAL CODE §§ 11160-11161 (Deering 1992).

questioned by the police. The doctor, realizing this risk of exposure, will therefore be particularly likely to promptly comply with the law.²³

Furthermore, the normative impact of this law should be considerably greater than the normative impact of more general duty-to-rescue/report laws. Most witnesses who fail to rescue or report act out of callousness, fear, or deep-seated loyalty to family, friends, or confederates; it's unlikely that knowing about a legal duty to rescue or report will have much normative effect on their behavior. Doctors who fail to report gunshot or stab wounds, on the other hand, are likely to be acting that way because they feel a less entrenched professional norm of loyalty to their patients. A duty-to-report law is especially likely to undermine this norm.

Sometimes the doctor's legal duty to report could indeed have an anticooperative effect: For instance, a doctor may perform the surgery alone, keep no records, and think that, if the matter eventually comes to light, he can plausibly (though falsely) claim that he hadn't realized the injury was a stab wound. In such a case, a doctor who, out of loyalty or unreasonable fear or hesitation, initially fails to report but later changes his mind could indeed be deterred from reporting by the risk of punishment for his initial silence. But I suspect the cases where all these factors are present would be rare, and the procooperative effect of the law would therefore exceed its anticooperative effect.

My analysis also doesn't apply in the context of less common²⁴ duties to help victims of accidents or natural disasters. There, late reporting will usually do little good because there's no criminal to be caught, and there's therefore less reason to worry about deterring such late reports. Legal duties to help accident victims may still be condemned on libertarian grounds or for other practical reasons, but my "anticooperative effect" argument doesn't say much about them.

My "anticooperative effect" analysis does, however, apply in spades to duties enforced through tort law, as I've suggested before.²⁵ Many people rightly fear the risk of civil liability, which could mean the loss of all the assets that they've worked for years to accumulate, even more than the risk of prosecution under a rarely enforced misdemeanor statute. Even if some Delayed or Passive Samaritans might expect a prosecutor to forgive them if they report late, they should have much less assurance about the victim, who may be angry, greedy, or both. The risk of civil liability will therefore make them less likely to belatedly come forward or to answer police questions.

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23. Some doctors may be reluctant to tattle on their criminal patients because they're afraid that the patients will retaliate; but this anticooperative effect flows from the criminal, not from the duty-to-report law, and thus tells us little about whether the law makes sense.

24. Only four of the ten state duty-to-rescue/report regimes—Minnesota, Rhode Island, Vermont, and Wisconsin—apply to perilous situations generally as well as to crimes. *See* statutes cited *supra* note 2; *cf.* Heyman, *supra* note 6, at 678-79 (suggesting that the normative case for a legal duty to help crime victims is stronger than the normative case for a legal duty to help accident victims).

25. *See* sources cited *supra* note 10.

The anticooperative effect I describe is particularly present in duty-to-rescue/report laws, but it may arise elsewhere, too. Illegal aliens, for instance, are often thought to be especially vulnerable to crime because the risk of being deported may deter them from reporting such crimes—likewise for prostitutes who risk criminal prosecution if they report being victimized by their pimps or customers. Their reporting of the crimes may help society, both by helping prevent and deter future victimization of illegal aliens and prostitutes and by helping catch criminals who may also prey on otherwise law-abiding citizens. But such cooperation often won't be forthcoming because of the anticooperative effect of laws that make it dangerous for illegal aliens and prostitutes to talk to the police.

These situations differ in some ways from a bystander's duty to rescue or report. The anticooperative effect is greater for illegal aliens or prostitutes than for Delayed or Passive Samaritans, because they face greater penalties when they come forward. On the other hand, the anticooperative effect is somewhat diminished by the fact that crime victims—unlike mere bystanders—have a strong personal incentive to report the crime to the police, because otherwise the criminals could victimize them again.²⁶ Moreover, if one thinks prostitution or illegal immigration really must be stamped out, the anticooperative effects in these cases might be outweighed by the perceived need for assiduous enforcement of prostitution and immigration laws.

Still, those who are ambivalent about these laws in the first place might conclude that the anticooperative effects sometimes weigh against maximally stringent law enforcement. It may be helpful, for instance, for the police to announce a policy of not going after prostitutes or illegal aliens who come to them as crime victims. Though this might seem counterintuitive at first, given a general assumption that more law enforcement is better than less, the concern about anticooperative effects of certain kinds of law enforcement can justify such a policy.²⁷ Likewise, this concern about anticooperative effects of law explains why people sometimes announce rewards for the return of lost property with “no questions asked.”²⁸

26. Even victims who aren't concerned about victimization by the same criminal may want to report the crime to the police so as to deter attacks by other criminals. Getting a reputation as someone who doesn't report attacks on oneself may make it likely that one will be attacked more often.

27. See *supra* text preceding note 16 for an explanation of why such an approach won't work in duty-to-rescue/report cases.

28. A related concern explains why many states give immunity from negligence lawsuits to bystanders who help crime or accident victims. See, e.g., MINN. STAT. § 604.05 subd. 2 (1992). Just as the fear of incidentally implicating oneself in a crime can discourage people from doing the right thing by going to the police, or from doing the right thing by returning property to its owner, so the fear of inadvertently incurring civil liability can discourage people from doing the right thing by trying to give emergency aid. Cf. MODEL PENAL CODE §§ 5.01(8), 5.01(4), 5.03(6) (1985) (describing the renunciation defense in attempt and conspiracy cases and justifying it as an incentive for people who have begun an attempt or conspiracy to do the right thing by stopping their course of conduct before actual harm is done). But see Paul R. Hoerber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 397-98 (1986) (rejecting this argument on empirical grounds).

Similarly, the anticooperative effect may come into play when a woman who illegally carries a gun in her purse uses it to scare off a robber or rapist. The woman probably won't report the attack because, even if her testimony may help catch the criminal and make the streets safer, the criminal's story will incriminate her too. Her only incentive to go to the police is public-spiritedness, which even a slight risk of prosecution on a weapons charge may counteract.

Again, if we think that law-abiding citizens can't be trusted to carry guns, we might conclude that the positive effect of the ban on gun carrying exceeds its anticooperative effect. But if we think that it's a close call whether such carrying actually poses a danger—in fact, thirty-one states now let pretty much all law-abiding adults carry concealed weapons,²⁹ holders of concealed weapon permits rarely abuse their guns,³⁰ and a recent study suggests that allowing concealed carrying may *decrease* violent crime³¹—then the anticooperative effect of carry bans may break the tie in favor of concealed carry liberalization.

More generally, this discussion illustrates the need for considering what happens when people refuse to comply with a proposed new law, rather than just evaluating the law on the assumption that they will comply. A duty-to-rescue/report law seems morally proper to many. It at first seems to create a good incentive. If people reacted to laws simply by obeying them, such a law would probably increase social welfare (again setting aside the libertarian objections). But some people won't obey the law, and this noncompliance does not simply mean the law won't affect their behavior: the law's anticooperative effect—through which an initial violation of the law makes one less likely to act in certain socially useful ways later—will at least to some extent counteract the law's positive effects, and may end up outweighing them.

When a law turns people into outlaws, even only modestly punishable ones, it naturally makes them less likely to cooperate with the legal system that is threatening to prosecute them, especially when their cooperation can alert the legal system to their misdeeds. This effect is an inevitable cost of using the threat of force to coerce people's conduct; and while this cost may often have to be paid, it ought not be ignored, and for some laws, such as duty-to-rescue/report laws, it may be dispositive.

29. Thirty states require the police to give concealed carry licenses to pretty much all law-abiding adults who apply; one state, Vermont, allows concealed carry without a license. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* 86-89 (1998).

30. In Florida, for instance (where the government has kept thorough records since concealed carry was liberalized in 1987), there are now a bit under 230,000 active concealed carry licenses. Over the 11 years from 1987 to 1997, on average 10 licenses per year have been revoked due to a gun crime by the licenseholder. See Florida Department of State—Division of Licensing, *Concealed Weapons/Firearms Monthly Report* (visited Mar. 4, 1999) <http://licgweb.dos.state.fl.us/stats/cw_monthly.html>. Even considering that not all gun-abusing licenseholders will be caught, this still reflects an extremely low rate of abuse.

31. See LOTT, *supra* note 29.