

# CRIMINAL LIABILITY AND THE DUTY TO AID THE DISTRESSED

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The aim of this Article is to address some of the normative, as opposed to the purely metaphysical, issues raised by Michael Moore's analysis of the criminal law's act requirement. On several occasions, Professor Moore himself recognizes the role of ethics in finally settling issues of the application of the metaphysics of action to the criminal law. For example, he acknowledges that, ultimately, moral criteria are needed to determine whether an event is the consequence of a basic act or its circumstance.<sup>1</sup> Moreover, he explains that the orthodox view of Bentham and Austin (that in addition to a basic action, all crimes involve but two dimensions: circumstance and result)<sup>2</sup> is based on practical, and not metaphysical, concerns.<sup>3</sup> Moore argues that it is compatible with his metaphysical realism to accept that the categories of actions applied by the criminal law—killing, mayhem, assault, theft, fraud, etc.—are conventional: they do not denote natural events or kinds, but rather are concepts that have their origins in the practical interests of beings of our kind.<sup>4</sup>

Moore's appreciation of the role of ethics and practical concerns in this area is commendable. Given the practical ends of the criminal law in a democracy, it is not only expedient but also desirable to avoid using the metaphysics of action as much as possible in the public realm. High metaphysics, including the metaphysics of action, is one area on which citizens in a democracy (including those within the legal community) cannot agree, even under the best of circumstances. Insofar as it is necessary to turn to metaphysics, it should be as a last resort, and then only to the degree necessary to resolve judicial and moral issues. Metaphysics

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<sup>1</sup> See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 208 (1993).

<sup>2</sup> See *id.* at 209-10 (arguing that a third element, the "nature" of the crime, is not necessary for description of the act).

<sup>3</sup> See *id.* at 201-02.

<sup>4</sup> See *id.*

should be seen not as the guide, but as the handmaiden to democratic adjudication and legislation. It should be used to resolve conceptual difficulties in principles and norms which themselves have their bases not in metaphysical considerations, but in the practical necessities and interests of democratic citizens. Moore seems to have a more robust view of the role of metaphysics in a democracy. This accounts for his wonderfully extensive treatment of the metaphysics of action as applied to the criminal law.

The goal of this discussion is to make a stronger case for the criminalization of certain omissions than that presented by Moore. In particular, I shall argue for a version of what is known as the duty to rescue, or sometimes "good samaritan" laws. As Moore indicates, in Anglo-American law, certain specific failures to take action are punishable and are therefore exceptions to the general act requirement.<sup>5</sup> Criminal liability is imposed for the failure to aid within special relationships such as those between parents and their small children, husbands and wives, or employers and their employees.<sup>6</sup> Criminal liability is also imposed for neglect of professional duties, as in the case of physicians or nurses and their patients, lifeguards and the swimmers they are paid to watch, and railroad gatemen and approaching motorists.<sup>7</sup> There are also other exceptions to the general rule.<sup>8</sup> However, there is generally no common law duty (and in the absence of statute, no duty whatsoever) to rescue a stranger in distress, even if one can do so without risk or inconvenience to oneself.<sup>9</sup> This contrasts with the continental rule, which

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<sup>5</sup> See *id.* at 57. On Moore's account, "the criminal law's act requirement requires that there be a simple bodily movement that is caused by a volition before criminal liability attaches, and that such a movement is all the action a person ever performs." *Id.* at 45.

<sup>6</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 26, at 184 (1972).

<sup>7</sup> See *id.* § 26, at 185. For examples of cases involving the liability of gatemen to the public, see *State v. Benton*, 187 A. 609, 616 (Del. Ch. 1936), and *State v. Harrison*, 152 A. 867, 868 (N.J. 1931) (contract between railroad and gateman, but latter owes duty to the public as well as to the railroad). *But cf.* *Anderson v. State*, 11 S.W. 33, 33-34 (Tex. Crim. App. 1889) (brakeman has no duty to signal engineer to stop train when he sees child on track, since that is not what he was hired to do). For an illuminating discussion of crimes of omission, see LEO KATZ, *BAD ACTS AND GUILTY MINDS* 135-53 (1987).

<sup>8</sup> For example, if one voluntarily assumes care, one has a duty to see the job through. See LAFAVE & SCOTT, *supra* note 6, § 26, at 185. Also, a landowner or merchant has a duty to act affirmatively to provide for the safety of those invited onto his premises. See *id.* at 186.

<sup>9</sup> See *id.* at 183. Vermont has adopted a duty to rescue statute. See VT. STAT. ANN. tit. 12, § 519(a) (1973) (requiring one to give reasonable assistance to someone

has long held that one is liable for the failure to come to the assistance of others in distress.<sup>10</sup>

Professor Moore, in his discussion of the act requirement in the criminal law, "raises the possibility that perhaps Anglo-American criminal law is mistaken in those rare instances where it genuinely imposes omission liability. Perhaps there ought not to be such crimes, recognizing that presently they do exist."<sup>11</sup> Nonetheless, although he considers this possibility, he does not, in the end, subscribe to it. He seems to conclude that the few exceptions to the act requirement that presently exist are justified on the ground that the moral wrong of omission in these few cases warrants retribution,<sup>12</sup> and that the Anglo-American rule of not punishing strangers for failure to rescue is generally sound.<sup>13</sup>

I aim to reconsider Moore's conclusion. Some cases of failure to rescue those in distress are sufficiently wrong to warrant retribution. Moreover, retribution is compatible with maintaining a liberty worth having.<sup>14</sup> The problem then becomes that of defining a positive legal duty to aid the distressed that is sufficiently specific to escape the usual objections of vagueness, unfairness, etc.<sup>15</sup> Resorting to Kant's typology of duty, the aim here will not be to specify such a statute—that is a job for the drafters—but rather to provide a philosophical justification and framework for statutes, existing or imagined, which impose a legal duty to aid the distressed. The argument throughout is guided by the resources of the democratic social contract tradition, as expounded in the works of the major proponents of that tradition.<sup>16</sup> In terms of this tradi-

in danger of grave physical harm if there is no risk involved).

<sup>10</sup> See, e.g., STRAFGESETZBUCH [StGB] § 323(c) (F.R.G.) (imposing criminal liability for failure to rescue).

<sup>11</sup> MOORE, *supra* note 1, at 34.

<sup>12</sup> See *id.* at 59 ("[T]he injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails."). Moore's argument is explored in greater detail below. See *infra* notes 26-33 and accompanying text.

<sup>13</sup> See MOORE, *supra* note 1, at 57.

<sup>14</sup> The liberty safeguarded by the duty to aid the distressed is not, of course, the liberty of the offender; but then there is no moral value to a liberty to do wrong. See *infra* part V.

<sup>15</sup> See *infra* parts IV-V.

<sup>16</sup> See generally IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., 1965) (1797) [hereinafter KANT, METAPHYSICAL ELEMENTS]; IMMANUEL KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY, BUT IT WON'T WORK IN PRACTICE (John Silber ed., E.B. Ashton trans., 1974) (1793); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., student ed. 1988) (3d ed. 1698); JOHN RAWLS, A THEORY OF JUSTICE (1971); JEAN-JACQUES ROUSSEAU, THE SOCIAL

tion, a legal duty to aid the distressed is, under certain circumstances, compatible with democratic liberty and the good of all individuals.

### I. MOORE ON OMISSIONS

At the end of chapter 3 of *Act and Crime*, Moore summarizes his defense of the orthodox view of the act requirement, and with it Anglo-American law's current practice with regard to omissions, as follows:

[1] There is and should be an act requirement, although it is and should be subject to an exception in the case of certain omissions. [2] Normatively, the retributive value of punishment justifies why we should punish actions and that value (sometimes in conjunction with the values of fairness and of liberty) also justifies why we should punish *only* actions and not character, emotions, or omissions. [3] The only exception to this is for those omissions that violate our duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails.<sup>17</sup>

How are we to understand propositions [2] and [3]? At one point in his discussion, Moore refers to Lord Thomas Macaulay's well-known example in which Macaulay attempts to justify why the penal code he proposed for India did not punish omissions:

"It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die."<sup>18</sup>

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CONTRACT (Rose M. Harrington trans., New York, G.P. Putnam's Sons 1893) (1761).

<sup>17</sup> MOORE, *supra* note 1, at 59.

<sup>18</sup> *Id.* at 55 (quoting THOMAS MACAULAY, NOTES ON THE INDIAN PENAL CODE note M (1837) (On Offences Against the Body), *reprinted in* 7 THE WORKS OF LORD MACAULAY 493-94 (Lady Trevelyan ed., New York, Longmans, Green & Co. 1897) (1837)). Just prior to the sentence quoted by Moore, Macaulay gives another example:

[I]t will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission.

MACAULAY, *supra*, at 493.

Although Moore agrees with Macaulay, it would be a mistake to conclude that Moore's view is identical to Macaulay's. Macaulay believes that one can be held criminally liable for omissions only where there exists some special relationship (natural, institutional, or contractual) between the parties that is otherwise recognized by the criminal or civil law.<sup>19</sup> In this vein, Macaulay states:

An omission is illegal . . . if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A. omits to give Z. food, and by that omission voluntarily causes Z.'s death. Is this murder? Under our rule it is murder if A. was Z.'s gaoler [jailer], directed by the law to furnish Z. with food. It is murder if Z. was the infant child of A., and had therefore a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z. was a bedridden invalid, and A. a nurse hire to feed Z. It is murder if A. was detaining Z. in unlawful confinement, and had thus contracted . . . a legal obligation to furnish Z., during the continuance of the confinement, with necessaries. It is not murder if Z. is a beggar, who has no other claim on A. than that of humanity.<sup>20</sup>

The reason it would be a mistake to interpret Moore as endorsing Macaulay's view is that the reasons Moore gives for not punishing omissions are not the same as those given by Macaulay. In Moore's view, a wrong committed by omission is punishable only if the wrong is sufficiently bad that morality and retributive justice require punishment, and only if the importance of retribution outweighs the interest in maintaining liberty.<sup>21</sup> Macaulay's condition on punishment for omissions, by contrast, does not refer to liberty and the degree of moral wrongness involved: where there is no legal duty otherwise enforced through civil or criminal liability, there should be no criminal liability for harmful omissions.<sup>22</sup> Hence, according to Macaulay, there is no liability, criminal or civil, for failure to assist mere strangers in distress:

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<sup>19</sup> See MACAULAY, *supra* note 18, at 493-97. This is especially true if the parties are strangers. See *id.* at 497.

<sup>20</sup> *Id.* at 495.

<sup>21</sup> See MOORE, *supra* note 1, at 59.

<sup>22</sup> See MACAULAY, *supra* note 18, at 493-97.

A. omits to tell Z. that a river is swollen so high that Z. cannot safely attempt to ford it, and by this omission voluntarily causes Z.'s death. This is murder, if A. is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A. is a guide who had contracted to conduct Z. It is not murder if A. is a person on whom Z. has no other claim than that of humanity.<sup>23</sup>

Now, as an answer to the question of whether the law should recognize a duty to warn or otherwise assist those who are, or are about to be, in distress and in need of immediate assistance, Macaulay's "special relationship" argument is quite unconvincing.<sup>24</sup> In effect, it merely asserts what we already know: that Anglo-American law imposes no general duty, civil or criminal, to rescue or give emergency assistance to strangers. The fact that the law recognizes no civil liability or action in damages is not an argument against the criminalization of such omissions. Perhaps there should be civil liability for such omissions as well.

Moore's position, on the other hand, would seem to leave open the question of the criminalization of omissions in cases where special relationships do not exist, and it is this, I think, which explains his ambivalence. What is important in Moore's test is not so much the nature of the preexisting legal relationship between the two people, but the gravity of the moral wrong that is done by one's failure to act under the circumstances.<sup>25</sup> I take Moore's position to rely on five propositions. First, the goal of the criminal law is retribution: to punish moral wrong. What is necessary (but not sufficient) for criminalizing any action is that it be morally wrong.<sup>26</sup> Second, the law does not, and should not, punish failures

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<sup>23</sup> *Id.* at 495.

<sup>24</sup> See JOEL FEINBERG, HARM TO OTHERS 150-59 (1984). Feinberg contends that Macaulay's argument here begs the question. See *id.* at 152-53.

<sup>25</sup> See MOORE, *supra* note 1, at 59.

<sup>26</sup> See Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987). Moore summarizes the retributivist position as follows:

Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral culpability ("desert") is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions. . . . For a retributivist, the moral culpability of an offender also gives society the *duty* to punish. . . . [W]e have an obligation to set up institutions so that retribution is achieved.

*Id.* at 181-82. In a footnote, Moore adds: "Moral culpability' as I am here using the phrase does not presuppose that the act done is morally bad, only that it is legally prohibited." *Id.* at 181 n.1. This is a serious qualification to his claim that moral

to rescue strangers or to relieve them from distress, because we are under no general moral duty to save, assist, or benefit strangers.<sup>27</sup> Third, the only exception in morality to this absence of duty is where we can save a stranger without risk to ourselves, and with only minimal inconvenience. So, while Camus is under no duty to jump into the Seine to save a drowning woman, “[e]ven if the chance of his own drowning was relatively small,”<sup>28</sup> and while a physician is under no duty to make a trip to save a dying person whom only the physician can save,<sup>29</sup> a passerby is under a moral duty to throw a rope to a child in peril.<sup>30</sup> Fourth, infraction of this moral duty is not sufficient for criminal liability (and, Moore seems to say, it should not be) because of “the value we accord to persons’ liberty to make the wrong choice.”<sup>31</sup> It is necessary for criminal liability, at least where there is a positive duty to act, that the moral wrongness of a failure to act be of sufficient magnitude so as to outweigh the infringement of liberty that criminal sanctions invariably impose.<sup>32</sup> Fifth, the value of liberty does not justify the noncriminalization of a parent’s failure to save her child from peril:

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culpability is a necessary condition of liability. It implies that one is “morally culpable,” and deserving of retribution for violating laws criminalizing harmless, or even morally justifiable, conduct. Perhaps Moore’s point here is simply the familiar one: that a breach of some law is a precondition to punishment.

<sup>27</sup> See MOORE, *supra* note 1, at 55 (“We are not, in general, obligated to prevent harm to others, and while it might be virtuous to do so on many occasions, morality itself permits us to be non-virtuous.”).

<sup>28</sup> *Id.* at 54.

<sup>29</sup> See *id.* at 55.

<sup>30</sup> See *id.* at 56-57. Presumably, the reason this last case is different from the first two is the fact that there is an absence of risk and a very slight degree of inconvenience imposed on the passerby. Nevertheless, Moore’s examples are ambiguous here. He might be read as saying that the difference between the three cases is not one of degree of risk and/or inconvenience, but the fact that in his third example a child is involved. This would mean that Moore sees people as having a special moral duty to rescue children, but not adults in similar danger, no matter how minimal the inconvenience to the passerby. I hesitate to attribute this alternative reading to Moore, since it rests on an arbitrary age distinction. What difference does the age of the victim make, since in both cases we are dealing with a helpless person under distressed conditions?

<sup>31</sup> *Id.* at 57. Here Moore’s ambivalence about the duty to aid the distressed becomes apparent. At least with respect to duties to children, he does say that while a parent’s duty to save her own child is of greater weight than a stranger’s duty to save someone else’s child, he is “unsure that the balance is different enough that a rightly conceived penal code would not punish both sorts of intentional omission.” *Id.* He seems to leave the door open to the question of whether the Anglo-American rule ought to be changed to allow for the criminalization of certain omissions by strangers, at least with respect to children.

<sup>32</sup> See *id.* at 57-58.

the neglectful parent is criminally liable since the weight of the positive moral duty to save her child is strong enough that it outweighs the liberty to do wrong.<sup>33</sup>

Given Moore's premise that the criminal law exists to punish moral wrong, it is not immediately clear why considerations of liberty should enter to defeat criminal liability for violations of positive, but not negative moral duties. In both cases the law acts as a restriction on natural liberty. Moore explains this discrepancy between positive and negative duties, and why the law punishes acts but not (most) omissions, by claiming that negative duties have greater moral force than positive ones:

[W]e do want an act/omission distinction that has the potential at least to carry some moral freight. The moral freight relevant here is the moral difference between our negative obligations not to make the world worse and our positive obligations to make it better. Many sense, as I do, the very real difference in the force of the two kinds of obligations.<sup>34</sup>

On this basis, Moore contends that the reason the failure to rescue is not legally punished "lies in the differential force of our negative obligations not to make the world worse, on the one hand, and either our positive obligations, or our supererogatory ideals, to make it better, on the other."<sup>35</sup> He explains: "We do much more wrong when we kill than when we fail to save, even when such failure violates a positive duty to prevent death."<sup>36</sup> Moore responds to James Rachels's comparison between the uncle who lets his young nephew drown in a bathtub in order to inherit the nephew's fortune with the uncle who willfully drowns his nephew for the same reason<sup>37</sup> by arguing:

[T]he first uncle is much less deserving of punishment than is the second because the first did much less wrong. Wrongful as it is to let the child drown, it is much more wrongful to drown the child. Drowning it makes the world a worse place, whereas not preventing its drowning only fails to improve the world.<sup>38</sup>

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<sup>33</sup> See *id.*

<sup>34</sup> *Id.* at 25.

<sup>35</sup> *Id.* at 54.

<sup>36</sup> *Id.* at 58.

<sup>37</sup> See *id.* (citing James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78, 78-80 (1975)).

<sup>38</sup> *Id.* at 58-59.



One problem with this line of argument is the suggestion that the reason the law does not criminalize (most) omissions of positive duties is simply “the very real difference there is in the moral force of our negative versus our positive duties,”<sup>39</sup> which Moore rests on the distinction between making the world a worse place and failing to improve it.<sup>40</sup> But if we generalize this as a justification for not criminalizing omissions, it implies more than just the statement that “[W]rongful as it is to let the child drown, it is much more wrongful to drown the child.”<sup>41</sup> It also implies that “Wrongful as it is to let the child drown, it is much more wrongful to steal the child’s purse (or pacifier, or any other trinket).” This second proposition is surely false, and it is false because its premise—that all negative duties outweigh all positive duties—is false. Some infringements of others’ rights and privileges are trivial in comparison to the great moral wrong we do in completely ignoring others and treating them as if they (or we) did not exist.

To take Rachels’s example again, surely my failure to save my drowning nephew is morally worse than my breach of a legally binding contract with his mother to sing to his sister and tuck her into bed, or (to take a nonlegal example) my lying to my spouse about my whereabouts last night. Perhaps I make the world a worse place by breaching these obligations (suppose the child suffers from insomnia as a result of my failure, or my marital deceit undermines my marriage’s integrity), but this is nowhere near the magnitude of the wrong that I commit when I fail to save an innocent person at virtually no inconvenience to myself. It is simply a false moral principle that all acts that make the world a worse place outweigh in wrongness all refusals to improve the world. Many failures to improve the world enormously outweigh in moral heinousness many acts that make it worse. Indeed, to describe such heinous wrongs as mere “failures to improve the world” makes it seem as if one’s omission were somehow legitimate (in the same way as our not joining in some community project, or devoting our lives to famine relief, are legitimate because we have equally justifiable things to do). The uncle’s inactivity is not a simple failure to improve his

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<sup>39</sup> *Id.* at 58.

<sup>40</sup> Moore explains, “If, as I shall argue in Chapter 10, omissions do not *cause* anything, then when I omit to prevent some harm I do not make the world worse; I only fail to make it better. Only when I cause that harm to occur—through my actions—do I worsen the world.” *Id.* at 28-29.

<sup>41</sup> *Id.* at 58.

nephew's status or well-being; it is a willful failure to prevent the destruction of his well-being.

At most, Moore's arguments regarding the relative importance of positive versus negative duties prove that acts that violate negative duties are of greater moral significance than omissions that violate their positive counterparts. Thus, killing is worse than letting someone die, and stealing is worse than allowing another to steal from a third party. It does not follow that letting someone die is always worse than stealing. Moore's appeal to the relative importance of negative over positive duties does not then establish that omissions should be ignored by the criminal law, especially if they result in great injury or loss to others. At most he has shown that these omissions should be subject to lesser sanctions than violations of negative duties that bring about the same results. Failures to rescue resulting in death may not be murder or even always homicide; that would depend on the circumstances and one's mental state. Nonetheless in many cases they are wrongs serious enough to warrant some degree of criminal liability.

## II. THE DUTY TO AID THE DESTITUTE

The first step in any argument for a legal duty to rescue is to establish some basis for distinguishing among positive duties. In particular it must be able to differentiate between a duty to assist the desperate or distressed and a more general duty of beneficence, and finally between both of these duties and supererogatory actions (actions that go beyond what is required or necessary).

Moore argues that we have no general obligation "to prevent harm to others, and while it might be virtuous to do so on many occasions, morality itself permits us to be non-virtuous."<sup>42</sup> Moore's position is contestable. Not only do we have a duty of beneficence requiring that we prevent or remove harm to others on appropriate occasions, or, as the case may be, that we take measures to promote their welfare, but we also have even more exacting natural duties of mutual aid, distinct from the general duty of beneficence. The duties of mutual aid include both a duty to help the destitute on the one hand, and a separate duty to give emergency aid to the desperate and distressed on the other. There is a tradition within which these duties are conceived, not as beneficence or duties of charity, far less so as supererogatory actions, but rather as duties of

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<sup>42</sup> *Id.* at 55.

justice. To say they are duties of justice does not necessarily imply that they correspond to rights in the beneficiaries of these duties. But, as is explained in the next Section, it does imply that these duties are reasonable requirements on social cooperation which are nondiscretionary and which always apply under the appropriate circumstances. In this Section, the duty to aid the destitute is discussed, primarily to distinguish it from this Article's primary concern, the duty to give emergency aid to the distressed.

Consider the following statement by that supposed friend of libertarians and forebear of natural property, John Locke:

But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please: God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a *Right* to the Surplusage of his Goods; so that it cannot *justly* be denied him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of property in Land or Possessions; since 'twould always be a Sin in any Man of Estate, to let his Brother perish for want of affording him Relief out of his Plenty.<sup>43</sup>

Locke has in mind here something more than the doctrine of necessity. In the criminal law, necessity can (theoretically) be a defense to a charge of theft if the theft was necessary to save oneself from starvation.<sup>44</sup> But necessity does not imply a positive duty on the part of the propertied to save the destitute from starvation. Rather, it simply suspends normal property rules regarding the crime of theft. This seems to be what Hume had in mind when he argued that under conditions of emergency and extreme necessity, such as famine or shipwreck, the "strict laws of justice are suspended" with respect to property: "[E]very man may now provide for

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<sup>43</sup> LOCKE, *supra* note 16, at 170 (emphasis added). Somewhat incongruously to our minds, Locke goes on to say, in the same paragraph, that "*Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise." *Id.* For this reason and others, the natural duty to help the destitute does not correlate with a right in beneficiaries.

<sup>44</sup> See LAFAVE & SCOTT, *supra* note 6, § 50, at 382. The doctrine is rarely, if ever, applied in actual practice as a defense to larceny. Evidently one would have to be on the verge of death (too weak to steal in effect) to justify theft in the name of necessity. See *id.* at 384 (citing *State v. Moe* 24 P.2d 638 (Wash. 1933) (refusing to allow the defense of economic necessity for rioting and larceny); *Rex v. Holden*, 168 Eng. Rep. 607 (Cr. Cas. Res. 1809) (referring to the execution of "very distressed" persons for forging bank notes)).

himself by all the means, which prudence can dictate, or humanity permit."<sup>45</sup>

The reason I think Locke goes beyond Hume and the legal doctrine of necessity here, and posits a (moral) duty to come to the assistance of the destitute, is that his most basic political principle, his "*first and fundamental natural Law*," is "*the preservation of the Society*, and . . . of every person in it."<sup>46</sup> Consistent with this, Locke refers to that relief which "God requires [a man] to afford to the wants of his Brother."<sup>47</sup>

If this is correct, then we have John Locke—the purported originator of the laissez-faire doctrine of natural property—claiming that the rights of property do not extend so far as to entitle their possessor to allow the destitute to perish. One has not just a duty to save the destitute, it is, Locke says, their "right." Why did so much of modern moral and legal theory lose this sense of moral urgency about the status of the destitute? I suspect the reason is to be found in the demands of capital and the economic inefficiency of preserving and maintaining the destitute, leading Hume's successors, Malthus, Bentham, and the classical utilitarians, to argue against the relief of the poor.<sup>48</sup> Contrast the attitude that supports

<sup>45</sup> DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 186 (L.A. Selby-Bigge ed., 2d ed. 1975) (1777).

<sup>46</sup> LOCKE, *supra* note 16, at 355-56. As Locke explains, "Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind." *Id.* at 271.

<sup>47</sup> *Id.* at 170; see also JAMES TULLY, A DISCOURSE ON PROPERTY 131-32, 137 (1980) (discussing the natural duty of relief to the distressed in Locke).

<sup>48</sup> See ROBERT E. GOODIN, REASONS FOR WELFARE 229-30, 332-59 (1988) (discussing the classical economists' views of the deleterious effects of welfare on efficiency and the labor supply, and on self-reliance). Goodin quotes Reverend Joseph Townsend, who, as early as 1787, warned that "to promote industry and economy it is necessary that the relief given to the poor be limited and precarious." *Id.* at 229; see also MARK BLAUG, *The Myth of the Old Poor Law and the Making of the New*, 23 J. ECON. HIST. 151-56, 173 (1963). Blaug discusses the classical economists' influence in enacting the "harsh but salutary" Poor Law Amendment Act of 1834," which denied relief to the able-bodied except under conditions of extreme necessity. *Id.* at 151. Charles Murray has revived the classical economists' attack on the Poor Laws in his influential book. See CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 (1984). Murray says: "Premise 1: People respond to incentives and disincentives. Sticks and carrots work. Premise 2: People are not inherently hard working or moral. In the absence of countervailing influences, people will avoid work and be amoral." *Id.* at 146. Characteristic of the New Right and the classical economists which they follow, the policy that Murray suggests implies sticks for the poor, carrots for those better off.

Locke's further claim:

[A] Man can no more justly make use of another's necessity, to force him to become his Vassal, by with-holding that Relief, God requires him to afford to the wants of his Brother, than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his throat offer him Death or Slavery.<sup>49</sup>

The classical economists' doctrine of laissez-faire not only sanctions, but requires that we "make use of another's necessity" if resources are to be put to their most effective uses and we are to maximize wealth. Given that way of thinking, any duty to assist the destitute must go by the wayside.

This Article argues that any moral theory that omits the duty of mutual aid, or either of its components, is fundamentally flawed. Moreover, any legal system that does not in some way enforce these moral duties is also flawed. Moral duties of mutual aid are matters of minimal decency, required as a matter of mutual respect for the humanity of others. As such, there is a sense in which the duties to help the destitute and the distressed are duties of justice.<sup>50</sup> This is not to say that it is a matter for retributive justice and the criminal law to enforce the duty to aid the destitute. There are very good reasons for not holding Macaulay's physician criminally liable for failing to save the starving beggars of India.<sup>51</sup> Anyone in his situation would be overwhelmed by such a duty, and everyone, no matter what means they took, would be in violation of it. The duty to help the destitute is not a duty of self-sacrifice. There is in fact little that we as individuals can do to help the destitute (except in emergencies, and then the relevant duty is the duty to aid the distressed). The problem of destitution is largely one of background justice, of the inability of prevailing economic and property schemes to provide adequately for the basic needs of all individuals. As a problem of background justice, alleviating destitution requires large scale coordination of everyone's activities to make possible the

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<sup>49</sup> LOCKE, *supra* note 16, at 170; *see also* TULLY, *supra* note 47, at 131-32, 137, 157-76 (arguing that these passages are incompatible with laissez-faire capitalism, and that, for Locke, one role of government is to provide for the basic necessities of each person).

<sup>50</sup> For a discussion of the natural duty of justice, see RAWLS, *supra* note 16, at 333-42. Rawls argues that natural duty and obligation "are an essential part of a conception of right: they define our institutional ties and how we become bound to one another." *Id.* at 333.

<sup>51</sup> *See* MACAULAY, *supra* note 18, at 496.

institutionalization of cooperative public assistance schemes that call upon everyone to contribute their fair share to mitigate the problem. Our natural duty to help the destitute is then for the most part satisfiable only politically; it is not adequately dealt with by individuals or by voluntary charitable associations. This duty then merges with the duty of justice, to put into place and support political institutions that correct for the effects and limitations of private transactions so that the basic needs of all individuals may be provided for. This is Kant's point when he says:

The general Will of the people has united itself into a society in order to maintain itself continually, and for this purpose it has subjected itself to the internal authority of the state in order to support those members of the society who are not able to support themselves. Therefore, it follows from the nature of the state that the government is authorized to require the wealthy to provide the means of sustenance to those who are unable to provide the most necessary needs of nature for themselves. . . . [T]hey have bound themselves to contribute to the support of their fellow citizens, and this is the ground for the state's right to require them to do so. . . .

As for children abandoned because of poverty . . . , the state has the right to charge the people with the duty of not letting them perish knowingly . . . .<sup>52</sup>

Kant, like Locke, is within the natural rights theory of the social contract tradition. But he transforms Locke's duty to help the destitute into an institutional requirement that authorizes governments to put into place public assistance programs and charge citizens with the perfect duty to support them. Kant is not original here. Hobbes, in his prudential social contract doctrine, saw public assistance as a legitimate and necessary government function:

And whereas many men, by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Laws of the Commonwealth. For as it is Uncharitableness in any man, to neglect the impotent; so it is in the Sovereign of a Commonwealth, to expose them to the hazard of such uncertain Charity.<sup>53</sup>

The natural duty to help the destitute merges with the duty of justice and implies a positive moral duty to support just schemes

<sup>52</sup> KANT, *METAPHYSICAL ELEMENTS*, *supra* note 16, at 93-94.

<sup>53</sup> THOMAS HOBBS, *LEVIATHAN* 239 (Richard Tuck ed., 1991) (1651).

that provide for a decent minimum income to meet each person's basic needs, as well as a duty to seek to bring such institutions into existence when they do not exist. For reasons I have alluded to above, neither of these duties are matters for criminal enforcement. What is a matter for criminal enforcement is the requirement that individuals contribute their fair share to the support of public assistance schemes by paying the necessary taxes. Failure to pay one's taxes to support the requirements of a just constitution is among the omissions that are rightly punishable by the criminal law in a just legal system. It is an omission that outweighs the wrong of many other criminal actions.

The duty to help the destitute is then only indirectly enforceable by the criminal law. It requires governmental action to put the requisite institutions in place that enable us to satisfy this duty fairly and effectively. It is also different from the duty to aid the distressed, which, I will argue, is criminally enforceable in a way the duty to assist the destitute is not. Unlike the duty to help the destitute, this duty concerns the kind of emergency assistance that can only be provided by individuals, not by long-term societal provisions for the destitute. Although it is the role of government to provide such public goods as emergency rescue, fire, ambulance, medical assistance, and other protections, individuals, even if they are able to do nothing else, should at least be required to alert these assisting institutions once they are in place. I shall argue that it is in this situation that the criminal law has a role in enforcing the natural duty to aid the distressed.

### III. KANT ON PERFECT AND IMPERFECT DUTIES

Before we can make sense of a legal duty to rescue, we must first define the moral duty to aid the distressed on which it is based. One standard objection to the criminalization of omissions is that we cannot clearly define the duty to rescue in a reasonable and enforceable way.<sup>54</sup> Even if it is conceded that we have a duty to prevent harm to others, where within this general duty are we to draw the line for purposes of the criminal law? If the callous bystander can be held liable for failing to rescue an infant from a wading pool, why isn't Macaulay's physician liable for failure to

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<sup>54</sup> See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 198, 203 (1973).

make a trip to perform an operation only he can perform?<sup>55</sup> And why should we not hold him equally liable for failure to save the ten starving beggars who sleep on his street? If any omissions are to be criminalized, the duty to undertake action must be clearly defined.

The immediate task is to distinguish a moral duty to help the distressed from a more general duty of beneficence, to prevent or remove harm, and to promote the well-being of others. To make these distinctions, we first need a more refined typology than the positive duty/negative duty distinction. Such a typology would permit us to make better sense of a legally enforceable duty to come to the emergency assistance of the distressed. Kant recognizes the positive/negative duty distinction, or, as he often puts it, the distinction between "duties of commission" and "duties of omission."<sup>56</sup> In addition, he draws further distinctions between types of duties: perfect and imperfect duties, juridical duties and ethical duties, and duties of justice as opposed to duties of virtue.<sup>57</sup>

To take these up in reverse order, duties of justice are moral duties which the state can, by right, enforce by the use of criminal or civil sanctions.<sup>58</sup> According to Kant, the state can, by right, enforce moral duties only if they comport with his Universal Principle of Justice, which states: "Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to universal law."<sup>59</sup> For now, we will set aside the meaning of this obscure principle. But for reasons discussed later,<sup>60</sup> it does not mean that the role of government is to maximize liberty by minimizing the kinds of legal constraints on peoples' conduct. Kant is not a libertarian. For as we have already seen, among the positive duties of justice Kant recognizes is a duty to contribute to political institutions to assist the destitute.<sup>61</sup> As argued in Part V, Kant's principle of justice is best read in light of his contractarianism: it assigns to some liberties greater value than others because of their role in procuring individuals' basic needs and independence.

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<sup>55</sup> See *supra* note 18 and accompanying text.

<sup>56</sup> IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE 79 (James Ellington trans., 1964) (1797) [hereinafter KANT, METAPHYSICAL PRINCIPLES].

<sup>57</sup> See KANT, METAPHYSICAL ELEMENTS, *supra* note 16, at 18-21, 45-48.

<sup>58</sup> See *id.* at 36-37.

<sup>59</sup> *Id.* at 35.

<sup>60</sup> See *infra* part IV.

<sup>61</sup> See *supra* note 52 and accompanying text.



Duties of justice can be either positive or negative, but all are both juridical and perfect duties. Juridical duties involve rules that are enforceable by the use of legal or other kinds of sanctions.<sup>62</sup> They involve duties to perform or refrain from performing certain actions. They apply to us without regard to our desires or ends. They impose constraints on what we are permitted to do to promote our interests (including our interests in others). Ethical duties differ from juridical duties in that they require that we act from certain motives.<sup>63</sup> They involve not (or not just) specified constraints on action, but the adoption of certain obligatory ends (such as the happiness of others or our own self-perfection—Kant's two primary cases).<sup>64</sup> It is because ethical duties require that we adopt ends and act from certain motives that they are not apt for legal enforcement.<sup>65</sup> By contrast, juridical duties require acts or omissions irrespective of our motives, and so can be legally enforced by sanction.<sup>66</sup> One can consistently act for reasons of self-interest, and yet still satisfy juridical duties, simply to avoid punishment.<sup>67</sup>

Kant's distinction between perfect and imperfect duties originates in Grotius<sup>68</sup> and Pufendorf,<sup>69</sup> but, as with most ideas he inherited, Kant refined it to a degree of sophistication not found in its originators.<sup>70</sup> Perfect duties, for Kant, are duties where a

<sup>62</sup> See KANT, METAPHYSICAL ELEMENTS, *supra* note 16, at 19.

<sup>63</sup> See *id.* (Kant uses the word "incentives" rather than "motives").

<sup>64</sup> See KANT, METAPHYSICAL PRINCIPLES, *supra* note 56, at 43-46, 50-52.

<sup>65</sup> See *id.* at 69-70.

<sup>66</sup> See KANT, METAPHYSICAL ELEMENTS, *supra* note 16, at 19.

<sup>67</sup> Still, not all juridical duties are duties of justice for Kant: they are not all by right legally enforceable. Duties to oneself, such as the duties not to commit suicide, to engage in self-abuse, or to impair one's capacities by drunkenness, are, for Kant, "perfect" juridical duties of virtue. See KANT, METAPHYSICAL PRINCIPLES, *supra* note 56, at 82-90.

<sup>68</sup> See GROTIUS, ON THE RIGHTS OF WAR AND PEACE 76 (William Whewell trans., Cambridge University Press 1853) (1625).

<sup>69</sup> See SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM (1688), *reprinted in* 17 CLASSICS OF INTERNATIONAL LAW pt. 2, at 231-63 (C.H. Oldfather & W.A. Oldfather trans., James B. Scott ed., 1934) (discussing the duties of man towards himself).

<sup>70</sup> See KANT, METAPHYSICAL ELEMENTS, *supra* note 16, at 46-48. On Kant's relation to Grotius, Pufendorf, and the natural law tradition, see generally Jerome B. Schneewind, *Kant and Natural Law Ethics*, 104 ETHICS 53 (1993). See also Jerome B. Schneewind, *Pufendorf's Place in the History of Ethics*, 72 SYNTHESSE 123 (1987). For my account of Kant's distinction, I rely on John Rawls's unpublished lectures on Kant given at Harvard during the Spring of 1980, and on John Rawls, *Themes in Kant's Moral Philosophy*, in KANT'S TRANSCENDENTAL DEDUCTIONS 81 (Eckhart Forster ed., 1989). For informative discussions on Kant's typology, see generally ONORA NELL, ACTING ON PRINCIPLE 43-58 (1975), and Thomas Hill, *Kant on Imperfect Duty and Supererogation*, in DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 147

certain definite and specific kind of action (of omission or commission) is required. Imperfect duties require no specific kind of act; instead they require that we adopt certain policies to realize the obligatory ends imposed on us by ethical duties. In the free choice and pursuit of our ends, we all are to follow plans of action that give obligatory ends some appropriate weight and which are rationally framed to promote them. In addition to requiring a specific kind of action, Kant also seems to hold that perfect duties are definite ("strict") with respect to their object or beneficiary and to the circumstances under which they apply.<sup>71</sup> Because perfect duties are nondiscretionary, they apply whenever we are confronted with these circumstances.<sup>72</sup> Imperfect duties, by contrast, are not definite in some or all these respects. Being "imperfect" with respect to one or more of the features that define perfect duties gives us discretionary latitude in the choice of object, occasion, and course of action.<sup>73</sup> Moreover, we are not always under a duty to promote the ends imperfect duties require.<sup>74</sup>

All juridical duties are perfect duties in Kant's view. Hence, all juridical duties require specific kinds of actions, without regard to one's ends. This is what makes them judicially enforceable. There are some perfect (juridical) duties which the state has no authority to compel under Kant's principle of justice. For example, we have perfect duties to ourselves not to engage in self-deception<sup>75</sup> or to commit suicide.<sup>76</sup> All duties to oneself are duties of virtue, including these duties of omission.

All imperfect duties, along with some perfect duties, are ethical duties of virtue in that they require that we cultivate a motive to act from an obligatory end. We have imperfect duties of beneficence,

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(1992).

<sup>71</sup> See KANT, METAPHYSICAL PRINCIPLES, *supra* note 56, at 48, 71.

<sup>72</sup> See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 89 (H.J. Paton trans., 3d ed. 1956) (1797) [hereinafter KANT, GROUNDWORK] ("[A] perfect duty . . . allows no exception in the interests of inclination . . ."). We are under perfect (juridical) duties of omission never to kill, maim, assault, steal, or to engage in fraud and deceit, etc., or to commit suicide, self-mutilation or self-abuse, or to allow others to abuse us by violating our humanity (for example, agreeing to voluntary slavery, serfdom, or perpetual servitude), see KANT, METAPHYSICAL ELEMENTS, *supra* note 16, at 98, and we have perfect duties of commission to keep our promises, and to provide for and educate our children. See *id.* at 99.

<sup>73</sup> See KANT, METAPHYSICAL PRINCIPLES, *supra* note 56, at 48, 71, 109-10.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 90-92.

<sup>76</sup> See *id.* at 82.

to benefit others according to our capacities,<sup>77</sup> as well as imperfect duties to ourselves to develop our capacities and talents.<sup>78</sup> The first of these duties require that we adopt the happiness of others as an end; the second requires an end of our own self-perfection. Both of these imperfect duties also require that we develop dispositions to act in appropriate ways to promote these ends. The duty to act from these dispositions and for these ends only sometimes applies.<sup>79</sup> It cannot be said that simply because I am not at any particular moment either promoting others' happiness or my own perfection that I am violating one or the other of these duties. It may be that I am acting on some other (perfect) duty (to keep a promise, aiding the destitute, etc.), or it may also be that I am freely pursuing permissible ends that fall under neither of these imperfect duties (for example, I may just be relaxing and watching baseball on TV).

With Kant's typology in place, we can distinguish at least three different kinds of duties that are important for our purposes: (1) perfect juridical duties of omission (the duties not to kill, injure, or cause undue suffering; the duty not to lie or deceive; the duty not to steal or injure others' property, etc.); (2) perfect juridical duties of commission (such as the duties to keep one's promises and commitments, to provide for the security and basic needs of one's children, and to relieve the emergency of the distressed so long as we can do so at negligible risk and little inconvenience to ourselves); and (3) imperfect ethical duties of commission (such as the duty of beneficence (to promote the well-being of others), the duty of self-perfection (to cultivate and exercise our higher capacities and talents),<sup>80</sup> and the duty of justice (to support and maintain just institutions when they exist, and to assist in their establishment when they do not).

While most legal duties are perfect duties of omission, many others are perfect duties of commission. For example, we have a legal duty to provide for our children, to care for our spouse and parents in various respects, to keep those promises that rise to the level of contractual requirements, and to fulfill civic duties such as

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<sup>77</sup> See *id.* at 60, 116-19.

<sup>78</sup> See *id.* at 108-11.

<sup>79</sup> See *id.* at 109-10.

<sup>80</sup> See PAUL GUYER, KANT AND THE EXPERIENCE OF FREEDOM 320-23 (1993) (considering the various kinds of perfect and imperfect duties toward oneself that Kant recognizes).

jury service, military service, or maintaining our private property to conform to local ordinances. Moreover, from the previous Section, we know that Kant recognizes a juridical duty of justice, to pay taxes to support the destitute, as well as to support the other legitimate functions of the state.<sup>81</sup> One duty Kant does not anywhere seem to mention as a juridical duty of justice is what I have called the perfect duty to aid the distressed. Indeed he does not clearly distinguish this duty of mutual aid from the general imperfect duty of beneficence and discuss this as a separate perfect duty at all. Still, I do not think that Kant's view would prevent legal liability for failure to act on this perfect duty. That, I believe, is indicated by his recognition of the institutionalization and legal enforcement of the duty to aid the destitute.<sup>82</sup>

Now, before proceeding, we should pause to consider that, to some, Kant's refined typology may appear unmotivated. Indeed, from a utilitarian perspective, these distinctions are arbitrary. For utilitarians, there is nothing "imperfect" about the duty of beneficence in Kant's sense, for the principle of utility puts us under an interminable duty to act so as to maximize social happiness as best we can. There may be some utility value in distinguishing between positive and negative, or perfect and imperfect duties for legal or educational purposes, but in the end all our duties are subordinate to the absolute claims of overall utility, which we are always under a general duty to maximize. This follows from the teleological conception of morality utilitarians adopt, that all that matters in morality is the goodness of the states of affairs that are affected by human choices.<sup>83</sup> If the goodness of states of affairs are all that matter in moral assessment of action, then it is morally insignificant whether one causes a state of affairs by her actions, or simply allows it to come about by her inactivity. But suppose we think about morality and justice differently, say in contractualist terms, as providing reasonable constraints on people's actions as they freely pursue their individual and shared ends, which constraints all can freely accept as equals.<sup>84</sup> Then the need for a more refined typology of duty like Kant's becomes apparent. Kant himself goes beyond contractualist morality, conceiving of it in terms of

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<sup>81</sup> See *supra* part II.

<sup>82</sup> See *supra* note 52 and accompanying text.

<sup>83</sup> See RAWLS, *supra* note 16, at 22-27.

<sup>84</sup> See, e.g., T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 103, 110-28 (Amaryta Sen & Bernard Williams eds., 1982).

providing the optimal conditions for realizing the powers of practical reasoning that underlie human agency. These powers include our rational powers to critically reflect on our ends, decide our plan of life, and schedule our activities accordingly; and our moral powers to understand and abide by requirements of morality and justice, and to justify our activities to others in these terms. Kant's liberal concern for freedom and ethical autonomy explains the role of the typology of duty within his view. But one does not have to accept the Kantian view of morality to recognize the need for a typology of the sort he offers. Any account of morality that places independent value on individuals' freedom to decide their activities and shape their lives, or on special commitments to particular persons or causes, is going to need similar distinctions among a range of duties.

With Kant's typology in place, let's return to Moore's claim regarding the absence of a duty "in general" to prevent harm to others.<sup>85</sup> Referring again to Macaulay's example, of the physician who allegedly does not have a duty to save,<sup>86</sup> we can say that in general Moore and Macaulay are right if their point is simply that one cannot always be under a duty, moral or legal, to act to prevent or remove harm to others even when it would be at no risk to one's self. This policy would be supererogatory, even according to Kant's view. Granted, a classical utilitarian might venture the view that our duty of beneficence is exclusive, constant, and everpresent. We have seen that the classic utilitarian view is not the only alternative to the claim that there is no duty to act whatsoever.<sup>87</sup> A third alternative exists in which there sometimes is a duty to prevent or remove harm to a stranger, or to promote her welfare, even if it is inconvenient.

It is not clear from Macaulay's facts on their face whether the physician has violated this duty. To determine the answer we have to look at more than his omission and its immediate circumstances; we also have to look to his present plans and his past history. Suppose that Macaulay's physician has practiced for many years and has never gone out of his way to help an indigent person or anyone who was not his contracted patient. Moreover, he does not plan to change his behavior in the future. (Assume that he is purely self-

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<sup>85</sup> See MOORE, *supra* note 1, at 55.

<sup>86</sup> See *supra* note 18 and accompanying text.

<sup>87</sup> See *supra* notes 46-49 and accompanying text.

interested or that he is a libertarian who does not believe in a duty of beneficence). Assume as well that this physician is about give up the practice of medicine entirely, retire to Scotland, and devote the remainder of his years to golfing at St. Andrews. In this case, Macaulay's doctor might well have violated an imperfect ethical duty of beneficence in refusing to travel ten hours to Meerut to save the person that only he can save. According to the nonutilitarian conception of the duty offered above, the doctor has a duty to adopt the good of others as an end and to cultivate a disposition of beneficence within himself so that he can occasionally fulfill this obligatory end. His failure to adopt this end, to develop this disposition, and to act from this disposition on this particular occasion (by not removing the harm to a stranger despite the inconvenience to himself) imply that he has violated at least the duty of beneficence.

I am not arguing, however, that such a duty should be legally enforced; nor would Kant. For Kant, the imperfect duty of beneficence is unenforceable, since the motive and end that would need to be adopted are not matters for legal regulation.<sup>88</sup> Under Kant's Principle of Justice, the state has no authority to compel the conscience, or to force the adoption of ends. The state only has the authority to compel external action by way of enforcing perfectly defined omissions or commissions.<sup>89</sup> It is for the sake of promoting individuals' freedom and autonomy that Kant sees the duty of beneficence as an imperfect duty. Kant's concern is to make it a matter of an individual's discretion to choose when to fulfill this duty and whom one should benefit as a result.<sup>90</sup> But discretion in the scheduling of beneficent activities to fit into one's freely adopted plans does not mean this duty itself is a matter of discretionary choice. Discretion in scheduling beneficent acts is not to be confused with having the discretion to wholly omit acting on the duty of beneficence. Nor does it mean that preventing harm or benefitting others is supererogatory. Undertaking uncommon risks for the common good or the benefit of a stranger is clearly supererogatory. Often though, removing harm to another at no risk to oneself is not supererogatory, but is simply a matter of fulfilling one's natural duty.

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<sup>88</sup> See KANT, METAPHYSICAL PRINCIPLES, *supra* note 56, at 38.

<sup>89</sup> See KANT, METAPHYSICAL ELEMENTS, *supra* note 16, at 34-35.

<sup>90</sup> See KANT, METAPHYSICAL PRINCIPLES, *supra* note 56, at 48.

Supererogatory acts are acts of benevolence (giving gifts, favors, etc.), mercy, heroism, or self-sacrifice. They are sometimes acts that would be morally required under the imperfect duty of beneficence or the perfect duty to help the distressed, were it not for the risk or potential loss to the agent.<sup>91</sup> Just as all negative duties do not have priority over all positive duties, and all perfect duties do not have priority over all imperfect duties, so too all duties do not outweigh in moral import all supererogatory acts. This does not mean that one can be under a duty to act supererogatorily. I mean rather that sometimes one can be morally excused from failure to execute some clear duty, if one's reasons for omission were some supererogatory action of great importance. For example, purchasing Christmas presents for poor children with my mortgage money may not (morally) excuse my failure to repay my debt; purchasing the same presents with escrow money entrusted to me by a pensioned widow definitely does not. But flinging myself overboard to save a child in a choppy sea is sufficient justification for my failure to keep my commitment to meet with young seaborne philosophers to discuss their interests. Duties are not then always morally prior to supererogatory actions.

Contrast three very different examples: warning a blind person nearby that he is about to step off a precipice; awakening neighbors by phone to notify them their house is on fire; or rescuing a drowning infant from a wading pool. In each of these cases, action comes at no risk or inconvenience to oneself (assuming that one is a normal and reasonable person). Moreover, the specific act one is to perform is definite with respect to what one must do, when it must be done, and who is to benefit from the action. Here we no longer have cases of discretionary action. Not only is action in these cases not supererogatory, but these actions also do not even come under the imperfect duty of beneficence. One does not require an obligatory end or benevolent motive in order to figure out what to do and act accordingly. These actions are morally required of anyone in the position to lend assistance. In cases like these where appropriate actions are immediately apparent and well-defined, there is a perfect duty to help others in distress.

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<sup>91</sup> See RAWLS, *supra* note 16, at 117.

## IV. THE NATURAL DUTY TO AID THE DISTRESSED

We have a duty to give emergency assistance to the distressed—those who are about to suffer or who are suffering some great physical or mental injury or loss—when: (a) we have the clear opportunity and are in a privileged position to give aid; (b) we have knowledge of their jeopardy and knowledge of the means necessary to relieve it; (c) we have the ability to directly relieve their distress by immediate and well-circumscribed action; and (d) we can do so at negligible risk, minimal costs, and at little inconvenience to ourselves. Because of these features, the duty to relieve the distressed is a perfect moral duty of commission; it is a nondiscretionary duty to undertake appropriate actions of assistance, and it applies to us whenever we are confronted with the requisite circumstances.

The natural objection to imposing such a duty to relieve the distressed is that it interferes with our discretionary plans and activities, frustrates our expectations, and consequently limits our freedom. But this perfect duty of commission often places far less restriction on our freedom than do many negative duties enforced by the law. For example, property laws prohibiting trespass restrict freedom of movement and can cause great inconvenience to a hiker lost in a snowstorm if the hiker is prohibited from the one path that she knows leads to civilization. The hiker's freedom is limited far more by the property rights of the estate owner than the estate owner's freedom would be limited by a positive duty to assist by allowing the hiker to pass over his land. Positive duties do not then always limit freedom more than negative duties.

Now it may be true that, as a class, positive duties generally circumscribe options (as distinguished from institutional liberties) more than negative duties since they require that one undertake a specific kind of action, whereas negative duties prohibit particular kinds of actions, and otherwise leave one's options open.<sup>92</sup> But this generalization does not hold in many cases when specific duties applied to specific circumstances are compared. The negative duty to respect others' property imposes far greater constraints on the options of the starving homeless person than the positive duties to assist the distressed and the destitute impose on the options of the comfortable property owner in a position to save her. The

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<sup>92</sup> I am indebted to George Fletcher for raising this issue during discussion at the Act & Crime Symposium at the University of Pennsylvania.



distressed and the destitute, whatever their institutional liberties may be, have no feasible options because of their desperate situation. Their basic needs are in jeopardy and it is often negative legal duties to respect others' property that immediately limit their options. The solution to their situation is not to excuse them from negative duties to respect others' property—though a defense of necessity might be appropriate if they breached those duties. Rather, the solution is the social recognition of duties and institutions designed to alleviate their desperate situation.<sup>93</sup>

This means that it is a mistake to hold that greater liberty or more options and opportunities are provided by minimizing moral and legal duties so as to include only negative duties. A society which imposes purely negative duties places far greater restrictions on individuals' freedom and options than a society in which certain positive duties are also recognized and legally enforced. We can imagine a purely libertarian state in which power and property are concentrated in the privileged that imposes only negative duties protecting persons, property, and contracts, but which places enormous restrictions on both the freedom and available options of the masses. Due to their destitution, and because they do not willingly accept the laws of a libertarian scheme, the majority of people frequently are led to breach these laws, and are met with increasing surveillance and repressive police action. It is mistaken to say that, in this or any other libertarian realm, individual liberty is "maximized,"<sup>94</sup> or that "people interfere with other's liberty as little as possible."<sup>95</sup> What these statements must mean is simply that the kinds of duties individuals are subject to are restricted as much as possible to negative duties. But limiting the kinds of duties people are subject to does not correspond with minimizing the real number of actual restrictions, legal or moral, on their conduct. There is no clear correlation between being subject only to negative duties and the liberal value of liberty.

A different objection to the duty to relieve the distressed is that there is something unfair about being required to assist in case of emergencies when others who are lucky enough not to be at the scene have no duty to act. Some may say, "Why should I have to be

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<sup>93</sup> See *supra* notes 51-53 and accompanying text.

<sup>94</sup> JAN NARVESON, *THE LIBERTARIAN IDEA* 175 (1988) (stating that "the idea of libertarianism is to maximize individual freedom by accounting each person's person as that person's own property").

<sup>95</sup> *Id.* at 32.

the one to interrupt my trip on this rainy night and call an ambulance to the isolated scene of an accident?" The answer to this objection highlights a major contractarian justification for a duty to aid the distressed. Over a lifetime, we are no more likely to be interrupted in our normal plans by having to assist another in distress, than we are likely to meet with distress ourselves and to require the emergency aid of another. Since the good realized by a person from acts alleviating his distress far outweigh the effort and costs others expend by lending emergency assistance, it is reasonable for each person to choose and agree to a social scheme where this duty is recognized over one where it is not.<sup>96</sup> Indeed, there is something irrational about rejecting this duty, for by rejecting a duty of mutual emergency assistance as a reasonable constraint on actions, one chooses a social world where one denies oneself others' assistance at the very times one needs it the most.<sup>97</sup> If so, there is nothing unfair about having to assist another once this duty is generally recognized, for each person in society is as likely

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<sup>96</sup> During discussion at the Symposium, Professor Frances Myrna Kamm suggested that, given the disparity between projected costs and benefits to each person upon which the contractarian argument relies to justify a duty of emergency assistance, the same argument might also seem to justify a perfect nondiscretionary duty of mutual beneficence, one that would require us to lend assistance to others in distress even at some risk and greater inconvenience to ourselves. Kamm's reading suggests that Macaulay's physician might well be under a perfect duty to make the ten-hour trip to Meerut. Indeed one might even be under a perfect duty to risk one's life to save someone who is drowning. But to recognize a perfect, as opposed to an imperfect, duty of mutual beneficence would be much more intrusive on people's freely adopted plans. Indeed under some circumstances (such as those confronted by Macaulay's physician in India) it would require that one perpetually act to prevent or remove existing suffering and harms.

Given the far greater restrictions such a duty would place upon people's freedom to pursue their plans and schedule their activities, I believe the contractarian argument justifying a perfect duty of mutual emergency assistance could not be extended to justify a perfect duty of mutual beneficence. What could be justified on contractarian grounds—though I shall not make the argument here—is an imperfect duty of beneficence, a duty to sometimes lend assistance at some risk and inconvenience to oneself.

<sup>97</sup> The argument I rely upon here is an adaptation of the fourth example in chapter 2 of *Groundwork of the Metaphysic of Morals*, in which Kant argues that a more general imperfect duty of mutual aid to relieve others' hardships is required by the categorical imperative. See KANT, *GROUNDWORK*, *supra* note 72, at 90-91. For an informative discussion of Kant's argument, see BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 45-72 (1993). While Herman does not distinguish a separate perfect duty to the distressed, she argues that Kant's imperfect duty of mutual aid requires that we always give aid when others' "true needs" are in jeopardy, if it can be done at little or even "minor but real" inconvenience. *Id.* at 65-68.

to derive greater benefit from reciprocal recognition of this duty than the burden it imposes on her.<sup>98</sup>

The contractarian argument for the duty to aid the distressed relies upon the idea of reasonableness that is characteristic of the democratic social contract tradition.<sup>99</sup> It assumes that agents are influenced by moral motives. They are moved not just by rational nonmoral interests, but are predisposed to act reasonably and fairly, with a desire to publicly justify their activities to others.<sup>100</sup> Now it may be that the aforementioned argument also works within the terms of a Hobbesian prudentialist contract view.<sup>101</sup> The purely self-interested utility maximizer assumed by such a view also then might be convinced that it is in her best interest to mutually accept a duty to aid the distressed. Indeed, an argument for this duty likely can be reformulated in utilitarian terms by weighing projected aggregate costs and benefits. If so, this is an added benefit, for it shows that the duty to aid the distressed is supported by the major modern political conceptions of justice. Whether the democratic contract argument that follows is amenable to Hobbesian and utilitarian views is a different question.

This argument relies upon the extensive effect that general recognition of the perfect duty to aid the distressed has upon the moral quality of civic life.<sup>102</sup> Imagine a society in which this duty was not recognized—or was even explicitly rejected—and emergency assistance was seen as at best, benevolent or supererogatory, or at worst, omission of emergency assistance became a matter of moral indifference. There could be no general expectation that others would come to our assistance at some of the very moments when we are most vulnerable. We would then be able to have little confidence in strangers' good will, and no assurance that they are there

<sup>98</sup> Some may be led to infer from this discussion that I am relying upon utilitarian reasons to justify the duty to relieve the distressed. This would be a misreading. The focus of the argument is on the reciprocal good, the good of each person, and not the aggregate good of overall utility. Each person benefits from the duty of mutual emergency assistance. This may be conducive to aggregate utility; then again it may not be. Reciprocal benefit is not a condition of utilitarian justification.

<sup>99</sup> I assume the argument can be made behind the veil of ignorance of Rawls's original position, or from the more informed perspective suggested in T.M. Scanlon's contractualist view. See RAWLS, *supra* note 16, at 136; Scanlon, *supra* note 84, at 120.

<sup>100</sup> See RAWLS, *supra* note 16, at 139.

<sup>101</sup> For a major modern restatement of the Hobbesian contract perspective, see DAVID GAUTHIER, *MORALS BY AGREEMENT* 157-89 (1986).

<sup>102</sup> See RAWLS, *supra* note 16, at 339 (declaring that "[a] sufficient ground for adopting this duty is its pervasive effect on the quality of everyday life").

to offer help when we and others we care for are in dire need. Unlike the preceding argument, the issue here is not a question of whether we ever actually need others' help or would directly benefit from the duty of emergency assistance. The issue is one of the worth society assigns to human life, the degree of respect people have for each other, and the effect this has on one's sense of self-worth. Even for the most secure among us, there is an indirect benefit just in knowing that one lives in a society where everyone can trust everyone else's good intentions, and be confident that others are there when help is needed the most. The absence of such mutual assurance results in a gross impoverishment of social life, since it diminishes trust in and respect for others, and perhaps even one's confidence in one's own worth to others in society. Granted, it is possible for society to exist without recognition of a duty to assist the distressed, but it would be marked by a kind of mutual disregard, perhaps even mutual disdain. Such a society would be neither desirable, nor would it command the secure allegiance of its members. For the sake of securing one's sense of self-worth and the common good of mutual respect among the members of society, it is then rational to agree to a duty of mutual emergency assistance as a perfect duty.

I think that we do generally recognize a moral duty to aid the distressed under the circumstances enumerated. It may not be conscious or explicit, especially given the theoretical confusion of this perfect duty with the imperfect duty of beneficence. But the difference is marked by our moral responses to one who omits assistance in a clear case, as opposed to one, such as Macaulay's physician, who chooses not to act on the duty of beneficence on a particular occasion. In the latter case, we think the omission unfortunate; it may even be morally wrong, we have seen, if he has never exercised his skills except to benefit his paying patients. But assuming that he has, we are as likely to think his omission is excusable, and maybe even justified, once we learn the reasons for his failure to undertake beneficent action. But in a case with negligible inconvenience where one neglects to assist the distressed there is something morally outrageous involved: the person who fails to do anything to rescue the helpless drowning infant, or who intentionally omits to warn the blind man about to step off the precipice, has acted in an inexcusable manner. We think him warped, heinous, perhaps even evil. One's thought may be that the world would be better off without such a person and that it is tragic that it is not he, the wrongdoer, rather than the innocent person

who suffered and perished as a result of the wrongdoer's neglect. These natural responses illustrate the clear distinction between a perfect duty to aid the distressed and the more general imperfect duty of beneficence—to prevent or remove harm at some cost or risk to ourselves.

## V. A LEGAL DUTY TO AID THE DISTRESSED

It has thus far been argued that we have a natural moral duty to lend emergency assistance to those in distress when we can do so at no risk and minimal cost and inconvenience to ourselves. Now we must consider our main issue: Should the perfect moral duty to aid the distressed be legally enforced?

Not all perfect duties are, or should be, enforced by the criminal or civil law. The general duty of fidelity, including the duties to tell the truth, not to deceive, and to keep one's promises and commitments are all perfect duties. These more specific duties always apply except when they are outweighed by some more stringent duty. But no one would argue that all lies should be susceptible to legal sanction. Normally fraudulent lies and lies that cause great harm are subject to legal sanction, but there are all kinds of misrepresentations that are not legally recognized.<sup>103</sup> Similarly, while the civil enforcement of contracts is a condition of a stable and productive economy, promises made without consideration are normally not civilly or criminally enforced. Finally, if we accept, with Kant, the existence of perfect duties towards ourselves, to the "humanity" that is a part of our person, there are nonetheless good reasons for not legally prohibiting self-deception, or even suicide and attempted suicide.

Given that all perfect duties are not, and should not, be legally enforced, should there be legal enforcement, under the criminal law, of the perfect and positive duty to assist the distressed? Why is it not like the case of the ordinary lie, or the broken promise? The major difference between these wrongs and the wrong done by failure to assist the distressed is the great loss suffered or harm that results from one's failure to act on this positive duty. Most lies and broken promises do not involve jeopardy to life or limb; if they did, then it is likely that they would be criminally sanctioned. Failure to

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<sup>103</sup> For example, lying to one's spouse about careless financial dealings, or having walked the dog; or lying to acquaintances about the large fish one caught (or that got away).

aid the distressed, however, does involve life-threatening jeopardy and therefore, should be criminally sanctioned.

But here the argument that a legal duty to aid the distressed limits liberty is more forceful than in the case of the moral argument for that duty. The consequence of breaching a legal duty of emergency assistance is not just moral sanction, but also coercive legal sanction. Surely Michael Moore is right in subscribing to the principle that there must be a special reason to limit liberty by criminal sanction.<sup>104</sup> Yet, what might this special reason be?

One cannot simply say here, and Moore does not, that a legal duty to give emergency assistance to the distressed “unduly limits” people’s freedom simply because it imposes a positive duty to act.<sup>105</sup> “Unduly limits” in what way? This assertion can, at most, be the conclusion of an argument that has yet to be made. All criminal laws and most civil ones limit natural freedom. Primary among the laws that limit liberty are those specifying property rights and interests. Any property scheme (whether capitalist, socialist, or something in between) is, by its nature, a complicated system of rules specifying rights with correlative duties which place severe restrictions on peoples’ freedom. Yet we think there are sufficient reasons of justice that justify such limitations on natural freedom (assuming a property scheme is just). Hence freedom is not “unduly” or unreasonably limited in these cases.

We have already seen that being under a moral duty to aid the distressed involves only a minimal restriction of one’s freedom of action—that is built into the definition of the duty. As argued earlier, the restriction on liberty that would be effected by the legal enforcement of this moral duty is less than that of many criminally enforceable duties. Moreover, a legal duty to the distressed does not interrupt our activities and plans to a significant degree. Under normal conditions, the number of times in a lifetime that one would be called upon to act on this duty are few.<sup>106</sup> All these reasons should be familiar from the previous argument for the existence of a perfect moral duty to aid the distressed.

Michael Moore contends that the reason we do not criminally sanction a stranger’s failure to prevent serious harm to another at

<sup>104</sup> This principle, while not enunciated by Moore, is the consequence of his argument. See MOORE, *supra* note 1, at 57.

<sup>105</sup> *Cf. id.*

<sup>106</sup> The reader should think about his or her own life, and the times he or she has been in a position to act on this duty.

no risk and minimal effort “lies in the value we accord to persons’ liberty to make the wrong choice.”<sup>107</sup> Moore’s claim here is ambiguous. Surely there is no moral value in the “liberty to make the wrong choice,” if by that it is meant that there is independent and intrinsic value in having the freedom to violate a natural moral duty, negative or positive.

Indeed, if “intrinsic value” is understood to mean what is desirable for its own sake, it is hard to see what could be the intrinsic nonmoral value of such absolute liberty, since absolute liberty includes a liberty to do what is unjust, even evil. A liberal legal community does not assign intrinsic value to absolute, or natural, liberty as such, the unrestrained liberty to do just as one pleases. Instead it assigns value to particular liberties, depending upon their significance in enabling individuals to realize their capacities and basic needs, so that they can be suitably independent and pursue their ends compatibly with others. A particular liberty is valuable because it in some way is a condition of realizing some morally legitimate need or interest, preventing some evil, or promoting some permissible end.

On this account, some liberties (such as freedom of thought, speech, and inquiry, liberty of conscience), in addition to being of instrumental value to pursuing many permissible ends (religious faith, scientific inquiry, or entertainment, for example) may be intrinsically valuable as well. For exercising these liberties is just part of what it is to freely exercise one’s reasoning capacities, critically reflect on one’s good, or become a free, autonomous being.<sup>108</sup> Other liberties, such as equal political liberties (the freedom to vote, hold office, and present grievances, freedom of assembly, or freedom to join or form political parties), if they are not intrinsically good for the same reasons, are at least essential to realizing one’s legitimate interests. Without these liberties one

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<sup>107</sup> MOORE, *supra* note 1, at 57.

<sup>108</sup> See JOHN S. MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 16-17, 20-61 (1991) (Oxford 1859). Mill argues that freedom of thought, speech, discussion, and inquiry, in addition to being means to uncovering falsehoods and discovering knowledge of truth, are part of Individuality, which is the ideal that underpins his liberal view. He characterizes Individuality in chapter 3 as containing two virtues, “the Greek ideal of self-development” of one’s higher capacities, and “the Christian ideal of self-government” of one’s activities in accordance with justice. *Id.* at 69-71; see also JOHN RAWLS, *POLITICAL LIBERALISM* 289-371 (1993) (arguing that freedom of thought and liberty of conscience are integral to the development and exercise of the moral powers necessary for social cooperation: the capacity for a sense of justice, and the capacity to form, revise, and pursue a rational conception of the good).

would not be in a position to protect her interests from others' overreaching or unreasonable conduct in legislation.<sup>109</sup> Still other liberties (such as the freedom of association, freedom of occupation and of movement, freedom to own and dispose of possessions and enter contractual relations for a variety of purposes) are instrumental to pursuing the wide range of permissible ends and commitments recognized by a liberal society. Finally, there may even be some purely instrumental value in affording people the legal freedom to commit certain moral wrongs. This would be one explanation of why we do not punish all lies, breached promises, and perhaps even failures to aid the distressed. But surely there is nothing intrinsically valuable about the natural liberty to do wrong by violating perfect and imperfect duties. To assign intrinsic value to natural liberty as such would imply that legal restrictions per se diminish this intrinsic value and that there is ethical loss with the imposition of any legal restriction. But what could that loss be in the case of legal restrictions on clearly unjust or evil conduct?

The sense, then, in which Moore must mean that we accord "value . . . to [the] liberty to make the wrong choice,"<sup>110</sup> is not that absolute liberty is valuable as such, but that affording this liberty legal protection is instrumental to promoting some other good. Sometimes we must not punish morally wrong choices in order to protect certain of the specific liberties mentioned above that it is essential and important to retain. This explains why we do not legally punish Scrooge's adamant refusal to recognize or act on the imperfect duty of beneficence, since that duty, like all imperfect duties, requires that one adopt a specific end, cultivate a beneficent disposition, and exercise a certain kind of discretionary judgment in scheduling this duty into one's plans and deciding when it appropriately applies. Attempts to legally enforce these acts of judgment and will, even if they could succeed, would require a gross infringement of people's freedom to schedule their activities and pursue their legitimate plans and projects. The price of maintaining that important freedom for each person is likely a sizable number of despicable characters like Scrooge, but it is a price worth paying in view of the alternatives.

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<sup>109</sup> See RAWLS, *supra* note 16, at 227-30. Rawls also contends that equal political liberties and public recognition of one's status as an equal citizen are a condition of realizing the good of self-respect. See *id.* at 544-46.

<sup>110</sup> MOORE, *supra* note 1, at 57.



No such reasons apply in the case of the failure to act on the perfect duty to give emergency aid to the distressed. Acting on this duty does not require adopting a beneficent attitude towards others. The most self-interested of persons can be motivated to rescue a drowning infant in a wading pool at little cost to his freedom of action, so long as there are sufficient sanctions—positive or negative—in place to induce that conduct. Nor does emergency rescue require the exercise of discretionary judgment, or the scheduling of one's activities. The circumstances under which this duty applies are as clear-cut as many other legally enforceable duties. The dangers of government exercising its prosecutorial and coercive powers in ways that jeopardize or undermine legitimate freedoms are not present as they are in the case of attempted criminal enforcement of imperfect duties; the clearly defined contexts in which this perfect duty arises render the danger of government power and discretion impinging on legitimate freedoms no more grave than it is under many duties that are currently enforced. In sum, the usual reasons for granting a legal right to do wrong are inapplicable to the case of the perfect duty to aid the distressed.

If we accept a legal duty to rescue the distressed, however, what impact will that acceptance have on the liberal principle that "liberty shall be limited only for the sake of liberty?"<sup>111</sup> If this principle means that one person's freedom of action can be limited only for the sake of creating even greater freedom of action among others, then, taken just in that way, the liberal principle is surely false. For there are all sorts of necessary limitations on people's freedom of action that are designed to promote ends other than liberty.<sup>112</sup>

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<sup>111</sup> This principle is implicit in John Stuart Mill's *Principle of Liberty*: that a person's freedom can be limited by coercive political power only in order to "prevent harm to others." See MILL, *supra* note 108, at 68. Mill explains that "harm" means injury to "certain interests, which . . . ought to be considered as rights." *Id.* at 83. The phrase "liberty can be limited only for the sake of liberty," comes from John Rawls's *A Theory of Justice*. See RAWLS, *supra* note 16, at 244. As Rawls makes clear in both *A Theory of Justice* and *Political Liberalism*, this phrase is intended to apply only to certain basic liberties, and not to liberty as such. See RAWLS, *supra* note 16, at 244-50; RAWLS, *supra* note 108, at 291-92.

<sup>112</sup> For example, laws against trespass, theft, and destruction of others' goods protect property and economic interests, not natural liberty as such. Restrictions on obnoxious noise and public indecency protect people's sensibilities and piece of mind, not their liberty. Content restrictions on speech prohibiting libel and fraud protect people's reputations and their economic interests; restrictions on advertising protect consumers' interests; and restrictions on the uses of property are enacted to preserve public health, public convenience, and aesthetic considerations. Mandatory education

I think the only way to make sense of the liberal idea that one person's liberty can be restricted only for the sake of protecting others' liberty is to see it as a principle that applies only to certain basic liberties essential to maintaining our status as free, responsible agents and equal, independent beings.<sup>113</sup> These liberties are essential to the development and exercise of the capacities for various forms of social life, and for the free pursuit of rational interests and legitimate projects. These liberties can be restricted only under those circumstances where the competing liberties of others are of greater importance and weight. "Natural liberty," or an unrestricted "freedom of action" cannot, on anyone's account, be a basic liberty; it is too broad and insufficiently defined. As we have just seen, inchoate freedom of action is, indeed must be, restricted for all sorts of reasons other than protecting basic liberty if society is to be possible.

My sense is that however this list of basic liberties is drawn up in the end, it will not include a liberty to violate perfect moral duties. That liberty is just not of intrinsic or even instrumental importance for liberal citizens. Nor will a list of basic liberties require such a right for the effective protection of basic liberties. It may indeed be the case that there are good reasons for not legally enforcing many perfect duties (against common lies, for example, or suicide, if there be such a duty), but these reasons will not be because inchoate "liberty" itself is an intrinsic good worth protecting whatever the costs.

The legal duty to aid the distressed does not then violate any essential basic liberty. Since we have no moral right to violate what I have argued is a natural duty, I conjecture that a legal duty to aid the distressed does not even restrict a significant nonbasic liberty. A legal duty to aid does impose a minimal restriction on our

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requirements restrict parents' and children's liberty so that children may develop their capacities to become cooperative, flourishing, and productive members of society.

<sup>113</sup> For example, Mill holds that the principle of liberty is designed to protect certain specific liberties including freedom of conscience, thought, speech, inquiry, and discussion, freedom of tastes and pursuits, the freedom to plan one's life to suit one's character, and freedom of association. It does not protect the freedom to use one's property as one pleases, freedom of trade, etc. See MILL, *supra* note 108, at 16-17, 106-07. Rawls also defines his first principle of justice as a "principle of equal basic liberties," including liberty of conscience and freedom of thought; equal political liberties; freedom of association; the freedoms specified by the liberty and integrity of the person (including the right to hold personal property); and certain rights and liberties covered by the rule of law. RAWLS, *supra* note 108, at 291, 298.

conduct, and it may well temporarily impede many from going about their normal courses of business. Still, this restriction is imposed in order to prevent or remove a great evil that occurs to someone else. Given its minimal restrictions and inconvenience,<sup>114</sup> the fact that it avoids great harm to one person's basic needs at minimal costs to another, and the significant fact that each of us is about as likely to benefit from this duty as to be inconvenienced by it, the political argument for the legalization of a duty to aid the distressed is that it promotes a common good, namely the safety and security of all persons in society. Since each person is sufficiently likely to benefit from this legal duty at some crucial point in their lifetime, it is a collectively rational legal constraint. Moreover, since it enforces a preexisting moral duty, does not unduly interfere with anyone's liberty, and has pervasive effects on the moral quality of civic life by promoting mutual respect and a sense of self-worth, it is also collectively reasonable. A legal duty to aid the distressed should then be mutually acceptable to reasonable individuals and could be freely agreed to by them as a legal constraint on the free pursuit of their plans and activities.

Return now to a familiar problem. One argument against criminalizing omissions, particularly failures to aid the distressed, is the slippery slope. Richard Epstein contends that there is no principled way to define the limits of the duty to help the distressed in unanticipated emergencies that are at hand, so we should not start down the path of legally requiring aid even in clear-cut cases of easy rescue.<sup>115</sup> Slippery slope arguments, however, apply equally well to crimes of commission, or for that matter, to virtually any practical decision. For example, is one a trespasser if she hovers in a hang glider a foot above my land? Of course she is. How about at 10,000 feet? Surely not. How about 1000, 999, 998, . . . and so on? The law against trespass and criminal law in general has been effectively and fairly upheld despite these bothersome possibilities.

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<sup>114</sup> It is pure exaggeration to say, as some have, that we are likely to be interrupted from our normal and legitimate business at any time by a legal duty to rescue, since the occasions in a lifetime that one is likely to actually have to respond to this duty are quite rare under normal circumstances.

<sup>115</sup> As Epstein says: "Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty." Epstein, *supra* note 54, at 203.

Borderline cases are unavoidable in the application of virtually any legal rule or moral principle for all of the familiar reasons: vagueness, ambiguity of terms, disagreements over the weight of conflicting reasons, and complex or insufficient evidence. At some point, decisions just must be made between competing alternatives, even absent a clear balance of substantive reasons compelling a particular conclusion. Does this mean normative decisions are arbitrary? Not at all. Indeterminacy affects the margins, not the core applications of well-formulated rules and principles. What is important is that we locate the range of decisions that are indeterminate—after critical reflection it is often much smaller than is initially supposed—and then decide among them in a fair fashion that comports with due process and the usual procedural requirements of justice. This is one of the primary arguments for majority rule in legislative procedures: it is a fair principle of settlement of issues that are substantively indeterminate from the standpoint of justice.<sup>116</sup> It is also a good argument for a jury trial before one's peers, and the requirement that they settle on guilt beyond a reasonable doubt.

To address the familiar slippery slope argument, I have tried to give sufficient schematic content to the duty to aid the distressed to distinguish it from a more general duty of beneficence and supererogatory action. Most often, decisions whether or not this duty has been violated will be quite clear, and, as with any other area of law, clarity will increase given a history of past decisions. Of course, Epstein's and others' reticence regarding a legal duty to give emergency aid might depend on something else, namely, the moral concepts that must be applied if we are to make principled distinctions that inform us when the duty to assist the distressed applies. To apply this requirement in the borderline cases with which he is concerned, we will no doubt at some point have to rely on a hypothetical standard of reasonableness: what a reasonable person would judge to be an unreasonable risk, expense, or inconvenience that would discharge one from the legal duty to take action to assist the distressed.<sup>117</sup>

What does it mean to be a reasonable person? One can be rational in the sense that he acts to best promote his interests and

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<sup>116</sup> See RAWLS, *supra* note 16, at 361-62.

<sup>117</sup> See FEINBERG, *supra* note 24, at 153-54. Feinberg also suggests a reasonableness standard, although he develops it in a different manner than I propose. See *infra* note 119 and accompanying text.

yet still not be reasonable. A rational wealth-maximizing corporate executive may be quite unreasonable when he dissolves a profitable firm to sell off its assets for his friend's greater gain, seizes workers' unprotected pension funds, and puts them out of work. Reasonableness is not a category immediately available to economic efficiency analysis. Insofar as it is to be understood within that framework, it would have to be reduced to rationality, meaning, what it is ultimately rational for an individual utility-maximizer to do to minimize costs and maximize individual or social utility, perhaps defined in terms of individual or social wealth.<sup>118</sup> But neither the legal nor the moral concept of reasonableness can be derived from nor reduced to the concept of rationality as conceived in economics and the theory of rational choice. Instead, reasonableness is a basic moral category that presupposes and supplements the concept of rationality; it works as an independent moral constraint on rational choice and individual or social utility maximization. To be reasonable is to be, in part, fair-minded. Thus, it is to be responsive to the rational interests and plans of others, and attentive to the individual reasons they have for doing what they do. It involves a willingness to limit one's claims, and to constrain one's actions and the pursuit of one's nonmoral interests (as measured by, say, a utility function) according to rules that respect others' pursuit of their rational good. A reasonable person, as I have argued, recognizes and accepts duties of mutual aid on contractualist grounds; he is willing to restrict the wholesale pursuit of his interests for the sake of preventing harm to another. A straight utility- or wealth-maximizer is, by definition, unreasonable according to this criterion. There are no considerations she recognizes as

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<sup>118</sup> See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 130-33 (1990). Posner characterizes a "reasonable decision" in terms of reasoning from precedents, statutory language, and other conventional materials, and when these sources are indeterminate, a judge is to make a policy decision based on "a social vision," which Posner suggests may be wealth maximization. *Id.* at 132 (stating that wealth maximization is currently the "popular candidate" for "an overall concept of antitrust law," but acknowledges that "it is, needless to say, a contestable choice"). Predictably, Posner then defends the economic approach to law. See *id.* at 353-92. He argues that

[s]ince wealth maximization is not only a guide in fact to common law judging but also a genuine social value and the only one judges are in a good position to promote, it provides not only the key to an accurate description of what the judges are up to but also the right benchmark for criticism and reform.

*Id.* at 360-61. Here the concept of reasonableness is absorbed into an account of economic rationality and wealth maximization.

sufficient to constrain or deter her from the most expedient means required to maximize individual or social utility and realize her rational good.<sup>119</sup>

Courts and juries make judgments about the reasonableness of persons, conduct, and evidence all the time. There is no way to avoid standards and judgments of reasonableness in a just legal scheme. And there is nothing "unprincipled" about these judgments and standards. It is not unprincipled to instruct juries to establish guilt beyond a reasonable doubt. Nor is it unprincipled to ask jurors to decide whether the legal duty to rescue has been violated, by considering what the reasonable person would do under the circumstances, given her assessment of the risks, costs, and inconvenience involved. Fears that the legalization of a duty to give emergency aid to the distressed is unjust because it is "unprincipled" are overblown. This Article has attempted to give that duty sufficient content to support this conclusion.

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<sup>119</sup> See generally RAWLS, *supra* note 108, at 48-54; Samuel Freeman, *Contractualism, Moral Motivation, and Practical Reason*, 88 J. PHIL. 281 (1991) (discussing further the concept of reasonableness in these terms).