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The Case for a Duty to Rescue*

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No observer would have any difficulty outlining the current state of the law throughout the common-law world regarding the duty to rescue. Except when the person endangered and the potential rescuer are linked in a special relationship, there is no such duty.¹ This general rule rests on the law's distinction between the infliction of harm and the failure to prevent it. The distinction between misfeasance and nonfeasance in turn reflects deeply rooted intuitions about causation, and it has played a critical role in the development of the common-law notions of contract and tort and of the boundary between them. In large part because this distinction is so fundamental to the common law, the courts have uniformly refused to enunciate a general duty to rescue,² even in the face of repeated criticisms that the absence of such a duty is callous.³

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1. See W. PROSSER, *THE LAW OF TORTS* § 56, at 338-43 (4th ed. 1971) (special relationships include husband-wife, shipmaster-crew, proprietor-customer, carrier-passenger, educator-pupil, and employer-employee); Note, *The Duty to Rescue*, 47 *IND. L.J.* 321, 321 & n.3 (1972) (same).

For the law in non-common-law jurisdictions, see Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 *AM. J. COMP. L.* 630 (1966); Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW* 91 (J. Ratcliffe ed. 1966); Note, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 *UTAH L. REV.* 529.

Cases from Canadian and British jurisdictions serve as the principal illustrations in this article, but the relevant American case law is noted throughout.

2. See, e.g., *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897); *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, 1029-30 (H.L.) (Lord Reid).

3. For several of the criticisms of the common-law rule, see note 17 *infra* (citing sources).

Nonetheless, recent developments, both judicial and academic, justify a reconsideration of the common-law position.

On the judicial side, many of the outposts of the doctrine that there is no general duty to rescue have fallen. Recognizing the meritoriousness of rescue and the desirability of encouraging it, the courts have increasingly accorded favorable treatment to injured rescuers. When a rescuer sues for compensation for his injuries, voluntary assumption of risk cannot be interposed as a defense,⁴ contributory negligence comes into play only if the plaintiff has been reckless,⁵ and a broad range of rescue attempts are deemed reasonably foreseeable by the defendant.⁶ Moreover, the courts have increased the number of special relationships that require one person to aid another in peril.⁷ These developments have made the general absence of a duty to rescue seem more eccentric and isolated.⁸ They have also raised the possibility that the general rule is in the process of being consumed and supplanted by the widening ambit of the exceptions⁹ and that the relationship between the general rule and the exceptions may be fundamentally incoherent.

4. See *Haynes v. Harwood*, [1935] 1 K.B. 146 (C.A.); cf. *Perpich v. Leetonia Mining Co.*, 118 Minn. 508, 512, 137 N.W. 12, 14 (1912) (rescuer may recover from imperiled person for injuries sustained in rescue attempt, unless rescuer acted with extreme recklessness); *Echert v. Long Island R.R.*, 43 N.Y. 502 (1871) (same).

5. See *Horsley v. MacLaren*, 22 D.L.R.3d 545, 558 (Can. 1971) (no contributory negligence of rescuer absent recklessness); J. FLEMING, *THE LAW OF TORTS* 159 (4th ed. 1971) (contributory negligence not good defense unless rescue foolhardy).

6. See *Hammonds v. Haven*, 280 S.W.2d 814 (Mo. 1955) (jury question whether pedestrian's assumption of dangerous position on road to warn drivers of hazard was reasonable); *Guca v. Pittsburgh Rys.*, 367 Pa. 579, 583, 80 A.2d 779, 781 (1951) (reasonable to stand on railroad tracks to warn of car stuck in tracks); H. HART & A. HONORE, *CAUSATION IN THE LAW* 239 (1959) (rescuer may recover where there is little practical foreseeability of his injury); Fleming, *Remoteness and Duty: The Control Devices in Liability for Negligence*, 31 CAN. B. REV. 471, 486 (1953) (limits of foreseeability have been stretched to encourage rescue attempts); *Linden, Down with Foreseeability: Of Thin Skulls and Rescuers*, 47 CAN. B. REV. 544 (1969) (same).

7. There are several recent examples. See, e.g., *Anderson v. Atchison, T. & S.F. Ry.*, 333 U.S. 821, 823 (1948) (employer-employee); *Devlin v. Safeway Stores, Inc.*, 235 F. Supp. 882, 887 (S.D.N.Y. 1964) (proprietor-customer); *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974) (landlord-trespasser); *Farwell v. Keaton*, 396 Mich. 281, 290-91, 240 N.W.2d 217, 221-22 (1976) (companion-companion); *O'Rourke v. Schacht*, 1 Can. S. Ct. 53 (1976) (police officer-driver); *Horsley v. MacLaren*, 22 D.L.R.3d 545, 552 (Can. 1971) (boat operator-passenger).

8. See *Horsley v. MacLaren*, 22 D.L.R.3d 545, 557 (Can. 1971) (Laskin, J.) ("The evolution of the law on this subject [the compensation of injured rescuers], originating in the moral approbation of assistance to a person in peril, involved a break with the 'mind your own business' philosophy.")

9. See *Caldwell v. Bechtel*, 631 F.2d 989, 1000 (D.D.C. 1980) (recent holdings "suggest that courts have been eroding the general rule that there is no duty to act to help another in distress, by creating exceptions based upon a relationship between the actors") (footnotes omitted).

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On the academic side, recent writing has given new life to the debate on rescue. Professor Coase's approach, for example, implies that, from an economic point of view, the distinction between misfeasance and nonfeasance that supports the common-law rule is without significance. For Coase, the real issue is whether the alleged tortfeasor is to be allowed to impose the cost of his physical activity on the plaintiff, or whether the plaintiff, by his invocation of the legal process, will be allowed to harm the alleged tortfeasor.¹⁰ For this approach, only the resulting distribution of costs matters; whether this result is accomplished by the defendant's operations in the physical world or by the plaintiff's operations in the legal world is not itself important. The refusal to accord a special recognition to the role of the court, and the assimilation of the court to an agency for the distribution of costs, has implications for the position of a person seeking judicial intervention. Because distinctions based on causation are obliterated in Coase's model of reciprocal harm, a plaintiff can claim no special consideration as the victim of another's action, and a defendant does not necessarily escape liability because the harm complained of was not caused by any of his actions. The causal nihilism of Coase's world,¹¹ which has its roots in utilitarian thought extending back to Bentham,¹² thus subverts the misfeasance-nonfeasance distinction and changes the terms on which the rescue problem is discussed.¹³

The most important critics of the economic approach to law have all in their various ways been concerned with rehabilitating causation as a central feature of law and morals.¹⁴ It is the work of Professor Epstein,¹⁵ among this group of scholars, that is of particular

10. See Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960).

11. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 592 (1978).

12. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 74-83 (J. Burns & H. Hart eds. 1970).

13. For an example of consequentialist analysis in the economic mode, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.8, at 76-77 (1972). The relationship between utilitarianism and Posner's principle of wealth-maximization, as well as the normative validity of Posner's approach, are currently the subject of controversy. See Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307 (1980); *Symposium—Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980).

14. E.g., G. FLETCHER, *supra* note 11; C. FRIED, *RIGHT AND WRONG* (1978); Epstein, *Defences and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 167 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-89 (1973) [hereinafter cited as *Epstein Theory*]; Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

15. *Epstein Theory*, *supra* note 14, at 189-204.

importance in connection with rescue. For Professor Epstein, causation is so pivotal a notion in a legal system that values liberty that it is not only *a* basis of liability in tort, but the *only* basis of liability in tort. This emphasis on causation has its roots in ethical thought leading back not to Bentham's utilitarianism but to Kant's injunction against treating other persons as means rather than as ends,¹⁶ a principle that seems to presuppose an idea of acting upon others that does not encompass nonfeasance. Relying on this tradition for his critique of the economic approach, Epstein has argued that the absence of a general duty to rescue is not an unfortunate fossil of a more barbaric age but is a morally defensible thread in the overall fabric of the common law.

Critics of the common-law position have generally proposed that the courts ought to recognize a duty to effect what might be termed an easy rescue, that is, a duty that would arise whenever one person is caught in a dangerous situation that another can alleviate at no significant cost to himself.¹⁷ The requirements of emergency and lack of prejudice distinguish the proposed obligation to rescue from the usual tort duties connected with misfeasance: the latter duties can be present in routine situations and can impose considerable costs on those who are subject to them. The recent judicial and academic developments bear upon this proposal in diverse ways. The tort decisions that recognize the distinctive merit of the rescuer stand in easy harmony with the proposed duty. The academic writings, on the other hand, seem incompatible with a duty of easy rescue. The Coasian framework would reject the restrictions on the duty because these restrictions acknowledge the fundamental character of the distinction between misfeasance and nonfeasance. For Epstein, by contrast, the difference between nonfeasance and misfeasance is fundamental, but the chasm between these two concepts is so deep that only duties respecting misfeasance can be accommodated within the common law of torts. The

16. I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS* 62 (10th ed. T. Abbott trans. 1955).

17. *E.g.*, J. BENTHAM, *supra* note 12, at 292-93 ("The limits of the law on this head seem . . . to be capable of being extended a good deal farther than they seem to have been extended hitherto. In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?"); see M. SHAFQ, *THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY* at xii, 64-68 (1978); Ames, *Law and Morals*, 22 HARV. L. REV. 92, 113 (1908); Franklin, *Vermont Requires Rescue*, 25 STAN. L. REV. 51 (1972); Rudolf, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 509 (1965). For recent legislation in the province of Quebec, see Barakett & Jobin, *Une Modeste Loi du Bon Samaritain pour le Quebec*, 54 CAN. B. REV. 290 (1976).

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proposed duty to rescue thus seems to be unacceptable both from an instrumentalist and from a Kantian point of view.

This article sets forth an argument in favor of a judicially created duty to effect an easy rescue. Because any special principle about rescue presupposes the distinction between misfeasance and nonfeasance, section I delineates this distinction and shows how it informs the policies behind the general common-law rule on rescue and some of the special-relationship exceptions. Section II sets forth and analyzes the arguments that have been offered, especially by Professor Epstein, against a generalized legal duty to rescue. This analysis, having highlighted the legal and ethical issues central to the argument against such a duty, clears the ground for the argument for the recognition by the common law of a duty of easy rescue. Section III argues that our moral intuitions are reflected in a coherent and growing pattern in the common law, a pattern indicating that the understanding of liberty in a market society does not preclude a legal obligation to rescue. Finally, section IV turns to the philosophic aspects of this pattern; it argues that a general duty of easy rescue can find support either on Benthamite-utilitarian or Kantian-deontological grounds. The article argues, in sum, that a duty of easy rescue would strengthen an already-broad pattern of common-law principles and that such a duty can plausibly be justified within both of the ethical traditions that inform the common-law system.

I. The Distinction Between Misfeasance and Nonfeasance

In his classic essay of 1908, Professor Francis H. Bohlen pointed out that “misfeasance differs from nonfeasance in two respects; in the character of the conduct complained of, and second, in the nature of the detriment suffered in consequence thereof.”¹⁸ With respect to the first difference, Bohlen asserted that the distinction between active and passive misconduct is, though in practice difficult to draw, in theory obvious. About the second difference Bohlen was more specific. In cases of misfeasance, the victim’s position is changed for the worse through the creation of a negative quantity in the form of a positive loss or new harm. In cases of nonfeasance, on the other hand, there is merely a failure to benefit the victim, which is a loss only in the sense that a positive quantity is not added.

18. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 220 (1908).

Bohlen stated these distinctions in skeletal form only, without providing the elaboration they require. For instance, the use of positive and negative quantities to explain the difference in the nature of the detriment presupposes not only a computational ledger but also a baseline with reference to which the computation is performed. Bohlen seems to have assumed that the baseline was the victim's position immediately prior to the incident that gives rise to the litigation, as when the victim of an automobile accident complains of the loss of a previously healthy limb. Since Bohlen's time, however, tort law has come to permit the imposition of liability for injuries that are not most naturally described as the loss of something actually possessed at an earlier time. A plaintiff, for example, can recover for economic injury not only when he has lost funds that he previously had,¹⁹ but also when the loss represents a potential profit that he had not yet realized.²⁰ Similarly, when an infant sues for prenatal injuries, recovery does not depend on whether the injury was inflicted on a limb that was already formed or whether the injury prevented the formation of a limb.²¹

Bohlen's other distinction, that concerned with the character of the misconduct, also needs elaboration. Bohlen himself acknowledged one of the problems when he pointed to the practical difficulties of characterizing behavior having elements of both active and passive misconduct. An illustration of this borderland situation is the old case of *Newton v. Ellis*,²² in which the plaintiff sued for injuries received at night when passing his carriage by a hole in the highway that the defendant had excavated but had failed to light. The court viewed the digging of the hole and the failure to light it as one complex act rather than as two separate events, one an act, the other a failure to act. Bohlen would have agreed,²³ but his distinction does not explain why one should prefer one characterization of the situation to the other. For principled use by courts, the unelaborated distinction between active and passive conduct is inadequate.²⁴

19. See *Giuliano Constr. Co. v. Simmons*, 147 Conn. 441, 162 A.2d 511 (1960); *Bankston v. Dumont*, 205 Miss. 272, 38 So. 2d 721 (1949); *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465 (H.L.).

20. See *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927); *Rivtow Marine v. Washington Iron Works*, 40 D.L.R.3d 530 (Can. 1973); *Spartan Steel & Alloys v. Martin & Co.*, [1972] 3 All E.R. 557 (C.A.).

21. See *Watt v. Rama*, [1972] Vict. 353 (S. Ct.); *Duval v. Seguin*, 40 D.L.R.3d 666 (Ont. C.A. 1973). For recovery for injuries that are not only pre-natal but pre-conceptual, see *Renslow v. Mennonite Hospital*, 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

22. 119 Eng. Rep. 424 (K.B. 1855).

23. Bohlen, *supra* note 18, at 220 n.6.

24. Nonfeasance is not equivalent to the nonperformance of an act in one recognized

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To begin elucidating the distinction between misfeasance and nonfeasance, consider the following fairly clear and extreme paradigmatic situations:

- A. An automobile driver (defendant) fails to apply his brakes in time, and a pedestrian (plaintiff) is thereby hurt.
- B. One person (defendant) sees another (plaintiff) drowning in a pool of water and refuses to toss him an easily available rope.

In both cases there has been a failure to act: in A, a failure to press the brakes; in B, a failure to toss the rope. Yet A and B are not both instances of nonfeasance.²⁵ On an intuitive understanding of causation, the defendant in A caused the injury, whereas the defendant in B did not. On one of tort law's prime understandings of causation, however, that conclusion is problematic. In both A and B, the defendants are but-for causes of injury: neither the injury in A nor the drowning in B would have happened had the defendants not failed to act in the specified ways.

The but-for test of factual causation first focuses on the time at which the defendant failed to act to prevent harm to the plaintiff, then compares the actual course of events after that time with a hypothetical course of events for the same subsequent period. Within that temporal framework, the structures of A and B are identical. What differentiates A from B is the course of events prior to the starting point. In B, there was no significant interaction between the plaintiff and the defendant in that earlier period: when encountered by the defendant, the plaintiff was already exposed to danger. In A, by contrast, the defendant, in the antecedent period,

sense of the word "act." Tort theory defines an "act" as a voluntary muscular contraction or as an external manifestation of the will. See O. HOLMES, *THE COMMON LAW* 54 (1881); *RESTATEMENT (SECOND) OF TORTS* § 2 (1965). Though primitive, see G. RYLE, *THE CONCEPT OF MIND* 62 (1949); Fitzgerald, *Voluntary and Involuntary Acts*, in *OXFORD ESSAYS IN JURISPRUDENCE* 1 (A. Guest ed. 1961), these definitions capture a basic feature of our notions of responsibility by setting as a minimal condition of liability the defendant's ability to avoid inflicting the harm that his behavior has caused. Thus, no liability attaches to a person who has been carried forcibly onto another's land, *Smith v. Stone*, 82 Eng. Rep. 533 (K.B. 1647), or has injured another while unconscious, *Stokes v. Carlson*, 362 Mo. 93, 240 S.W.2d 132 (1951); *Slattery v. Haley*, [1923] 3 D.L.R. 156 (Ont. App. Div.). A defendant who is pleading nonfeasance, however, has performed an act in this narrow sense. Indeed his act may have been quite callously deliberate, as when an employer vindictively refuses to make an elevator available to employees who wish to emerge from a mine. *Herd v. Weardale Steel, Coal, & Coke Co.*, [1913] 3 K.B. 771 (C.A.), *aff'd*, [1915] A.C. 67 (H.L.). A defendant in a nonfeasance case, then, can concede that in one sense he has acted and yet argue that in a second sense he has not acted.

25. *But see Kelly v. Metropolitan Ry.*, [1895] 1 Q.B. 944 (negligence may be by action or by inaction).

played a part in the creation of the very danger that he subsequently failed to abate. To treat A as identical to B is thus to start *in medias res*. Situations like A, in which misfeasance masquerades as nonfeasance, have aptly been categorized as "pseudo-nonfeasance."²⁶

Action can be variously described, and pseudo-nonfeasance is one instance of the technique of distorting the description by focusing on only one of the phases of an action.²⁷ This technique was presented in *Newton v. Ellis*,²⁸ where the defendant argued that the gravamen of the suit was the failure to put up a light rather than the digging of the hole in the highway. This argument would have equated the excavator of the hole with the rest of the world by confining judicial attention to a phase subsequent to that in which the defendant established a unique relationship with the particular hole and thereby with all passing drivers. Although not all courts are sensitive to the dynamics of pseudo-nonfeasance,²⁹ the court in this case was alert to the distorting technique and insisted upon looking at the excavator's behavior in its entirety.³⁰

The difference between real nonfeasance and pseudo-nonfeasance can be formulated by transforming the but-for test so that it attends not to the actual injury but to the risk of injury. In this view, situation B is a case of real nonfeasance because the risk of drowning existed independent of the defendant's presence or absence; the defendant's part in the materialization of the risk has no bearing on this fact. Situation A, by contrast, is a case of pseudo-

26. McNeice & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1272-73 (1949).

27. The philosopher J. L. Austin described the various ways of dividing an action as follows:

[W]hat is *an* or *one* or *the* action? For we can generally split up what might be named as one action in several distinct ways, into different *stretches* or *phases* or *stages*. Stages have already been mentioned: we can dismantle the machinery of the act, and describe (and excuse) separately the intelligence, the appreciation, the planning, the decision, the execution and so forth. Phases are rather different: we can say that he painted a picture or fought a campaign, or else we can say that first he laid on this stroke of paint and then that, first he fought this action and then that. Stretches are different again: a single term descriptive of what he did may be made to cover either a smaller or a larger stretch of events, those excluded by the narrower description being then called 'consequences' or 'results' or 'effects' or the like of his act.

J. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 123, 149 (1961).

28. 119 Eng. Rep. 424 (K.B. 1855).

29. See, e.g., *Miller & Brown Ltd. v. City of Vancouver*, 59 D.L.R.2d 640 (B.C.C.A. 1966) (failure of defendant to lop off bough of tree he planted held to be nonfeasance).

30. *Newton v. Ellis*, 119 Eng. Rep. 424, 428 (K.B. 1855) (Erle, J.) ("Here the cause of action is the making of the hole, compounded with a not putting up a light. When these are blended, the result is no more than if two positive acts were committed, such as digging the hole and throwing out the dirt: the two would make up one act."); cf. *id.* at 427-28 (Coleridge, J.) (actions constitute one complex act).

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nonfeasance because the defendant's driving of his car was a factual cause of the plaintiff's exposure to the risk of the injury that he suffered. In *Newton v. Ellis*, for example, the danger of falling into the excavator's hole would not have existed but for the defendant's having dug it.

Distinguishing misfeasance from nonfeasance on the basis of the defendant's participation in the creation of the risk is adequate not only for the extreme situations of A and B but also for more complicated situations. In particular, because this formulation of the distinction focuses on the defendant's having had some role in the creation of the risk, and not on the quality of that role, the defendant's fault in creating the risk is irrelevant to the decision whether a case is one of nonfeasance or not. Fault, of course, is relevant to the decision whether the defendant is liable, but the fault need not attach in the phase of risk creation; rather, it might be found in the subsequent phase, when the defendant failed to abate the risk. Consider the following situations, in which the faulty conduct at issue is intentional:

- C. An automobile driver (defendant) intentionally drives onto another's (plaintiff's) foot and leaves the car there.
- D. An automobile driver (defendant) without fault drives onto another's (plaintiff's) foot, but when he becomes aware of his action, he refuses to remove his car.³¹

In D, the defendant might argue that the court should assess his conduct only from the time of his refusal to move the car, and that from that perspective, the car's position on the plaintiff's foot was an unfortunate happenstance for which he was not at fault. This argument, like the one put forward in situation A, equates the defendant with all bystanders by ignoring the distinctive role of the defendant in bringing about the tortious contact between car and foot. The defendants in both C and D participated in the creation of the plaintiff's peril and intended the consequent harm to the plaintiffs. The only difference is one of sequence: in D the intent followed, whereas in C it preceded, the arrival of the automobile on the plaintiff's foot. The law recognizes this difference by refusing in D to impose liability on the defendant for harm caused during the period between the initial contact and the formation of his intention to continue it.

The same analysis can be applied to cases of negligence. In *Oke v.*

31. A similar situation was presented in *Fagan v. Commissioner of Metropolitan Police*, [1969] 1 Q.B. 439.

Weide Transport Ltd. and Carra,³² the defendant driver, without fault, knocked down a traffic sign, embedding the metal post in the ground. The next day, another driver drove over the post and was impaled. The plaintiff alleged that the defendant was negligent in failing to report the dangerous road condition to the police. On the analysis of nonfeasance under consideration, this case is essentially similar to *Newton v. Ellis*, which also concerned a failure by the defendant to abate a dangerous highway condition that he had created. The only difference is that in *Newton*, the defendant intentionally created the condition requiring abatement, whereas in *Oke* the defendant created the peril without fault. The defendant in *Oke* is exempt from liability for damage to the sign, of course, but with respect to liability to the injured driver, his position is identical to that of the defendant in *Newton*: each was negligent in failing to alleviate a danger that he himself had created. To ignore the defendant's role in creating the peril would be to equate the position of the defendant with that of any other motorist who happened to pass by and notice the danger. Those members of the court in *Oke* who considered the nonfeasance issue explicitly refused to make this equation.³³

Participation by the defendant in the creation of the risk, even if such participation is innocent, is thus the crucial factor in distinguishing misfeasance from nonfeasance.³⁴ The law's acknowledgement of the importance of this factor is clear in some contexts, oblique in others. For instance, some statutes require a driver who is involved in an accident to offer assistance to its vic-

32. 41 D.L.R.2d 53 (Man. C.A. 1963). For comparable cases, see *Simonsen v. Thorin*, 120 Neb. 684, 234 N.W. 628 (1931); *Montgomery v. National Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1937).

33. *Oke v. Weide Transport Ltd. & Carra*, 41 D.L.R.2d 53, 62-63 (Man. C.A. 1963) (Freedman, J.A., dissenting). The majority held that there was no negligence in failing to report because the victim's death happened under such extraordinary circumstances that it was not reasonably foreseeable. This holding eliminated the need to decide whether there was a duty to report the condition of the sign. The validity of the dissenting opinion's approach to the nonfeasance issue has been supported by *Rivtow Marine v. Washington Iron Works*, 40 D.L.R.3d 530 (Can. 1973), where the Supreme Court of Canada held that the manufacturer of a defective item that causes economic loss is beyond the reach of liability for negligence in manufacturing it, but that he is under a duty to abate the danger thus created by warning of the defect when he becomes aware of it.

34. In cases that focus on the materialization of risk, the "but-for" test must be supplemented by consideration of substantiality and remoteness. Similarly, where the creation of risk is at issue, supplementary factors are also needed. Otherwise, a worker whose labor contributed to the manufacture of an automobile will have his behavior placed within the category of misfeasance if he fails to aid a person injured by that automobile. Considerations of remoteness and substantiality are currently of no practical importance, however, because the courts have erred on the side of an excessively restrictive view of misfeasance, see notes 31 & 33 *supra*, rather than an excessively expansive one.

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tims regardless of his fault in causing the accident.³⁵ Courts also frequently hold occupiers of land liable for failure to abate the dangers to which their use of the land has innocently exposed others, at least where the injured party is an invitee.³⁶ In addition, the common law now imposes a duty on the captain of a vessel to rescue a sailor or passenger who falls overboard. For many years, the law exonerated the captain who neglected to rescue as long as the need to rescue arose without his fault.³⁷ Recently, however, courts have recognized that the very act of taking a person out in one's boat constitutes participation in the creation of the danger of drowning.³⁸ The resulting duty to rescue is imposed only on the owner or operator of the boat because of this participation and because of the passenger's necessary dependence on him.³⁹ The duty does not extend to other parties who might be in a position to rescue a person from a danger that arose independently of them: to impose such a duty would be to cross the line from misfeasance to nonfeasance.

The analysis of nonfeasance in terms of risk creation also explains why, even though a risk may have arisen independently of a defendant, he is responsible for aggravation of the danger, that is, for substantially increasing the likelihood that it will materialize in harm. By diminishing the ability of the victim or of others to abate the danger, the defendant, though innocent of the original danger, must account for the increased risk. Indeed, the defendant's action can occur before the original risk even begins to materialize, as when an insurance agent neglects to arrange for the negotiated

35. *E.g.*, CAL. VEH. CODE § 20001 (West 1971); Criminal Code, CAN. REV. STAT. ch. C-34, s. 232 (1970); Highway Traffic Act, ONT. REV. STAT. ch. 202, s. 140 (1970).

36. *E.g.*, *Jordan House Ltd. v. Menow & Honsberger*, 38 D.L.R.3d 105 (Can. 1973); *cf.* *Tubbs v. Argus*, 140 Ind. App. 695, 225 N.E.2d 841 (1967) (invitee in automobile).

To the extent that tort law's function is to shape the behavior of the defendant, the status of the plaintiff in such circumstances should not be crucial: in many cases, that status is unknown to the defendant at the moment when action is required. Some courts have recognized the primary importance of the defendant's control over the instrumentality causing injury. *E.g.*, *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942); *Tubbs v. Argus*, 140 Ind. App. 695, 225 N.E.2d 841 (1967). Moreover, several recent cases have held that liability for failure to abate a danger may be imposed on an occupier of property even when the persons injured are licensees or trespassers. *E.g.*, *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. Cir. 1972); *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974).

37. *Vanvalkenburg v. Northern Navigation Co.*, 19 D.L.R. 649 (Ont. S. Ct. 1913).

38. Most courts now hold that a captain must make reasonable attempts to rescue crew members. *E.g.*, *Harris v. Pennsylvania R.R.*, 50 F.2d 866, 868 (4th Cir. 1931).

39. *See Hutchinson v. Dickie*, 162 F.2d 103, 106 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947) (yacht captain has duty to use reasonable care to rescue social guest on yacht for pleasure cruise); *Horsley v. MacLaren*, 22 D.L.R.3d 545, 546 (Can. 1971) (same).

coverage.⁴⁰ Although the inducing of reliance is the most usual example of aggravating an independent risk,⁴¹ it does not exhaust the category. Cutting off the victim from the aid that third parties might naturally be inclined to give is as much misfeasance as lulling the victim into a false sense of security and decreasing his ability to remove himself from peril. Although it may be nonfeasance to refuse to rescue a drowning person whose predicament arose independently, it is misfeasance to hide the rope that others might toss out to him.⁴²

II. Arguments Against a Duty to Rescue

Both courts and commentators generally consider it morally outrageous that the defense of nonfeasance can deny endangered persons a legal right to easy rescue.⁴³ Yet the defense is taken to be so basic to the law and so compelling that it overrides the moral perceptions of the judges and the shared attitudes of the community. This in itself is a tribute to the power of the idea of nonfeasance. Few legal concepts, however, are applied in an absolute or monolithic manner. The purpose of this section is to explore the justifications that can be offered in support of the common-law position, and thus to discover the limits of the nonfeasance idea.

The most explicit and elaborate justification of the absence of a duty to rescue—almost the only such attempt in the legal literature⁴⁴—appears in an important and ambitious article by Pro-

40. *Fine's Flowers Ltd. v. General Accident Assur. Co. of Can.*, 81 D.L.R.3d 139 (Ont. C.A. 1977) (insurance agent liable for failure to obtain requested full coverage for plaintiff's greenhouses); *Baxter v. Jones*, 6 Ont. L.R. 360 (C.A. 1903) (general insurance agent liable for failure to notify plaintiff's other insurers of additional insurance). *Baxter* can be seen either as a case of misplaced reliance or, because the placing of the subsequent insurance without notice to the other insurers deprived the insured of coverage he previously had, as a case in which the agent participated in the creation of a risk.

41. This type of misfeasance is therefore usually viewed as in the legal borderland between tort and contract. See Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 914 (1951); Wright, *Negligent "Acts or Omissions"*, 19 CAN. B. REV. 465, 471 n.14 (1941).

42. See *Zelenko v. Gimbel Bros.*, 158 Misc. 904, 287 N.Y.S. 134 (Sup. Ct. 1935) (department store assumed duty towards ailing customer when it moved her to isolated infirmary, where other aid could not reach her).

43. See note 17 *supra*; note 48 *infra*.

44. For another recent defense of the common-law rule, see Note, *supra* note 1. In R. POSNER, *supra* note 13, Richard Posner suggests that a duty to rescue might be inefficient, but in Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 126 (1978), the conclusion is much more qualified. D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798, 802 (1975), accepts Epstein's argument that there should be no tort liability for failure to rescue, but proposes that there should be criminal liability. Epstein himself has reiterated his position on rescue. See Epstein, *Causation and Corrective Justice*, 8 J. LEGAL STUD. 477, 491-93 (1979).

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fessor Richard Epstein.⁴⁵ Epstein's work challenges the conception of tort law as a body of law embodying utilitarian and economic assumptions and seeks to develop "a normative theory of torts that takes into account common sense notions of individual responsibility."⁴⁶ In his view, the idea that one is responsible for whatever harm one causes is the fundamental moral principle in the law of torts: unless one of a few specified excuses can be invoked, liability should follow from a finding of causation of harm. Thus strict liability should replace negligence as the dominant notion in tort law. More importantly for the rescue situation, absence of causation renders one immune from liability; in particular, there should be no duty to abate a danger one did not cause.

Epstein's conception of responsibility purports to reflect common morality in its attention both to the effects on other persons of an individual's conduct and to the motive with which actions are performed.

[M]ost systems of conventional morality try to distinguish between those circumstances in which a person should be compelled to act for the benefit of his fellow man, and those cases where he should be allowed to do so only if prompted by the appropriate motives. To put the point in other terms, the distinction is taken between that conduct which is required and that which, so to speak is beyond the call of duty. If that distinction is accepted as part of a common morality, then the argument in favor of the good Samaritan rule is that it, better than any possible alternatives, serves to mark off the first class of activities from the second. Compensation for harm caused can be demanded in accordance with the principles of strict liability. Failure to aid those in need can invoke at most moral censure on the ground that the person so accused did not voluntarily conform his conduct to some "universal" principle of justice. The rules of causation, which create liability in the first case, deny it in the second. It may well be that the conduct of individuals who do not aid fellow men is under some circumstances outrageous, but it does not follow that a legal system that does not enforce a duty to aid is outrageous as well.⁴⁷

This passage is problematic in a number of ways. First, the conclusion that there is no obligation to rescue under any circumstances seems to conflict with Epstein's general purpose to develop

45. *Epstein Theory*, *supra* note 14, at 189-204.

46. *Id.* at 151.

47. *Id.* at 200-01.

a normative theory corresponding to common-sense morality. Criticism of the common-law position on rescue, after all, rests on the perception that, as a matter of inarticulate common sense, it is wrong for one person to stand by as another suffers an injury that could easily be prevented.⁴⁸ Moreover, Epstein concedes that the behavior of such defendants is "under some circumstances outrageous." There is a paradox in concluding, as Epstein does, that the legal doctrine in question, reprobated though it is, is actually in accord with common-sense notions of morality.

Second, as a defense of the common-law position on rescue, Epstein's single-minded concern with causation may prove too much. Although there is no general requirement of rescue at common law, rescue is required if any of several special relationships exists between the parties.⁴⁹ Epstein's defense of the common-law position on rescue poses the dilemma of abandoning that part of the position requiring rescue in special circumstances or acknowledging that tort liability is not based solely on causation.

These criticisms of Epstein's argument point to a lack of coherence among the argument's premises, actual conclusions, and purported conclusion. The argument, however, is also somewhat obscure. Epstein's argument that the absence of a duty to rescue at common law is consistent with moral principles is open to any of several interpretations. It might be a denial that there is a moral obligation to rescue, even though failure to rescue arouses "moral censure" and outrage, because rescue falls in the class of conduct that is "beyond the call of duty." Alternatively, the argument might be conceding that there is a moral obligation to rescue but denying that the creation of a parallel legal duty is justified. Moreover, this second interpretation might suppose either that, as a matter of principle, a chasm exists between the ethical and the legal realms, or that the transformation of this particular ethical duty into a legal one is inappropriate. An assessment of Epstein's argument must begin by examining the far-reaching issues raised by these various interpretations.

Epstein seeks to justify the absence of a common-law duty to rescue by invoking the distinction in common morality between acts

48. Even judges who have dismissed claims by victims against callous non-rescuers have indicated the moral revulsion with which they regard the defendant's inaction. *E.g.*, *Union Pacific Ry. v. Cappier*, 66 Kan. 649, 653, 72 P. 281, 282 (1903); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1898); *Yania v. Bigan*, 397 Pa. 316, 332, 155 A.2d 343, 346 (1959).

49. See note 1 *supra*.

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that are required and acts that are beyond the call of duty.⁵⁰ This distinction has been the subject of much attention in moral and legal philosophy—for example, in Lon Fuller's development of a contrast between the morality of duty and the morality of aspiration.⁵¹ Acts that are beyond the call of duty demand of the agent extraordinary heroism or sacrifice, and "while we praise their performance, we do not condemn their non-performance."⁵² The very fact that a failure to rescue may evoke moral censure, as Epstein concedes, is a strong indication that the rescue was obligatory and not supererogatory. The distinction that Epstein endorses therefore should not lead him to a simple denial of any duty to rescue; rather it should lead to efforts to structure the duty to avoid requiring of the rescuer the heroism or sacrifice that characterizes the morality of aspiration. In fact, all the proposals of the last two centuries for a legal duty to rescue have been structured in this way.⁵³

Epstein thus cannot sustain the position that failure to effect an easy rescue is not immoral.⁵⁴ His remarks can alternatively be interpreted as conceding that rescue is a moral requirement but denying that it should be a legal one. That he probably intends this view is indicated by his comment that although failure to aid a per-

50. The Epstein paragraph quoted above says many things in a small compass, and interpretation is difficult. Epstein seems to regard cases in which conduct is beyond the call of duty as equivalent to cases in which a person should be "allowed" to benefit his fellow man only if prompted by the appropriate motives. I have no idea what Epstein means by this. The issue is whether rescue is obligatory, not whether it is permitted. John Stuart Mill mentioned the problem of whether it is right to rescue a person if one's motive is to preserve him for torture, J.S. MILL, *UTILITARIANISM* 26 n.* (1888), which may be the problem that Epstein had in mind, but such a tiny problem cannot be relevant to the issue of a general duty to rescue.

51. L. FULLER, *THE MORALITY OF LAW* 3, 30-32 (1964). In recent moral philosophy, the seminal essay is Urmson, *Saints and Heroes*, in *ESSAYS IN MORAL PHILOSOPHY* 198-216 (A. Melden ed. 1958); cf. R. FLATHMAN, *POLITICAL OBLIGATION* 34-38 (1972) (distinguishing obligation from aspiration towards ideal).

52. H. SIDGWICK, *THE METHODS OF ETHICS* 219 (7th ed. 1907); see R. FLATHMAN, *supra* note 51, at 155-56. Flathman points out that to think that obligation implies praise bespeaks either misapprehension or an unsettled moral environment. But there may be exceptional circumstances where praise is in order. If the jewelry in Guy de Maupassant's story, *La Parure*, had been real, would not the enormous sacrifices undergone by the borrowers have been praiseworthy, even though they were endured solely for the purpose of repaying a debt? Similarly, would not the soldier be praiseworthy who undertakes an exceptionally dangerous, though obligatory, mission in wartime?

53. The various proposals in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 1, are so structured.

54. The discussion to this point does not, of course, show that rescue is morally required. It has been concerned only with critically exploring the implications of Epstein's defense of the common-law position. Section IV of this article considers rescue as a moral requirement.

son may be outrageous, "it does not follow that a legal system that does not enforce a duty to aid is outrageous as well."⁵⁵ This attempt to separate morality and legality may in turn reflect any of the following three notions: that transforming this particular moral duty into a legal duty is administratively difficult, that legal duties are generally disjoint from moral ones, or that there is some reason of principle that disqualifies this particular moral duty from being a legal duty.⁵⁶

The first of these alternatives is frequently invoked.⁵⁷ The adherents of this position point to the difficulty of determining who among the many potential rescuers should be held liable. This point can also be made in terms of fairness: singling out one from a group of equally culpable non-rescuers is unfairly to differentiate among like cases.⁵⁸ Why these difficulties should be of decisive weight, however, is hard to see. Even if there are many possible rescuers, the difficulties are no less surmountable than are those in cases of negligence involving many tortfeasors. Though potentially more complicated on average, the rules could be the same: the victim has a right to only one recovery, and all tortfeasors are liable to the victim, but they are entitled to contribution among themselves. The device of contribution, moreover, might be invoked by the defendant to prevent his being unfairly singled out: because the purpose of contribution is to prevent the unjust enrichment that would otherwise accrue when one party is forced by law to discharge an obligation to which others are also subject,⁵⁹ a defendant would be able to claim contribution from other potential rescuers.

The second interpretation of Epstein's argument, that moral and legal duties are in principle separate, is the most comprehensive of the three. Under this approach, the immorality of not rescuing has

55. See p. 259 *supra*.

56. The first and third propositions address the specific character of the rescue duty; the second addresses, in general, the relationship of law and morality. See pp. 260-61 *supra*.

57. *E.g.*, *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, 1027 (H.L.) (Lord Reid) ("And when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty."); see *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1976) (common law rule is "[m]orally questionable" but "owes its survival to 'the difficulties of setting any workable standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue . . .'" (Prosser, *Torts* (4th ed. 1971) § 56, p. 341).")

58. See Fried, *Right and Wrong—Preliminary Considerations*, 5 J. LEGAL STUD. 165, 181-82 (1976).

59. See Weinrib, *Contribution in a Contractual Setting*, 54 CAN. B. REV. 338, 342 (1976).

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no bearing on whether the omission should be legally condemned.⁶⁰ Although this proposition seems to raise basic and longstanding jurisprudential questions, it does not raise the ancient dispute between natural-law theory and positive-law theory. An adherent of natural-law theory can more readily pass between the moral and the legal domains, but the positivist too, though perhaps more skeptical about the feasibility of discovering moral duties, can approve the creation of a legal duty to parallel a moral one. For the legal positivist, law may have any content, moral or immoral,⁶¹ and particular moral duties can be made into legal ones.⁶²

More affirmatively, the role of the common-law judge centrally involves making moral duties into legal ones. The disqualification of moral considerations from the judge's decision would leave him with very sparse resources. Formalist reasoning from preexisting rules is indeterminate in many cases.⁶³ Moreover, if the system is consistent, no rules, including the premises for such formalist reasoning, could have moral dimensions. The first case in any new

60. Cf. *Union Pacific Ry. v. Cappier*, 66 Kan. 649, 653, 72 P. 281, 282 (1903) ("With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance.") A more extreme version of this position is implied in *Schacht v. The Queen*, 30 D.L.R.3d 641, 651 (Ont. C.A. 1972) ("Much as the humanitarian spirit which motivated the conduct of the good Samaritan has been lauded, it was rooted in moral philosophy, hence from the legal standpoint the *laissez-faire* attitude of the priest and the Levite was condoned.") For this view, the existence of a moral duty to rescue is not only irrelevant to the judgment but precludes the construction of a parallel legal duty.

61. Thus, it is not surprising that the sort of content that Dworkin finds in the common law is consistent with the formal analysis of the positivists. See Weinreb, *Law As Order*, 91 HARV. L. REV. 909 (1978).

62. The writings of John Austin illustrate how legal positivism can be combined with legal reform. Austin, who said that "the existence of law is one thing, its merit or demerit is another," J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (H. Hart ed. 1954), derived several consequences from this statement: an immoral law may be valid; when conscience counsels disobedience to law, it is only out of ignorance or self-interest; and because moral judgments are always in dispute, judicial attention to morality as a basis for decision may result in arbitrariness. Austin, however, did not assert that the existence of a moral obligation is irrelevant to the construction of a parallel legal obligation. On the contrary, his distinction between the law as it is and as it ought to be was borrowed from Bentham, J. BENTHAM, *A Fragment on Government*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 393, 397 (J. Burns & H. Hart eds. 1977), who used it as a tool for criticizing Blackstone's complacent description of the common law and for proposing reform of the law on utilitarian principles. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597 (1958). Even Austin believed that there is no general reason for not translating a rationally justifiable moral view into a legal obligation.

A utilitarian positivist like Austin would hold, at most, that particular moral duties should not be enforced as legal duties if the process of enforcement would be too costly. The classical utilitarians, however, did not consider this objection fatal to a duty to effect an easy rescue. See pp. 279-86 *infra*.

63. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14-24 (1921).

line of development could not be justified on legal grounds alone; yet it would be decisive for all posterity. Indeed, it is difficult to imagine how a judge in a case of first impression would proceed. Conversely, moral duties not only provide a basis for judicial justification; they also provide a minimal standard for legal legitimacy. If any legal obligations are legitimate, legal obligations that duplicate preexisting moral ones must be. The only grounds for opposing the imposition of such a legal duty would be the general one that law should not coerce.⁶⁴

The third interpretation of Epstein's position postulates a disjunction in principle not between moral and legal duties generally, but between the particular moral duty to effect an easy rescue and its proposed legal analogue. Such a position combines an admission that rescue is morally required, a recognition that legal duties may justifiably be created to parallel moral ones, and a principled argument that the moral duty to rescue is beyond the justifiable scope of state action. This position has a long history in both the utilitarian and non-utilitarian traditions, though Epstein, who does not explicitly take this position, makes no mention of its historic roots. Because the early statements form parts of comprehensive legal philosophies, and are not merely, as in Epstein's case, possible interpretations of murky expressed reflections on the common law of torts, it is worth examining the eighteenth-century expositions and their relations to Epstein's position.

The principal utilitarian adherent to this position was the proto-anarchist William Godwin. Godwin's comprehensive view of morality required everyone to devote all of their resources, energies, and opportunities to the assistance of others in order to maximize the utility of all.⁶⁵ His position on rescue was that there was a moral duty to rescue even when it required extreme personal sacrifice.⁶⁶ This extreme view of individuals' moral duty, however, was

64. This notion of legal obligation is embodied in the concept of *malum in se*, which was seized upon by critics of Hobbes centuries ago to specify the minimum content of political obligation, and thus to reject pure political contractarianism. See S. CLARKE, A DISCOURSE OF NATURAL RELIGION 228 (1706), reprinted in 1 D. RAPHAEL, BRITISH MORALISTS 1650-1800, at 191, 196 (1969); R. CUDWORTH, A TREATISE CONCERNING ETERNAL AND IMMUTABLE MORALITY 122 (1731), reprinted in 1 D. RAPHAEL, *supra*, at 105; cf. 1 W. BLACKSTONE, COMMENTARIES *54-55 (positive law has no force with regard to naturally wrong actions). The concept cannot embody a complete theory of political obligation because it ignores *mala prohibita* and the political element of obligations; but it does provide a minimum content.

65. See 1 W. GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS 165, 192, 219, 327 (I. Kramnick ed. 1976).

66. *Id.* at 169.

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matched by an equally narrow view of the role of law. In Godwin's ideal society, individuals would do their duties without any compulsion from the law, which would respect each person's right to private judgment, a right that was essential for the development of the person's moral capacities. Even in contemporary society, which was not ripe for the dissolution of government, this right to private judgment determined the scope of law. In this society, the government's function was to ensure that the exercise of each individual's private judgment did not intrude upon his neighbor's equal right to private judgment.⁶⁷ The government could legitimately prevent one person from harming another, because harm impaired the exercise of private judgment; but it could not legitimately force one person to benefit another, even though such benefaction might be morally required, because such coercion would violate the right to private judgment.

Godwin would evidently have agreed with Epstein that the moral outrageousness of a failure to act should not entail a legal duty to act. Yet Godwin's argument is not very secure. Particularly questionable is the place of the right to private judgment in Godwin's utilitarian framework. Rights are always problematic for utilitarians,⁶⁸ and Godwin's right to private judgment is no exception. Godwin does not mean that this right is immune to the utilitarian calculus, but rather, that regard for it in the calculus will lead to the utilitarian goal of general happiness, and that it can therefore be suspended whenever utility requires.⁶⁹ The right is accordingly vulnerable to differing assessments of utility. Thus evaluated, Godwin's view that man's moral development requires the law's abstention from interference in private judgment is implausible. Both Plato and Aristotle disputed it;⁷⁰ and although the idea that legal action can effectively and legitimately promote virtue has not been as popular in the last two hundred years as it had been in the previous two thousand, it still has considerable force.⁷¹ Moreover, in the context of rescue, the immense gain in utility through the saving of life may plausibly be thought to outweigh the disadvantage

67. *Id.* at 198, 234.

68. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 90, 171 (1977).

69. See W. GODWIN, *supra* note 65, at 225.

70. See ARISTOTLE, *NICOMACHEAN ETHICS* 1179b (W. Ross trans. 1954); PLATO, *GORGIAS* 517 (W. Woodhead trans. 1953).

71. See, e.g., W. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976); W. BERNS, *FREEDOM, VIRTUE, AND THE FIRST AMENDMENT* (1957); Salkever, *Virtue, Obligation and Politics*, 68 *AM. POL. SCI. REV.* 78 (1974).

of a small moral retardation inherent in legal compulsion; Bentham and Mill, at least, thought so.⁷²

The most important non-utilitarian adherent to the view that the moral duty to aid another did not justify the creation of a parallel legal duty was Immanuel Kant. Morality, for Kant, was the internal phenomenon of a person freely fulfilling a duty that, using pure practical reason, he legislates for himself; and practical reason requires the duty to give assistance to others. Law, by contrast, coerces individuals by regulating external action. Although law and ethics may coincidentally legislate about the same conduct, law cannot make a person virtuous: virtue is by its nature indifferent to external compulsion.⁷³ Yet positive law can be just. To do so, it must reflect some formal and universal principle, and because positive law acts only upon the external freedom of the person, not on his internal freedom as a morally autonomous agent, justice, for Kant, was "the aggregate of those conditions under which the will of one person can be cojoined with the will of another in accordance with a universal law of freedom."⁷⁴

For Kant, as for Godwin, freedom was central. But Kant reached a position similar to Godwin's without the utilitarian grounding that made Godwin's position vulnerable to differing predictive assessments. Acts of misfeasance may properly be prohibited by positive law because they cannot coexist with the freedom of everyone as defined by a universal law; but beneficence, of which rescue is a part, was beyond the scope of justice. Either acts of beneficence were responses to specific needs and desires, or else they followed from a general policy of benevolence that had been adopted by the benefactor. If the former, Kant thought, they were not a manifestation of morality because specific desires and needs cannot be the subjects of a universal law.⁷⁵ If the latter, they were a manifestation of morality because the adoption of such a policy was required by pure practical reason; but a policy of benevolence was an internal matter beyond the reach of the external constraints of positive law.

An objection to the artificiality of this distinction between misfea-

72. See J. BENTHAM, *supra* note 12, at 292-93; J. S. MILL, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 255-56 (M. Lerner ed. 1961). The utilitarian position is explored in more detail below. See pp. 279-92 *infra*.

73. I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 19 (J. Ladd trans. 1965). Epstein apparently refers to this tradition of ethics when he says that the compulsion of positive law is destructive of the moral worth of the act. See *Epstein Theory*, *supra* note 14, at 200. Kant's point is different; it is that legal compulsion is irrelevant to the moral worth of the act.

74. I. KANT, *supra* note 73, at 34.

75. *Id.*

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sance and nonfeasance would point out that the liberty of an endangered person is equally limited by misfeasance and nonfeasance. For Kant, however, beneficence was special because it is the subject of an imperfect duty—that is, a duty that varies according to specific circumstances, so that “the law cannot specify precisely what and how much one’s actions should do toward the obligatory end.”⁷⁶ Kant viewed the moral duty to effect an easy rescue in an emergency and the moral duty to help the needy as indistinguishable; both are merely instances of an ethically required policy of beneficence not susceptible to a legal duty. Because no particular action can be required in many circumstances—although there may be a duty to give charity, no particular person is required to give any particular amount to any particular charitable cause—the omission of any particular action cannot be considered a legal wrong.

At first glance, Kant’s analysis does not seem to apply to the legal obligation to rescue that is usually put forward. A duty to effect an easy rescue in an emergency seems to have the specificity that Kant’s imperfect duty of beneficence lacks. In fact, Kant’s rejection of a legal duty can apply only if the apparent difference between the rescue proposal and the duty of beneficence can be proven illusory. Here Epstein provides the argument suggested by the Kantian analysis.

In his defense of the common-law position, Epstein argues that confining the duty to rescue to situations of emergency and lack of inconvenience would not be feasible. For Epstein, as for Kant and Godwin, freedom is a central value; indeed, he believes that “the first task of the law of torts is to define the boundaries of individual liberty.”⁷⁷ If the proposed duty is admitted, he argues, no principled basis could be found to prevent unacceptable infringements of individual liberty. Charitable contributions in amounts dependent on the donor’s wealth would become compulsory if it were substantially certain that without them someone would die. Moreover, because the inconvenience to the reluctant rescuer could be eliminated by the victim’s offer of objectively suitable reimbursement, the rescuer would find himself coerced to exchange the means of salvation for compensation. Once such forced exchanges are required, says Epstein, there will be no way to distinguish liberty from obligation or contract from tort.⁷⁸

76. I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* 49 (M. Gregor trans. 1964).

77. *Epstein Theory*, *supra* note 14, at 203.

78. *Id.* at 199.

This argument is the most powerful objection that can be made to the judicial creation and enforcement of a duty to effect an easy rescue. The argument does not merely assert the priority of liberty: the rescue proposal's emergency and convenience limitations, which are absent in misfeasance situations, reflect that priority. Rather, Epstein's argument is that no principles that respect the priority of liberty can distinguish between rescue and beneficence. The next two sections of this article explore and respond to this argument.

III. Common-Law Foundations for a Duty of Easy Rescue

To the extent that an issue of interpersonal action is not made the subject of a tort or criminal duty, it is remitted to the operation of the law of contract. If neither tort law nor criminal law imposes a duty to rescue, the relations between rescuer and victim are left entirely to the contractual arrangements between them. Absent any duty, a victim cannot conscript a rescuer's services; he must purchase them under the usual contractual mechanisms.⁷⁹

Contract law gives practical application to a market society's reliance on consensual private ordering, and thus provides the principal embodiment in the law of the ideal of individual liberty.⁸⁰ It both gives individuals the means to exercise their liberty and restricts liberty where, for either practical or ideological reasons, the circumstances are not appropriate for its exercise. In particular, the law of contract presupposes a certain social equality of those who engage in the bargaining process.⁸¹ In thus giving shape to the ideal of liberty in its application to specific circumstances, contract law can be looked to for evidence of the extent to which, and the situations in which, the law prizes individual liberty.

To the extent that contract law reveals principles that distinguish a duty to rescue from a more thoroughgoing duty of beneficence, it provides a response to Professor Epstein's challenge to find a principled basis for imposing a duty to rescue that respects the law's ideal of liberty. The object of this section of the article is to demonstrate that such principles exist. More generally, this section shows that there is a pattern in the common law that the creation of a duty of easy rescue would extend in a coherent manner.

79. See Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946).

80. See Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 128 (S. Hampshire ed. 1978).

81. See C. FRIED, *supra* note 14, at 100.

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The common-law position on nonfeasance generally relies on contract law, and hence on the market, to regulate the provision of aid to others for independently existing dangers.⁸² There are exceptions, however, that require a person to abate a risk to another even though he had no part in creating the risk. These exceptions exemplify the relationship between the existence of a tort obligation and the absence of any social value in the liberty to contract.

A recent case illustrates the relationship. In *O'Rourke v. Schacht*,⁸³ a police officer was held liable in tort for failing to warn automobile drivers of a dangerous highway condition that he had not created.⁸⁴ In the course of his duties, he had come across a section of road where a sign warning of highway excavation had been knocked down. The court's holding required the policeman to confer a benefit on other drivers without permitting him to bargain for compensation. Because society's interest in upholding freedom to contract, if present at all, is very attenuated, however, this coercion and the concomitant deprivation of the opportunity to contract are not serious. The transaction costs of negotiating with successive drivers are so high, and the form of negotiation is so unmanageable, that contracting would be highly inefficient if not completely unfeasible.⁸⁵ More importantly, a policeman's contract to sell information about road conditions would be undesirable and perhaps unenforceable.⁸⁶ The police officer is already under a public duty, reinforced by statute, to promote highway safety; his liberty not to further this goal is not prized by the legal system.⁸⁷

82. See W. PROSSER, *supra* note 1, § 92, at 613-16.

83. 1 Can. S. Ct. 53 (1976).

84. In *Newton v. Ellis*, 119 Eng. Rep. 424 (K.B. 1855), and *Oke v. Weide Transport Ltd. & Carra*, 41 D.L.R.2d 53 (Man. C.A. 1963), the defendants had created the danger on the highway.

85. Economists are fond of this justification for having an issue dealt with by tort rather than by contract. E.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 219 (1973).

86. Cf. *Gray v. Martino*, 19 N.J.L. 462, 103 A. 24 (1918) (police officer may not receive reward for recovery of stolen property); English Law Revision Committee, *The Statute of Frauds and the Doctrine of Consideration*, 15 CAN. B. REV. 585, 605 (1937) (reprinting LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, CMD. 5449).

In *England v. Davidson*, 113 Eng. Rep. 640 (Q.B. 1840), the court held enforceable a promise to give a reward for information regarding the commission of a crime, even though the claimant of the reward was a police constable. Two circumstances should be noted. First, the court considered the policeman not bound by duty to reveal the information, thus implying that if he had been so bound, the contract would not have been enforceable. Second, the offer was made to the whole world, not specifically to police constables; thus, it does not follow from the case that the constable would have been able to initiate or to engage in negotiations for the divulging of particular information.

87. These remarks on liberty deal only with the market position of a police officer

The court in *O'Rourke* laid particular stress on the police officer's statutory obligation to maintain a traffic patrol, and it is especially important to clarify the role of the statute.⁸⁸ As read in the light of the legislative intent, the statute did not create a civil cause of action, but it did supply authoritative evidence of a public policy signaling the weakness of contract values in this context, and it is therefore relevant to the judicial decision.⁸⁹ The framework of individual liberty embodied in the law of contract, and reflected in the statute, is thus seen not to be violated by the imposition of a duty in tort.

The pattern of a tort obligation existing when the values of contractual liberty are absent is also illustrated by the duty that family members owe to each other.⁹⁰ Despite its intuitive clarity, this duty

when contract values are manifest. Of course, there is also an administrative justification for not forcing the officer to act: he should be free to allocate his scarce resources of time and attention to the problems that seem most urgent to him or to his superiors. But this consideration concerns only the adequacy of particular conduct as an attempt to fulfill the duty to act; it does not concern the existence of the duty. The problem it raises is not the interaction of tort law with contract, but the interaction of tort law with the discretion of administrative agents. Here the courts have evinced a reasonably limited respect for the exercise of bona fide discretion by public authorities. *See, e.g.*, *American Exch. Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (Federal Tort Claims Act not violated by discretionary decision not to install handrails on public staircase); *City of Freeport v. Isbell*, 83 Ill. 440 (1877) (misfeasance-nonfeasance distinction applied to find no liability for city inaction); *Anns v. London Borough of Merton*, [1978] A.C. 728, 754 (H.L.) (Lord Wilberforce) (public agency not liable if act or omission within statutorily defined discretion); *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, 1068 (H.L.) (Lord Diplock) (same). In *O'Rourke v. Schacht*, 1 Can. S. Ct. 53 (1976), *aff'g* *Schacht v. The Queen*, 30 D.L.R.3d 641 (Ont. C.A. 1972), there was apparently no police business of competing urgency. *See* 30 D.L.R.3d at 644.

88. A dissenting opinion reasoned that if the police officer were liable, the liability must flow either from the legislation or from the common law. The statute was excluded because there was no indication that the legislature intended to create civil liability. The common law was excluded because the danger in question existed independently of the defendant, whose behavior was therefore an instance of pure nonfeasance. Because liability could be based on neither statute nor common law, there could be no liability. *O'Rourke v. Schacht*, 1 Can. S. Ct. 53, 74-87 (1976) (Martland, J., dissenting). This argument, contrary to the familiar common-law practice, *see* note 89 *infra*, views statutes and the common law as watertight compartments.

89. The use of statutes as sources of public policy is common practice in common-law adjudication. *See* Landis, *Statutes and the Sources of the Law*, in *HARVARD LEGAL ESSAYS* 213 (1934), reprinted in 2 *HARV. J. LEGIS.* 7 (1965); Traynor, *Statutes Revolving in Common-Law Orbits*, 17 *CATH. U.L. REV.* 401 (1968); *cf.* *Jordan House Ltd. v. Menow*, 38 D.L.R.3d 105, 110 (Can. 1973) (statute described as "crystallizing a relevant fact situation which, because of its authoritative source, the Court was entitled to consider in determining, on common law principles, whether a duty of care should be raised"). The legislative-intent approach has often been criticized. *E.g.*, C. WRIGHT, *CASES ON THE LAW OF TORTS* 284 (4th ed. 1967); Alexander, *Legislation and the Standard of Care in Negligence*, 42 *CAN. B. REV.* 243 (1964); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 *COLUM. L. REV.* 21 (1949).

90. *See* *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907); *Territory v. Manton*, 8 Mont. 95, 19 P. 387 (1888); *R. v. Russell*, [1933] Vict. 59.

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has proved difficult to analyze. Bohlen, for instance, could do no better than to classify it among a miscellany of situations, and to assert that it derived broadly from “the ability of the one upon whom the duty is alleged to rest to afford the necessary protection and the dependence and helplessness of him who claims that the duty is owing to him.”⁹¹ This justification for a duty to rescue goes far beyond anything the common law or its critics supported. The contract-values analysis provides a much better justification for the family category. The common law has traditionally held that, absent express evidence of intention to the contrary, family agreements are “outside the realm of contracts” and that “each house is a domain into which the King’s writ does not seek to run.”⁹² Moreover, statutory requirements that certain family members supply certain necessities of life to those within their charge are common.⁹³ The law thus deems some family relations never appropriate for market regulation, and others regulable only when natural affection is clearly inadequate to support or account for the relations.⁹⁴

The conceptual pattern revealed by special-relationship exceptions casts light on the reach of the main rule. The thread that runs through the apparently diverse cases of police officer and family member is the law’s refusal to recognize persons in these roles as market agents and its consequent tolerance for the deprivation of liberty involved in coercing them to act. When an endangered stranger can be rescued with ease, elements of the same pattern are present. If a potential rescuer struck a bargain with a drowning person before tossing him a rope, the agreement reached would be unenforceable as unconscionable or made under duress. Thus, in *Post v. Jones*,⁹⁵ the United States Supreme Court held unenforceable a contract imposed by rescuers on whalers who had been marooned in the Arctic. Noting the passivity and helplessness of the defendant and the absence of market conditions for competition, the Court declared the agreement “a transaction which has no

91. Bohlen, *supra* note 18, at 227.

92. *Balfour v. Balfour*, [1919] 2 K.B. 571, 579 (C.A.).

93. For example, in *Sommers v. Putnam Bd. of Educ.*, 113 Ohio St. 177, 148 N.E. 682 (1925), a statute requiring a man to see that his children attend school formed one ground for holding the school board liable for the costs that the man incurred in transporting his children to school when the school board failed to perform its statutory duty to provide transportation.

94. In placing value and reliance on natural affection, the law exhibits its commitment to the ethical priority of certain human ties. The argument given below for a duty of easy rescue that rests on Kantian principles, *see* pp. 287-92 *infra*, relies on this commitment.

95. 60 U.S. (19 How.) 150 (1857).

characteristic of a valid contract."⁹⁶ In this sort of emergency, there are no liberty-of-contract values to be vindicated by the absence of a tort duty. It therefore seems that the imposition of a duty to effect an easy rescue in an emergency would form a coherent part of a growing pattern⁹⁷ in those doctrines that most fully embody the common law's notion of individual liberty.

The relationship between tort obligation and contract values also provides a way of circumscribing the duty to rescue and thus of answering the formidable objections to recognizing such a duty. The responses depend in part on the fact that the duty is to be created and enforced by the judiciary, not by another branch of government. One of Professor Epstein's objections, it will be recalled,⁹⁸ was that the imposition of a duty of easy rescue would be impossible to confine within acceptable limits: the wealthy, for example, would be compelled to make charitable contributions to alleviate hardships in emergencies.⁹⁹ This result would be unacceptable in our legal system because it would make the wealth of the parties a consideration in the litigation and would thus confound corrective and distributive justice; it would transform the system of adjudicating private claims into an administrative agency of the welfare state. The duty of easy rescue, however, can be distinguished from the broader duty of beneficence. In the rescue context, the resource to be expended (time and effort directed at aiding the victim) cannot be traded on the market, and no administrative scheme could be established to ensure the socially desirable level of benefits. In the charity context, by contrast, the resource to be expended (money) can be traded on the market, and an administrative scheme could be established not only to ensure the socially desirable level of benefits but to do so at a lower social cost than could a judicially enforced duty in tort, or so the welfare state assumes. In other words, in Epstein's example of

96. *Id.* at 159; see *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 327-20 (1942) (Frankfurter, J., dissenting) (fundamental principle of law that courts will not enforce bargains in which one party has unconscionably taken advantage of necessities and distress of other party).

97. See note 9 *supra*.

98. See p. 267 *supra*.

99. A similar point was made by T. MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS, note M (1837), reprinted in M. FRIEDLAND, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 265-68 (5th ed. 1978):

On the other hand, it 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.

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charitable contributions, but not in the rescue situation, there is a societal interest in preserving contractual liberty, and an administrative solution is preferable to a judicial one. There is thus a principled reason why a duty of easy rescue need not lead to a general duty of charity or beneficence.

This seemingly exotic but important point was at stake in *London Borough of Southwark v. Williams*.¹⁰⁰ The plaintiff borough had left some houses unoccupied pending redevelopment, and squatters seeking shelter in London's severe housing shortage occupied them. In the borough's suit to regain possession, the defendants interposed the defense of necessity; in fact, it does appear that without this housing the squatters' plight would have been appalling. The issue in the case—whether the private-necessity defense is good—closely resembles the issue in the rescue situation. In both situations, a person who had no part in the creation of another's peril has the power to abate the danger. The issues raised by the two cases are different only in the means of transferring the resources of salvation. In the rescue context, the law asks whether the person having the resources is obliged to make them available to the person in need. In the necessity context, the law asks whether the person needing the resources may simply appropriate them. The fundamental question raised by both legal issues is under what circumstances involuntary transfers are legitimate.

All members of the *Southwark* court held that, although the law recognized a defense of necessity, the defense did not apply in this case. The court divided, however, on the rationale for the result. Lord Justice Megaw focused on the process aspects of the problem. Because the court had no criteria to allocate housing, and because the court could not be certain that all potential claimants were before it, the borough's policy regarding the distribution of scarce accommodation was for political, not judicial, processes to set. Moreover, judicial approval of the squatter's occupation, he thought, would both undermine the orderly administrative procedures for housing distribution and give an unfair preference to the squatters over others seeking public housing. The necessity defense, whatever its scope, must stop short of transforming the courts into an agency for the general redistribution of wealth.¹⁰¹

Lord Denning and Lord Justice Edmund Davies concentrated on substantive counterparts to the procedural concerns of Lord Jus-

100. [1971] 2 All E.R. 175 (C.A.).

101. For a discussion of the necessity defense in American law, see W. PROSSER, *supra* note 1, § 24, at 124-27.

tice Megaw. "[I]f homelessness were once admitted as a defense to trespass," Lord Denning feared, "no one's house could be safe;"¹⁰² anarchy and disorder would result. As in Epstein's example of coerced charity, the commodity involved could legitimately be traded for gain on the market, whose orderly processes would be disrupted by recognition of the necessity defense in these circumstances. Yet both judges assumed that a plea of necessity would be upheld in other circumstances. In language reminiscent of suggested formulations of the duty to rescue, Lord Justice Edmund Davies restricted the operation of the necessity defense to "an urgent situation of imminent peril,"¹⁰³ a situation one of whose distinguishing characteristics is the suspension of values associated with liberty to contract. Because of the close relation between the necessity and nonfeasance arguments, this restriction can be transferred to the nonfeasance context, so that even if a duty of easy rescue were adopted, a claim by homeless persons that a house owner was obligated to admit them to his property could rationally be dismissed, even though the claimants needed shelter and the house was otherwise unoccupied.¹⁰⁴

Using the absence of contract values as a point of reference for creating a duty to rescue raises several important questions. One is

102. *London Borough of Southwark v. Williams*, [1971] 2 All E.R. 175, 179 (C.A.) (Lord Denning, M.R.).

103. *Id.* at 181; *cf.* *Depue v. Flateau*, 100 Minn. 299, 111 N.W. 1 (1907) (jury question whether dinner host negligent in refusing request of ill guest to spend the night). Prosser noted that "the privilege of necessity resembles those of self-defense and defense of property," but he also deemed it unwise to confine this privilege "within too narrow limits." W. PROSSER, *supra* note 1, § 24, at 127 & n.18.

104. It is sufficient for purposes of this article if the *Southwark* case shows the attitude of the common law to involuntary exchanges between individuals of a commodity that has market value. This theory does not, however, completely justify the holding of the case. The owner in *Southwark* was not an individual but a public authority, and the house in question was not being used at all but had been boarded up by the municipality and then rendered habitable by the efforts of the squatters. Evicting the squatters and restoring the property to its unoccupied status might be an example of wasting the resource. It might be in accord with a liberal theory of law to allow a waste of property by *individuals*, because it is illegitimate to interfere with the individual's satisfaction of his self-regarding desires, and wasting his own resources might provide him with satisfaction. *Cf.* J. RAWLS, *A THEORY OF JUSTICE* 432-33 (1971) (definition of individual satisfaction in moral theory must accommodate highly idiosyncratic preferences). *But see* *Brown v. Burdett*, 21 Ch. D. 667 (1882) (restricting satisfaction from posthumous waste). By contrast, a public authority must always act in the public interest and not for the satisfaction of its desires; allowing waste should therefore be beyond the bounds of its discretion. Thus, Lord Justice Megaw's concern for the integrity of the queue would be misplaced if there were no queue for this property. Similarly, Lord Denning's generalization from this case to property in general confounds the roles of a private individual and a public authority.

I am grateful to my colleague Professor Arnold Weinrib for discussion of these points. They merit more attention, and we hope to deal with them elsewhere.

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whether such an approach to justifying the adoption of a common-law rule is circular. To say that the scarce resource in the *Southwark* case can be traded on the market, one might object, is to say only that the law permits such trading; one cannot in turn justify this legal treatment by pointing back to the market. The legal argument for a duty to rescue in emergencies, however, is not one of deduction but one of coherence. Recognizing that the central concepts are those of obligation and liberty, the argument looks for the common law's concrete manifestation of society's general intuitions about these concepts. Examining instances of the operation of these concepts, the argument extracts general features from the instances, searching for and shaping a coherent pattern that fits as much of the law as possible while respecting the underlying ethical intuitions.¹⁰⁵

A second question raised by the contract-values approach to the rescue problem is whether the approach helps to define the precise contours of the duty. How urgent must the emergency be? Even if the absence of inconvenience to the rescuer is regarded objectively in terms of market values, is there not a large gray area between the extremes of tossing a rope and donating to charity? It is these problems of demarcation, "the difficulties of setting any standards of unselfish service to fellow men,"¹⁰⁶ that have traditionally been seen as insurmountable obstacles to a general requirement of rescue; Kant's view of beneficence as an ethical but not a legal duty, for example, depends on this indeterminacy. However, the issue is not whether the imposition of a duty to rescue will create an area of indeterminacy. Because legal language is very often "open textured,"¹⁰⁷ the vagueness of a legal principle cannot be a sufficient ground for repudiating it, especially in a tort system that enshrines the concept of reasonableness as a fundamental notion. The correct question is whether the indeterminacy in a rescue principle will be legally manageable.

The contract-values approach to defining a duty of easy rescue answers this question by reference to contract law and the necessity defense, where the common-law experience has contradicted Kant's insistence on precision in legal norms.¹⁰⁸ The line between

105. Rawls' notion of "reflective equilibrium" is similar. See J. RAWLS, *supra* note 104, at 20, 48. For the relationship between this notion and legal reasoning, see Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 511 (1973).

106. W. PROSSER, *supra* note 1, § 56, at 341.

107. See H.L.A. HART, *THE CONCEPT OF LAW* 120 (1961).

108. Cf. I. KANT, *supra* note 73, at 40 (court of equity has self-contradictory nature).

abuse of unequal bargaining position and the legitimate exercise of market power is notoriously difficult to draw;¹⁰⁹ yet few would say that the rescue agreement imposed upon marooned whalers that was at issue in *Post v. Jones*¹¹⁰ should have been enforceable. Similarly, the possibility of over-extending the necessity defense in *London Borough of Southwark v. Williams*¹¹¹ entails not the repudiation of the defense, but only care in its application. Both duress and necessity are vague but manageable concepts; a duty of easy rescue defined to extend the pattern created by the law's use of these concepts should be equally manageable.¹¹²

A third question raised by the proposed definition of a duty of easy rescue is what its implications are for a duty properly to continue an initiated rescue. Consideration of the proper contours of a duty to continue a rescue has been bedevilled by two facts. First, courts have tried to narrow the gap between the doctrine that there is no duty to rescue and their moral discomfort with this doctrine by using the inchoateness of a rescue attempt as a ground for requiring its completion without negligence.¹¹³ It is an easy step from liability for negligently aggravating a pre-existing condition to liability for carelessly failing in one's endeavor to extend a benefit.¹¹⁴ There is, however, a crucial difference between the two bases of liability: the former deals with misfeasance,¹¹⁵ whereas the latter is grounded on pure nonfeasance. Whatever liberty interest stands as a bar to a duty to start a rescue remains strong throughout an initiated rescue as long as the victim has not been made worse off.¹¹⁶ The only reason a duty to continue a rescue might infringe

109. Some commentators have argued that the law now excessively restricts market freedom. *E.g.*, Trebilcock, *The Doctrine of Inequality of Bargaining Powers: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359 (1976).

110. 60 U.S. (19 How.) 150 (1856).

111. [1971] 2 All E.R. 175 (C.A.).

112. *Cf.* L. FULLER, *supra* note 51, at 10 (invisible pointer between morality of duty and morality of aspiration).

113. W. PROSSER, *supra* note 1, § 56, at 343-48; *cf.* Mathews v. MacLaren, 4 D.L.R.3d 557, 564 (Ont. H.C. 1969) (pleasure-boat master has duty to rescue passenger who has fallen overboard, even if master not at fault in accident).

114. *See, e.g.*, Zelenko v. Gimbel Bros., 158 Misc. 904, 287 N.Y.S. 134 (Sup. Ct. 1935) (containing language supporting either interpretation).

115. *See* pp. 251-58 *supra*. Courts have found liability where a rescuer promises aid, fails to produce such aid, and the imperiled party or other potential rescuers rely on the promise. *See, e.g.*, Johnson v. Souza, 71 N.J. Super. 240, 176 A.2d 797 (1961) (host liable to guest for injury on icy steps because of assurances that steps would be salted). *See generally* W. PROSSER, *supra* note 1, § 56, at 343-48.

116. *See* Wright, *supra* note 41, at 471. In Alexander, *One Rescuer's Obligation to Another: The 'Ogopogo' Lands in the Supreme Court of Canada*, 22 U. TORONTO L.J. 98, 104 (1972), Professor E.R. Alexander proposed that there be liability when the defendant has "taken charge of the situation" on the basis of a "voluntary assumption of duty" comparable to the

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on liberty less than a duty to initiate is the relatively clear opportunity to choose whether to assume the former duty; but this reason only tempers one criticism and does not justify the duty. In addition, there is an ethically troubling “incongruity in imposing liability on a good Samaritan when he who passes by does not attract it.”¹¹⁷ Of course, creating a duty to rescue eliminates these difficulties with a single stroke. It also reduces the uncertainty that arises when judges use artificial concepts to reach just results that cannot be reached directly because of deeply embedded rules of law.

The second fact complicating the question of what relevance beginning to act has for a duty to continue is that, at least in the Commonwealth, courts have failed to distinguish private rescuers from public authorities in their definition of the problem. Much attention, for example, has been paid to *East Suffolk Rivers Catchment Board v. Kent*,¹¹⁸ which held the defendant Board not liable for taking an inordinately long time to drain flooded land; the court reasoned that in the absence of an initial duty to drain the land, the Board was not required to act with reasonable care and diligence when it did intervene, but needed only to avoid aggravating the situation.¹¹⁹ In the public-authority context, the court thus reached a result contrary to that in the private context, yet the law defined the problem in the two contexts as the same.

The problem is that the two contexts are in fact different. The argument against imposing a duty to act on administrative bodies is not one concerned with individual liberty as reflected in the pres-

voluntary assumption of responsibility in *Hedley Byrne v. Heller*, [1964] A.C. 465 (H.L.). The language of “voluntary assumption of duty,” however, is merely an alternative way of expressing the conclusion that there should be liability, not a justification of it. In *Hedley Byrne*, the criterion of voluntary assumption of responsibility is coupled with the causing of a loss through detrimental reliance. It is precisely the absence of detrimental reliance that makes the problem one of nonfeasance rather than misfeasance.

117. *Horsley v. MacLaren*, 22 D.L.R.3d 545, 561 (Can. 1971) (Laskin, J., dissenting).

118. [1941] A.C. 74 (H.L.). This case has, in effect, been overruled by *Anns v. London Borough of Merton*, [1978] A.C. 728 (H.L.).

119. The case was applied by both Justices Schroeder and Jessup in *Horsley v. MacLaren*, 11 D.L.R.3d 277 (Ont. C.A. 1970). When the case reached the Supreme Court, Justice Laskin, by contrast, referred to the *East Suffolk* case as follows: “Whether a case involving the exercise of statutory powers (but not duties) by a public authority should govern the issue of liability or non-liability to an injured rescuer is a question that need not be answered here.” *Horsley v. MacLaren*, 22 D.L.R.3d 545, 561 (Can. 1971) (Laskin, J., dissenting).

The American courts have been less deferential, at least to quasi-public authorities, often requiring utilities and common carriers to render a minimum standard of service. *E.g.*, *Williams v. Carolina & N.W.R.R.*, 144 N.C. 498, 57 S.E. 216 (1907); *Oklahoma Natural Gas Co. v. Pack*, 186 Okla. 330, 97 P.2d 768 (1939). *Contra*, *Reimann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952); *Baum v. Somerville Water Works Co.*, 84 N.J.L. 611, 87 A. 140 (1913).

ence of contract values. Rather, at stake is the principle that, although administrative authorities, unlike individuals, must act only for a public purpose, they have—indeed they must have—significant discretion in deciding how to allocate their resources. A court should therefore be reluctant to overturn an agency's statutorily authorized setting of priorities.¹²⁰ Once a public body embarks on a particular project, however, it *prima facie* indicates its decision to allocate resources to it, though it was under no obligation to do so. Very rarely would judicial imposition of liability for the mishandling of a job that the public authority had decided to undertake constitute a retrospective interference with the operation of administrative discretion.¹²¹

Those considerations are irrelevant to the question of an individual's duty to rescue. Individual liberty as reflected in contract values, unlike the administrator's discretion to choose a particular project from a host of possible ones, is not waived at any point before the aggravation of a harmful condition. Respect for administrative discretion may justify a court's different treatment of abstention from action and failure properly to carry through on de-

120. Thus, it would be improper for a public body to refuse to perform its function because of the fear of liability for negligent performance, and such a decision would be reviewable by a court. *Anns v. London Borough of Merton*, [1978] A.C. 728, 754-55 (H.L.) (Lord Wilberforce). Lord Salmon, *id.* at 507, would make such a decision a ground for administrative law remedies only, not for tort damages.

American courts have shown similar reluctance to second-guess government allocation of resources, usually finding no liability for inaction. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 25.04 (1972). *But see* *Runkel v. City of New York*, 282 A.D. 173, 123 N.Y.S.2d 485 (1953) (city liable for building collapse when official had earlier ordered it repaired or demolished but failed to carry out the order).

121. For example, it might be onerous for a municipality to have to inspect the foundations of every building being constructed within its boundaries, and it would be improper for a court to order the inspection of one building rather than another. But once the municipality exercises its discretion by embarking on a particular inspection, an inspector's negligence could not be covered by an immunity attaching to the municipality's discretion. *See* *McCrea v. City of White Rock*, 56 D.L.R.3d 525 (B.C.C.A. 1974); *Anns v. London Borough of Merton*, [1978] A.C. 728 (H.L.).

Similarly, although a valid public purpose may be served by refusing to commit the fire brigade to a particular fire, it does not follow that once the fire brigade is sent to the scene, it may sit around and watch the fire spread. *See* *Veach v. City of Phoenix*, 102 Ariz. 195, 427 P.2d 335 (1967) (city has no duty to provide fire protection, but having assumed responsibility, it may not discriminate among property owners). *But see* *Stevens-Willson v. City of Chatham*, [1933] 2 D.L.R. 407 (Ont. C.A.), *aff'd sub nom.* *Stevens & Willson v. Chatham*, [1934] 3 D.L.R. 1 (Can.) (firemen merely engaged in nonfeasance and thus municipality not liable). In *County of Parkland No. 31 v. Stetar*, 50 D.L.R.3d 376 (Can. 1974), it was held that, although a municipality is not required to put up a particular traffic-warning sign, once it is up, it must be maintained. Of course, a public authority can change a decision once made if the change is itself an exercise of discretion for a public purpose. *E.g.*, *Sheppard v. Glossop Corp.*, [1921] 3 K.B. 132 (C.A.) (municipal council cut back on street lighting in order to save money).

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cisions once made. For the individual, starting and continuing a rescue are not similarly separable.

A legal duty to rescue would involve the recognition of an obligation to confer a benefit on a person whose plight is not the result of one's own actions. The traditional objection to the judicial enunciation of such a duty has been that coerced service for another interferes with personal liberty. The burden of this section has been to show that, to the extent that the notion of personal liberty is reflected in the values associated with liberty of contract, the imposition of a duty to effect an easy rescue in situations where such values are absent does not significantly violate personal liberty. Such a legal requirement of rescue would correspond to existing restrictions on the power to contract. It remains for the final section of this article to argue that the two principal philosophical traditions in our legal culture both provide affirmative arguments for the creation of the duty. Together with the observations that the special-relationship exceptions seem to be eroding the general rule and that even the defenders of the general rule admit the existence of a moral duty of easy rescue, this argument suggests that the refusal of the common law to impose a duty of easy rescue is an anomaly that can and should be corrected.

IV. Philosophical Foundations for a Duty of Easy Rescue

This article has been concerned with the interplay between our moral intuitions and various aspects of the legal structure. The distinction between misfeasance and nonfeasance was accepted as a suitable starting point that required elucidation rather than justification. Also accepted was the intuition that failure to effect an easy rescue was morally reprehensible. From these premises, the article criticized arguments supporting the legal order's refusal to reflect the moral intuition about rescue, and argued that a legal duty of easy rescue would fit into a coherent pattern formed by a miscellany of doctrines in the common law of contract and of tort.

Having eliminated objections to a legal duty of easy rescue, and shown its compatibility with existing doctrines, the final section of the article puts forth arguments for the adoption of such a duty. To this end, the section attempts to give philosophical specificity to the moral sentiment that condemns a failure to effect an easy rescue. Attention is devoted to the two traditions of moral philosophy represented by Kant and by Bentham, for those traditions have dominated efforts of the last two centuries to explicate and systematize our moral notions. If the law is to be "the witness and

external deposit of our moral life,"¹²² the demonstration that both traditions provide support for a duty of easy rescue implies that the absence of a duty to rescue at common law is an aberration that should be corrected.

Consideration of the utilitarian approach towards rescue must begin with Jeremy Bentham's thought on the problem. "[I]n cases where the person is in danger," he asked, "why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself . . . ?"¹²³ Bentham supported the implicit answer to this question with several illustrations: using water at hand to quench a fire in a woman's head-dress; moving a sleeping drunk whose face is in a puddle; warning a person about to carry a lighted candle into a room strewn with gunpowder. Bentham clearly had in mind a legal duty that would be triggered by the combination of the victim's emergency and the absence of inconvenience to the rescuer—that is, by the features of most of the proposed reforms requiring rescue.¹²⁴ Unfortunately, the rhetorical question was the whole of Bentham's argument for his position. With this question, Bentham appealed directly to his reader's moral intuition; he did not show how his proposed duty can be derived through his distinctive felicific calculus.¹²⁵

Can one supply the Benthamite justification that Bentham himself omitted? Because the avoidance of injury or death¹²⁶ obviously contributes to the greatest happiness of the greatest number, the difficulties revolve not around the basic requirement of rescue but around the limitations placed upon that requirement by the notions of emergency and absence of inconvenience. Those limitations have no parallel with respect to participation in putting others at risk; they apply only in cases of nonfeasance. Indeed, Bentham's comments come in a section of his *Introduction to the Principles of Morals and Legislation* that distinguishes beneficence (increasing an-

122. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

123. J. BENTHAM, *supra* note 12, at 293; see 1 J. BENTHAM, *THE PRINCIPLES OF LEGISLATION* 85-86 (R. Hildreth ed. 1840).

124. See note 17 *supra*.

125. See J. BENTHAM, *supra* note 12, at 38-41. That something is askew in Bentham's analysis is indicated by his statement that for many beneficent acts, "the beneficial quality of the act depends essentially upon the disposition of the agent; that is, upon the motives by which he appears to have been prompted to perform it." *Id.* at 322. In utilitarian theory, however, there is no such thing as a good or bad motive, only motives that cause good or bad acts. See *id.* at 97-130; J.S. MILL, *supra* note 50, at 26-27.

126. On the controversy over the significance of death for classical utilitarianism, see Henson, *Utilitarianism and the Wrongness of Killing*, 80 PHIL. REV. 320 (1971); Sumner, *A Matter of Life and Death*, 10 NOUS 145 (1976).

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other's happiness) from probity (forbearing to diminish another's happiness). Yet Bentham had earlier contended that the distinction between acts of omission and acts of commission was of no significance.¹²⁷ The utilitarian's only concern is that an individual bring about a situation that results in a higher surplus of pleasure over pain than would any of the alternative situations that his actions could produce. Consequences are important; how they are reached is not. The distinction between nonfeasance and misfeasance has no place in this theory, and neither would the rescue duty's emergency or convenience limitations, which apply only after that distinction is made.

One solution to the apparent inconsistency between the rescue limitations and Benthamite theory's regard only for consequences is to drop the conditions of emergency and convenience as limitations on the duty to rescue. The position could be taken that there is an obligation to rescue whenever rescuing would result in greater net happiness than not rescuing. This principle, it is important to observe, cannot really be a principle about rescuing as that concept is generally understood. As a matter of common usage, a rescue presupposes the existence of an emergency, of a predicament that poses danger of greater magnitude and imminence than one ordinarily encounters. The proposed principle, however, requires no emergency to trigger a duty to act. The principle, in fact, is one of beneficence, not rescue, and should be formulated more generally to require providing aid whenever it will yield greater net happiness than not providing aid.

Eliminating the limitations regarding emergency and convenience might transform a requirement of rescue conceived along utilitarian lines into a requirement of perfect and general altruism.¹²⁸ This demand of perfect altruism would be undesirable for several reasons. First, it would encourage the obnoxious character known to the law as the officious intermeddler. Also, its imposition of a duty of continual saintliness and heroism is unrealistic. Moreover, it would overwhelm the relationships founded on friendship and love as well as the distinction between the praiseworthy and the required; it would thereby obscure some efficient ways, in the utilitarian's eyes, of organizing and stimulating beneficence.¹²⁹ Finally, and most fundamentally, it would be self-defeating. The requirement of aid assumes that there is some other

127. See J. BENTHAM, *supra* note 12, at 74-83.

128. This position was espoused by the utilitarian William Godwin. See note 65 *supra*.

129. See H. SIDGWICK, *supra* note 52, at 492-93.

person who has at least a minimal core of personhood as well as projects of his own that the altruist can further. In a society of perfect and general altruism, however, any potential recipient of aid would himself be an altruist, who must, accordingly, subordinate the pursuit of his own projects to the rendering of aid to others. No one could claim for his own projects the priority that would provide others with a stable object of their altruistic ministrations. Each person would continually find himself obligated to attempt to embrace a phantom.¹³⁰

Although the utilitarian principle that requires the provision of aid whenever it will result in greater net happiness than failure to aid easily slips into the pure-altruism duty, it need not lead to so extreme a position. The obvious alternative interpretation of the principle is that aid is not obligatory whenever the costs to one's own projects outweigh the benefits to the recipient's. This interpretation avoids the embracing-of-phantoms objection to pure altruism, but it is subject to all the other criticisms of the purer theory. Because the cost-benefit calculus is so difficult to perform in particular instances, the duty would remain ill-defined. In many cases, therefore, it would encourage the officious intermeddler, seem unrealistically to require saintliness, overwhelm friendship and love, and obliterate the distinction between the praiseworthy and the required. Moreover, the vagueness of the duty would lead many individuals unhappily and inefficiently to drop their own projects in preference for those of others.

A different formulation of the rescue duty is needed to harness and temper the utilitarian impulses toward altruism and to direct them more precisely toward an intelligible goal. One important weakness of a too-generally beneficent utilitarianism is that it tempts one to consider only the immediate consequences of particular acts, and not the longer term consequences, the most important of which are the expectations generated that such acts will continue. If, as the classical utilitarians believed,¹³¹ the general happiness is advanced when people engage in productive activities that are of value to others, the harm done by a duty of general beneficence, in either version discussed above, would override its specific benefits. The deadening of industry resulting from both reliance on beneficence and devotion to beneficence would in the long

130. J. RAWLS, *supra* note 104, at 189; *cf.* C. FRIED, *supra* note 14, at 15 (crude consequentialist position can lead to paralysis, obsession, and contradiction).

131. *E.g.*, J. BENTHAM, *Principles of the Civil Code*, in 1 WORKS 303-04 (J. Bowring ed. 1843).

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run be an evil greater than the countenancing of individual instances of unfulfilled needs or wants. "In all cases of helping," wrote John Stuart Mill, in a passage concerned only with the reliance costs,

there are two sets of consequences to be considered: the consequences of the assistance and the consequences of relying on the assistance. The former are generally beneficial, but the latter, for the most part, injurious . . . There are few things for which it is more mischievous that people should rely on the habitual aid of others than for the means of subsistence, and unhappily there is no lesson which they more easily learn.¹³²

Utilitarianism can use the notion of reliance to restrict the requirement of beneficence. If an act of beneficence would tend to induce reliance on similar acts, it should be avoided. If the act of beneficence does not have this tendency, it should be performed as long as the benefit produced is greater than the cost of performance. In the latter case, there are no harmful effects on industry flowing from excessive reliance to outweigh the specific benefits. This rule can account for Bentham's restriction of the duty to rescue to situations of emergency. People do not regularly expose themselves to extraordinary dangers in reliance on the relief that may be available if the emergency materializes, and only a fool would deliberately court a peril because he or others had previously been rescued from a similar one. As Sidgwick put it, an emergency rescue "will have no bad effect on the receiver, from the exceptional nature of the emergency."¹³³ Furthermore, an emergency is not only a desperate situation; it is also a situation that deviates from society's usual pattern. The relief of an emergency is therefore unlikely to induce reliance on the assistance of others in normal conditions. The abnormality of emergencies also means that rescuers can confidently pursue their own projects under normal circumstances. The motive for industry that Bentham located in each person's needs is not undermined by extraordinary and isolated events.

The role of emergency in the utilitarian obligation to rescue corresponds to, and illuminates, the definition of a legal duty to rescue by reference to the absence of contract values, as set out in the previous section. Utilitarian philosophy and the concept of the

132. J.S. MILL, *THE PRINCIPLES OF POLITICAL ECONOMY* 967 (W. Ashley ed. 1923).

133. H. SIDGWICK, *supra* note 52, at 437.

market are closely related.¹³⁴ Both regard individuals as maximizers of their own happiness, and both see the use of contracts to acquire and to exchange property as conducive to the public good. Contract law's refusal to enforce certain transactions sets them apart from the usual structure of relationships, in which the satisfaction of the parties' needs and desires can legitimately serve as a stimulus to exchange. The person who sees a member of his own family in difficulty and the police officer who notices a hazard on the highway may not act as ordinary members of the market with respect to those endangered. Those pockets of contractual non-enforcement are sufficiently isolated that they are unlikely to be generalized: they will not generate a widespread reliance on assistance or sense of obligation to assist in settings where market exchanges are permitted and common.

An emergency is similar. Contract values are absent in such a situation because the assistance required is of such a kind that it cannot be purchased on ordinary commercial terms. Suspension of contract values in an emergency will not result in a general deadening of individual industry; the utilitarian can therefore confine his calculus to the specific consequences of the rescue. The denial of relief to the Southwark squatters¹³⁵ is a case in point. The desperate situation there was a consequence of poverty and not an extraordinary condition that deviated from the ordinary pattern of contemporary existence. The utilitarian must be concerned in that situation that judicially coercing individual assistance to the poor will generate a reliance whose harmful effects will, in the long run and across society as a whole, outweigh the benefits of the specific assistance.

Bentham's intuitive restriction of beneficence to situations of emergency can thus be supported on utilitarian grounds. Is the same true of the inconvenience limitation? As with the emergency restriction, finding utilitarian support requires looking behind the specific action to its social and legal context. For the utilitarian, the enforcement of a duty through legal sanctions is always an evil, which can be justified only to avoid a greater evil. If the sanction is applied, the offender suffers the pain of punishment. If the prospect of the sanction is sufficient to deter conduct, those deterred suffer the detriment of frustrated preferences. Moreover, the ap-

134. The relationship has been noticed by critics of both. See, e.g., C. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 4 (1973); Marx & Engels, *The German Ideology*, in *KARL MARX: SELECTED WRITINGS* 185 (D. McLellan ed. 1977).

135. *London Borough of Southwark v. Williams*, [1971] 2 All E.R. 175 (C.A.).

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paratus of enforcement siphons off social resources from other projects promoting the general happiness.

Accordingly, a utilitarian will be restrained and circumspect in the elaboration of legal duties. In particular, he will not pitch a standard of behavior at too high a level: the higher the standard, the more onerous it will be to the person subjected to it, the greater the pleasure that he must forego in adhering to it, and the greater his resistance to its demands. A high standard entails both more severe punishment and a more elaborate apparatus of detection and enforcement. Applied to the rescue situation, this reasoning implies that some convenience restriction should be adopted as part of the duty. Compelling the rescuer to place himself in physical danger, for instance, would be inefficacious, to use Bentham's terminology, because such coercion cannot influence the will: "the evil, which he sees himself about to undergo . . . is so great that the evil denounced by the penal clause . . . cannot appear greater."¹³⁶ Limiting the duty of rescue to emergency situations where the rescue will not inconvenience the rescuer—as judicial decisions would elaborate that limitation and thus give direction to individuals—minimizes both the interference with the rescuer's own preferences and the difficulties of enforcement that would result from recalcitrance. Bentham's second limitation can thus also be supported on a utilitarian basis.

The utilitarian arguments for the duty to rescue and for the limitations on that duty rest primarily on administrative considerations. The arguments focus not so much on the parties and their duties as persons as on the difficulties that might be created throughout the whole range of societal interactions. The elements of the duty are evaluated in terms of their likely consequences, no matter how remote. In the convenience limitation, for instance, whether the rescuer *ought* to feel aggrieved at the requirements of a high standard is of no concern. The likelihood that he *will* feel aggrieved is all that matters: for the Benthamite utilitarian, general happiness is the criterion of evaluation and not itself an object of evaluation.¹³⁷ Moreover, recalcitrance necessitates more costly en-

136. J. BENTHAM, *supra* note 12, at 162 (footnote omitted).

137. *Id.* at 13. For Bentham, the pleasures of good will count equally with the pleasures of malevolence. *See id.* at 44. Bentham wrote:

Let a man's motive be ill-will; call it even malice, envy, cruelty; it is still a kind of pleasure that is his motive: the pleasure he takes at the thought of the pain which he sees, or expects to see, his adversary undergo. Now even this wretched pleasure taken by itself, is good: it may be faint; it may be short: it must at any rate be impure: yet while

forcement, and that consequence must also enter the calculus. The same is true for the emergency limitation. The argument for that limitation focused on the possibility that a particular instance of assistance would, by example, induce socially detrimental general reliance or beneficence. This use of example does not explore either the fairness of singling out particular persons for particular treatment or the consistency and scope of certain principles. Rather, the argument examines the cumulative consequences of repetition, and decides whether a particular person should perform a particular act on the basis of the act's implications for the entire society's market arrangements.

At least one philosopher has argued that administrative considerations of this sort are not moral ones at all, or that they are moral only in a derivative sense.¹³⁸ In this view, the administrative and enforcement considerations on which the utilitarian account of rescue rests are irrelevant to the individual's obligations as a moral agent. The individual should ask what he ought to do, not how others can compel him to fulfill his duty.¹³⁹ The merit of this view is its observation that any utilitarian version of a duty to rescue has nuances that do not ring true to the moral contours of the situation. The person in need of rescue stands in danger of serious physical injury or loss of life, harms not quite comparable by any quantitative measure to other losses of happiness. Health and life are not merely components of the aggregate of goods that an individual enjoys. Rather, they are constitutive of the individual, who partakes of them in a unique and intimate way; they are the preconditions for the enjoyment of other goods.¹⁴⁰ Moreover, there is something false in viewing an act of rescue as a contribution to the greatest happiness of the greatest number.¹⁴¹ If there is an obliga-

it lasts, and before any bad consequences arrive, it is as good as any other that is not more intense.

Id. at 100 n.e. Mill's attempt to modify this position is notorious. See J.S. MILL, *supra* note 50, at 26-31.

138. See Fried, *supra* note 58, at 182.

139. Fried traces this view back to Kant. *Id.* Bentham, however, also comes close to this view in his distinction between private ethics and the art of government. See J. BENTHAM, *supra* note 12, at 285. But a utilitarian justification of rescue that ignores administrative considerations merely leads back to excessive beneficence.

140. See C. FRIED, *MEDICAL EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY* 95-96 (1974); I. KANT, *supra* note 76, at 112. The distinctive quality of physical integrity relative to the goods of property also lies at the root of Hume's account of justice. See D. HUME, *A TREATISE OF HUMAN NATURE* 489 (2d ed. L. Selby-Bigge 1978).

141. A. GEWIRTH, *REASON AND MORALITY* 218 (1978); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1076 (1975).

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tion to rescue, it is owed to particular persons rather than to the greatest number. Any such duty would require the rescuing not only of the eminent heart surgeon but also of the hermit bachelor; and even the duty to rescue the heart surgeon would be owed primarily to him, not to his present or prospective patients.

Because the utilitarian account of rescue thus appears to lack an important moral ingredient, and because utilitarianism is not the law's only important philosophical tradition, it is worth attempting to outline a non-utilitarian version of the obligation to rescue. Although the two approaches support the same conclusion, the arguments are different in texture.¹⁴² In particular, the non-utilitarian argument recognizes the distinctive importance of avoiding physical injury or death; it resists the assimilation of health and life to other goods. This attention to the centrality of the person avoids the utilitarian dilemma of either demanding excessive beneficence or having recourse to administrative considerations, which shifts the focus away from the rescuer's obligation to a particular endangered individual. In the non-utilitarian argument, of course, administrative considerations are not ignored; to do so would be impossible in elaborating an argument that attempts to provide an ethical foundation for a judicially enforced duty to rescue. Nonetheless, the non-utilitarian's use of administrative considerations differs from the utilitarian's. The utilitarian weaves the fabric of the duty to rescue out of administrative strands; the cost of administration and enforcement are relevant to the very existence of the duty. The non-utilitarian, by contrast, justifies a legal duty to rescue independently of the administrative costs; the mechanisms of enforcement are invoked only to structure and to coordinate the operation of the duty.

The deontological argument begins with the observation that the idea of an individual's being under a moral duty is intimately related to the notion that health and life are of distinctive importance. The concept of duty applies only to an individual endowed with the capacity to make choices and to set ends for himself.¹⁴³ Further, the person, as a purposive and choosing entity, does not merely set physical integrity as one of his ends; he requires it as a precondition to the accomplishment of the purposes that his freedom gives him the power to set. As Kant put it, physical integrity is

142. See Fried, *supra* note 58, at 182-84.

143. The concept of duty does not apply to creatures that act out of necessity. I. KANT, *CRITIQUE OF PRACTICAL REASON* 28 (L. Beck trans. 1956); I. KANT, *supra* note 16, at 78-102.

“the basic *stuff* (the matter) in man without which he could not realize his ends.”¹⁴⁴

A person contemplating the ethical exercise of his freedom of action must impose certain restrictions on that freedom. Because morality is something he shares with all humanity,¹⁴⁵ he cannot claim a preferred moral position for himself. Any moral claim he makes must, by its very nature as a moral claim, be one to which he is subject when others can assert it. Acting on the basis of his own personhood therefore demands recognition of the personhood of others. This recognition, however, cannot be elaborated in the first instance in terms of the enjoyment of ordinary material goods. Because no conception of happiness is shared by everyone and is constant throughout any individual's life, the universal concept of personhood cannot be reflected in a system of moral duties directed at the satisfaction of unstable desires for such goods.¹⁴⁶ Physical integrity, by contrast, is necessary for the accomplishment of any human aim, and so is an appropriate subject for a system of mutually restraining duties.

An individual contemplating his actions from a moral point of view must recognize that all others form their projects on a substratum of physical integrity. If he claims the freedom to pursue his projects as a moral right, he cannot as a rational and moral agent deny to others the same freedom. Because his claim to that freedom implies a right to the physical integrity that is necessary to its exercise, he must concede to others the right to physical integrity that he implicitly and inevitably claims for himself.¹⁴⁷

This conception of the right to life and health derives from the notion of personhood that is presupposed by the concept of moral action. So too do the right's natural limitations. The duty of beneficence exacted by this right need not collapse into a comprehensive

144. I. KANT, *supra* note 76, at 112.

145. The parable of the Good Samaritan, *Luke* 10:30, itself emphasizes in its opening formulation that the only relevant quality of the man who fell among the robbers was that he was a human being. See E. CAHN, *THE MORAL DECISION* 195 (1955).

146. See I. KANT, *supra* note 143, at 27.

147. The argument leans heavily on the work of Professor Alan Gewirth. See A. GEWIRTH, *supra* note 141; Gewirth, *The 'Is-Ought' Problem Resolved*, 47 *PROC. & ADDRESSES AMER. PHIL. ASS'N* 34 (1974); Gewirth, *The Normative Structure of Action*, 25 *REV. METAPHYSICS* 238 (1971). My purpose is more modest than his in one crucial respect: it is enough for my purpose that a person who assumes a moral point of view would elaborate a deontological justification of rescue, whereas Gewirth argues that a rational actor must assume the moral point of view. For discussion of this wider claim, see Grunebaum, *Gewirth and a Reluctant Protagonist*, 86 *ETHICS* 274 (1976); Veatch, *Paying Heed to Gewirth's Principle of Categorical Consistency*, 86 *ETHICS* 278 (1976); Gewirth, *Action and Rights: A Reply*, 86 *ETHICS* 288 (1976).

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and self-defeating altruism. Respect for another's physical security does not entail foregoing one's own.¹⁴⁸ The right to life and health, seen to give content to the universal concept of personhood, must be ascribed not only to others, but also to oneself. As Kant put it,

since all *other* men with the exception of myself would not be *all* men, and the maxim would then not have the universality of a law, as it must have in order to be obligatory, the law prescribing the duty of benevolence will include myself, as the object of benevolence, in the command of practical reason.¹⁴⁹

Moreover, the universalizing process radiates outward from the actor: it is only one's desire to act that makes necessary the exploration of the action's implicit claims and thus of the rights that he must rationally concede to others.¹⁵⁰ The priority of the actor is thus embedded in the structure of the argument and should be reflected in the concrete duties that the argument yields.

This outline of deontological analysis can be applied to examine the standard suggestion that the common law should recognize a duty to effect an easy rescue. Such a duty would be the judicial analogue of the moral obligation to respect the person of another and to safeguard his physical integrity, which is necessary for whatever aims he chooses to pursue. The emergency and convenience limitations also fit quite readily into the analysis. An emergency is a particularly imminent threat to physical security, and the convenience limitation reflects the rescuer's entitlement to the priority of his own physical security over that of the endangered person. Although the proposed legal duty fits comfortably within the deontological moral duty of beneficence, however, the two are not co-extensive. Emergencies are not the only circumstances in which life and health are threatened; disease, starvation, and poverty can affect the physical substratum of personhood on a routine basis. If

148. See I. KANT, *supra* note 76, at 53, 122.

149. *Id.* at 118.

150. Kant wrote:

[R]ational nature exists as an end in itself. Man necessarily conceives his own existence as being so; so far then this is a *subjective* principle of human actions. But every other rational being regards its existence similarly, just on the same principle that holds for me; so that it is at the same time an objective principle, from which as a supreme practical law all laws of the will must be capable of being deduced.

I. KANT, *supra* note 16, at 46 (footnote omitted). For the problems of interpretation in this passage, see H. JONES, KANT'S PRINCIPLE OF PERSONALITY 20-26 (1971); Haezrahi, *The Concept of Man as an End-in-Himself*, in I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS WITH CRITICAL ESSAYS 292 (L. Beck trans. R. Wolff ed. 1969). On the priority of the self, see I. KANT, *supra* note 76, at 119; Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1070 (1976).

legal duties must reflect moral ones, should not a legal duty to rescue be supplemented by a legal duty to alleviate those less isolated abridgments of physical security?

The convenience limitation on the rescue duty might similarly be loosened in a deontological analysis. One tempting extension would be very far-reaching: if the physical substratum is the "basic stuff (the matter) in man without which he could not realize his ends,"¹⁵¹ and if we are under a duty to safeguard that substratum in others as in ourselves, the priority that the rescuer can legitimately grant to himself can be only with respect to his physical integrity. Under this extension, a rescuer could—indeed would be obligated to—abstain from acting only if the act would place him in physical danger; if it would not put him in danger, he would be required to attempt a rescue, no matter what the disruption of his life. In Macaulay's famous example,¹⁵² the surgeon would have to travel from Calcutta to Meerut to perform an operation that only he could perform, because the journey, though inconvenient, would not be dangerous. Indeed, he would have to make the trip even if he were about to leave for Europe or to greet members of his family arriving on an incoming ship. The patient's right to physical security would rank ahead of the satisfaction of the surgeon's contingent desires.

The deontological approach to rescue does not compel such a drastic extension. Although every moral person must value physical integrity, its protection is not an end in itself. Rather, physical security is valued because it allows individuals to realize their own projects and purposes. Whatever the reach of the right to physical integrity, therefore, it must allow the rescuer to satisfy his purposes in a reasonably coherent way.¹⁵³ Still, though the extension of the moral duty cannot be so drastic as to require the sacrifice of all of a person's projects, it can be substantial. It can require the rescuer to undergo considerable inconvenience short of fundamental changes in the fabric of his life. The deontological duty relaxes both the emergency and convenience limitations of the duty of easy rescue in emergencies: it applies not only in emergencies but whenever physical integrity is threatened, and it applies even when the rescuer might have to undergo considerable inconveniences. The duty might, after all, obligate Macaulay's surgeon to travel from Calcutta to Meerut. Would it also require the wealthy to use at least

151. I. KANT, *supra* note 76, at 112.

152. See p. 272 *supra*.

153. A similar point is made by Professor Fried in C. FRIED, *supra* note 14, at 123.

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some of their resources to alleviate the plight of the starving and the afflicted? For those concerned about the possibility of setting principled limits to a duty of rescue,¹⁵⁴ the question is critical.

The objection to an affirmative answer to the question rests on the premises that even the wealthy are under no obligation to be charitable and that the afflicted have no right to receive charity. Under the deontological theory, those premises are incorrect. The duty of beneficence derives from the concept of personhood; it is therefore not properly called charity, for the benefactor's performance of this duty is no reason for self-congratulation.¹⁵⁵ Although the duty is an imperfect one—"since no determinate limits can be assigned to what should be done, the duty has in it a play-room for doing more or less,"¹⁵⁶ as Kant said—it is nonetheless a duty to the performance of which the recipient is entitled.

The extent of the duty of beneficence, of course, can still be troubling. It is the indeterminateness of the duty, the "play-room," that is particularly relevant to this problem. Kant meant by this expression that the form and the amount of the benefaction would vary, depending on the resources of the benefactor, the identity of the recipient, and the recipient's own conception of happiness.¹⁵⁷ The indeterminateness, however, applies not only to the form of the benefaction but also to the linking of particular benefactors to particular beneficiaries. Why should any particular person be singled out of the whole group of potential benefactors, and why should the benefit be conferred on one rather than another person in need? If a duty "may be *exacted* from a person, as one exacts a debt,"¹⁵⁸ it is a debt that leaves unclear the precise terms of discharge as well as the identities of obligor and obligee.

The proper response to this indeterminacy is not to deny that there is a duty. What is required is to set up social institutions to perform the necessary tasks of coordination and determination. Those institutions would ensure that no person is singled out unfairly either for burdens or for benefits, and that the forms of benefaction correlate both with the resources of those who give and with the needs of those who receive. In fact, all Western democracies undertake to perform this task through programs for social assistance. The institutions they establish, however, are primarily leg-

154. *E.g.*, *Epstein Theory*, *supra* note 14, at 198-99.

155. I. KANT, *supra* note 76, at 54; *see* J.S. MILL, *supra* note 50, at 74-75.

156. *See* I. KANT, *supra* note 76, at 121.

157. *See* M. GREGOR, *LAWS OF FREEDOM* 95-112, 194-96 (1963).

158. J.S. MILL, *supra* note 50, at 232-33.

islative and administrative; precisely because a general duty of beneficence is imperfect, it cannot be judicially enforced. The traditional claim-settling function of courts does not permit the transfer of a resource from one person to another solely because the former has it and the latter needs it. Such judicial action would unfairly prefer one needy person over others¹⁵⁹ and unfairly burden one resourceful person over others. Because the duty of beneficence is general and indeterminate, it does not, in the absence of legislative action that specifies and coordinates, yield judicially enforceable moral claims by individuals against others.

The significant characteristic of the emergency and convenience limitations is that, in combination, they eliminate the "play-room" inherent in the duty of beneficence, thus providing a principled response to Kant and to Epstein and rendering the narrower duty to rescue appropriate for judicial enforcement. An emergency marks a particular person as physically endangered in a way that is not general or routine throughout the society. An imminent peril cannot await assistance from the appropriate social institutions. The provision of aid to an emergency victim does not deplete the social resources committed to the alleviation of more routine threats to physical integrity. Moreover, aid in such circumstances presents no unfairness problems in singling out a particular person to receive the aid. Similarly, emergency aid does not unfairly single out one of a class of routinely advantaged persons; the rescuer just happens to find himself for a short period in a position, which few if any others share, to render a service to some specific person. In addition, when a rescue can be accomplished without a significant disruption of his own projects, the rescuer's freedom to realize his own ends is not abridged by the duty to preserve the physical security of another.¹⁶⁰ In sum, when there is an emergency that the rescuer can alleviate with no inconvenience to himself, the general duty of beneficence that is suspended over society like a floating charge is temporarily revealed to identify a particular obligor and obligee, and to define obligations that are specific enough for judicial enforcement.

159. The unfairness of preferring the squatters to other homeless persons was adverted to by Lord Justice Megaw in *London Borough of Southwark v. Williams*, [1971] 2 All E.R. 175, 182 (C.A.) (Megaw, L.J.).

160. In I. KANT, *supra* note 76, at 49, Kant writes: "Imperfect duties, accordingly, are only duties of virtue. To fulfill them is merit (*meritum* = +a); but to transgress them is not so much guilt (*demeritum* = -a) as rather mere lack of moral worth (= 0), unless the agent makes it his principle not to submit to these duties." Is not a person who refuses to rescue another at no cost to himself "making it his principle not to submit to these duties?"

Duty to Rescue

Conclusion

The problem of rescue is a central issue in the controversies about the relationships between law and morality, between contract and tort, and between utilitarian and deontological ethics. The argument of this article has been that tort law's adoption of a duty of easy rescue in emergencies would fit a common-law pattern, found principally in contract law, that gives expression to the law's understanding of liberty. This pattern reveals that the common law is already instinct with the attitude of benevolence on which a duty to rescue is grounded. The attitude of benevolence is accepted by many legal commentators as a basic moral intuition, yet the particular duty proposed in this article can be systematically elaborated in both the utilitarian and deontological traditions. For those who believe that law should attempt to render concrete the notion of ethical dealing between persons, as well as for those concerned about the method of common-law evolution or about the social costs of legal rules, the article provides an argument for changing the common-law rule on rescue.