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The Duty to Rescue

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NOTES

THE DUTY TO RESCUE

Historically, Anglo-American law has been reluctant to enforce moral duties.¹ A number of early cases have held that the law will not intervene where affirmative benevolence has been withheld to the detriment of the plaintiff.² This laissez faire doctrine has been specially scrutinized because the cases involve conduct that is regarded as outrageous. The judicial response has not been to abrogate the rule but to carve out an array of exceptions by using legal categories from various fields of law to establish a legal as well as a moral relationship between plaintiff and defendant.³ This approach has resulted in much uncertainty as to whether any given case qualifies under an established exception or might result in a new exception.⁴ The antiquity and moral context of this doctrine reveal two subjective reasons why there exists a very broad consensus favoring the creation of a legal duty to rescue.⁵ First, the laissez faire rule is old, times have changed and modern complex society appears incompatible with the rule.⁶ Second, the rule appears morally

1. The term "duty" is ambiguous. Throughout this note, the phrase "legal duty" refers to a relationship between parties that is necessary to create a cause of action, while the phrase "moral duty" refers to norms that exert external influence on choices of conduct.

2. *See, e.g.*, *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 261, 44 A. 809, 811 (1897): The duty to protect against wrong is . . . a moral obligation only, not recognized or enforced by law.

See also *Union Pac. Ry. v. Cappier*, 66 Kan. 649, 653, 72 P. 281, 282 (1903): "With the humane side of the question courts are not concerned."

3. *Territory v. Manton*, 8 Mont. 95, 19 P. 387 (1888) (husband-wife); *Pacific Atlantic S.S. Co. v. Hutchison*, 242 F.2d 691 (9th Cir. 1957) (shipmaster-crew); *Devlin v. Safeway Stores, Inc.*, 235 F. Supp. 882 (S.D.N.Y. 1964) (businessman-customer); *Yazoo & M.V.R.R. v. Byrd*, 89 Miss. 308, 42 So. 286 (1906) (carrier-passenger); *Pirkle v. Oakdale Union Grammar School Dist.*, 40 Cal. 2d 207, 253 P.2d 1 (1953) (school-pupil); *Anderson v. Atchison, T. & S.F. Ry.*, 333 U.S. 821 (1948) (employer-employee).

4. An excellent example is *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959), where the court declined an opportunity to create another exception based on a business host-guest relationship. The outcome in a similar case today could not safely be predicted in any American jurisdiction.

5. An avalanche of articles criticizing the state of the law was triggered by Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908). The unanimity is startling. *See, e.g.*, the views of the distinguished members of the University of Chicago symposium compiled in *THE GOOD SAMARITAN AND THE LAW* (J. Ratcliffe ed. 1966) [hereinafter cited as *GOOD SAMARITAN*].

6. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25 (1928); Bohler, *The Moral Duty to Aid Others as a Basis of Tort Liability* (pts. 1-2), 56 U. PA. L. REV. 217, 316

barbaric inasmuch as it permits highly reprehensible conduct.⁷

These facts indicate that a legal duty to rescue may be subjectively desirable, but assuming that legal liability must be objectively justified as well, the following analysis will attempt to show that the creation of a legal duty to rescue is neither effective nor proper. To this end it should be noted that the efficacy of a legal duty to rescue is an empirical inquiry, determining what effects actually impinge on the citizenry and on social institutions. In contrast, the propriety of such a legal duty is a philosophical inquiry, turning on the nature of law and on evaluation of the effects resulting from the adoption of one or the other legal posture.

Four arguments frequently advanced in favor of creating a legal duty to rescue are: (1) compensation of the injured, (2) enhancement of the legal system's public image, (3) elimination of the possibility that a laissez faire policy would be tantamount to official approval of immoral conduct and (4) stimulation of rescue in order to save lives. The first three arguments will be analyzed in order, and the ramifications will be carried forward to an analysis of the fourth and most important argument.

COMPENSATION FOR THE INJURED

A tort law⁸ legal duty to rescue is a potential source of compensation for losses. The need for compensation, however, does not speak to the need for a legal duty to rescue. Further considerations are necessary in order to make the logical leap from "compensation is needed" to "compensation by the putative non-rescuer is needed." In the usual tort case these considerations include culpability and risk-spreading.⁹ In rescue cases, however, there are elements that nullify these policies.

Culpability

Although moral culpability is almost always necessary for liability, it is very rarely sufficient. On the one hand, postulating that "causing" the loss by failing to prevent it morally obligates the non-rescuer to

(1908); Hofstetter & Marshall, *Amendment of the Belgian Code Penal: The Duty to Rescue Persons in Danger*, 11 AM. J. COMP. L. 66 (1962).

7. The results of these [sic] cases and similar ones are vivid illustrations of the fact that a change in the law is required in order to prevent such *inhumane decisions* in the future.

Note, *Duty to Aid One in Peril Good Samaritan Laws*, 15 How. L.J. 672, 674 (1969) (emphasis added). This view confuses the conduct of the putative rescuer with the conduct of a judge and jury.

8. The scope of this analysis is restricted to tort law since criminal sanctions are not related to personal compensation except under the special conditions where criminal legislation may argue for tort liability. See, e.g., *Brown v. Shyne*, 242 N.Y. 176, 151 N.E. 197 (1926); *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

compensate the injured and then contending that this subjective postulate constitutes objective justification for the legal duty to rescue is to beg the question. The original issue is whether a legal duty to rescue is justifiable in the presence of a concession that there exists a moral duty to rescue,¹⁰ and obviously the inquiry is not advanced by adding a moral duty to compensate. On the other hand, if the compensatory obligation of the non-rescuer is said to rest solely on the just deserts of the injured, it is evident that justice to the injured is only served by chance, since the existence of a legally identifiable non-rescuer is as fortuitous as his ability to compensate adequately. While it may be claimed that fortuitous compensation is better than none, such a claim assumes that the injured has no other recourse, an assumption belied by the prevalence and effectiveness of health and accident insurance.

Risk Spreading

To invoke the risk-spreading policy is to treat the compensatory relationship as economic rather than moral. This view is even less persuasive. Non-rescuers are no more able to bear losses than are the injured, nor do non-rescuers present a broader base on which to spread the risk. Further, holding non-rescuers liable for preventable losses would not decrease the cost of or the need for accident insurance¹¹ since very few accident losses are preventable by rescue. Moreover, legal liability for failure to rescue is probably not amenable to actuarial analysis since past experience is unrelated to the future conduct of any given applicant. Consequently, "rescuers" would necessarily be included in the risk pool. At any rate, normal accident insurance is equally necessary with or without a legal duty to rescue and is already computed so as to be applicable to failure-to-rescue cases. Thus, "failure to rescue" insurance is uneconomical because it does not envision a logical risk pool and because it is actuarially redundant.¹² Finally, it is anomalous that such liability insurance would

9. A third consideration is loss prevention, which depends entirely on the efficacy of the legal duty to rescue, discussed at note 19 *et seq. infra* & text accompanying.

10. It is conceded that "saving lives is a good." This concession will play an important role in all that follows.

11. Cost would be determined by the probability of a previously uncompensated accident discounted by the probability of compensation by a legally identifiable non-rescuer. Clearly, this discount would be *de minimis* because failure-to-rescue cases are only a percentage of cases where rescue is possible, and these cases in turn are an extremely small percentage of accidents in general. The need for accident insurance is even less related to liability, since the first element of the need for insurance is the insured's social and financial situation, a factor totally independent of the likelihood that he will be forsaken when imperiled.

12. Though theoretically possible, it is doubtful that the cost of ordinary accident insurance would be decreased by a clause releasing the insurer in the event the insured

permit the policy-holder to rationalize non-rescue. Therefore, the extraction of compensation from the putative non-rescuer is of no consequence in arguing for the creation of a legal duty to rescue.

ENHANCING THE STATUS OF THE LAW

Proponents of the second argument contend that the legal system is demeaned by the absence of a legal duty to rescue.¹³ Conscience-shocking conduct, however, can be condoned without shocking the conscience. Consider the following judicial comment on a non-rescuer:

[H]e may, perhaps, justly be styled a ruthless savage and a moral monster, but he is not liable in damages. . . .¹⁴

It is not unreasonable to suggest that the conduct shocked the judge but that the decision did not. For some, however, such a decision is unfortunate¹⁵ and thereby disparages the legal system. Note the assumptions underlying this view: (1) the law ought to enforce a moral duty to rescue and (2) defendant's conduct did breach a moral duty. With respect to the second assumption, recall that it has been conceded that there exists a moral duty,¹⁶ but it is not conceded that failure to rescue necessarily constitutes a breach of that duty. The bare factual context of conduct is never sufficient to justify moral outrage. Even under the strictest teleological ethics (where the effects of conduct suffice to classify it as moral or not moral) state of mind may function at least as an excuse. An example of a state of mind that is not exculpatory is the callousness that denies the assumption that a moral duty exists, so that failure to rescue out of callousness is necessarily a breach. An example of a state of mind that may well be exculpatory is the type of cowardice¹⁷ wherein the putative rescuer is terror-stricken or awe-stricken by the very presence of peril but does not deny the moral duty to rescue. There is little rationale and even less humanity in viewing a cowardly act as immoral. Cowardice is more akin to the excuse of impossibility than to callousness. Consequently, since justifiable moral outrage about conduct requires a consideration

was not rescued by a spectator who satisfied the criteria for legal liability and who was either insured or not judgment-proof.

13. Honoré, *Law, Morals and Rescue*, in *GOOD SAMARITAN*, *supra* note 5, at 225.

14. *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1897).

15. "Fortunately, the law may be changing in this type of case. . . ." Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in *GOOD SAMARITAN*, *supra* note 5, at 27.

16. See note 10 *supra* & text accompanying.

17. The reference to cowardice is not directed toward the case where failure to rescue results from the non-rescuer's fear for his own safety, but rather to the case where the existence of peril is debilitating.

of the state of mind, and since cowardice is non-volitional, cowardice cannot engender justifiable moral outrage. Therefore, a legal duty to rescue cannot enhance the status of law by impinging on cowardly conduct.

Turning to the first assumption, that the law ought to enforce this moral duty, observe that whenever a legal duty to rescue "works" it causes rescue, and whenever it "fails" it results in a cause of action. "Work" and "fail" here refer to fulfilling the legal purpose. But from the public perspective, a legal duty "works" when callousness generates liability. If a legal duty to rescue is to insure that callousness will generate liability, the legal duty may have to be formulated so broadly as to be overinclusive. No matter how it is formulated, in view of the haphazard occurrence of occasions for its application and the fact that all such occasions are crises, uncertainty as to what conduct will fulfill the legal duty is an unavoidable concomitant. Moreover, since cowards are many (even if their ranks are diminished by the existence of a legal duty to rescue) and the callous are few, to the degree that cowardly conduct is threatened the uncertainty is compounded. Thus, a legal duty to rescue that might subsume cowardly conduct has a high potential for unnerving the citizenry rather than cultivating public respect.

The foregoing indicates that "enhancing the status of the law" refers primarily to the case of the "moral monster" and calls for distinguishing callousness from cowardice. Supposing that this can be done and that enough breadth can be retained so as not to "fail" in egregious cases, the status of the legal system could theoretically be improved by creating a legal duty to rescue.¹⁸ It remains to be considered whether this improvement is compatible with the policy of stimulating rescue.

NOT HAVING A LEGAL DUTY TO RESCUE MAY ENCOURAGE NON-RESCUE

This third claim asserts that the absence of a legal duty to rescue must function as official approval of non-rescue, and is as much a legal

18. The following arguments indicate that the possibilities for improvement are minimal: (1) Statutory and common-law standards for affirmative benevolence may appear to the public as paternalistic substitutes for individual judgment or as usurpations of individual morality. *I.e.*, in addition to the threat of overinclusiveness there is an element of insult which demeans rather than enhances the status of the law. (2) Ordinarily, criminal sanctions do not enhance the stature of the law. They are founded on fear, an atmosphere in which respect rarely flourishes. (3) Civil liability is less oppressive, usually because its threat can be countered by precautions. For a legal duty to rescue, however, even caution is difficult in crisis; to expect precaution is highly optimistic.

intervention as a positive sanction would be. A legal duty to rescue attempts to cause conduct that conforms to the consensus morality. Clearly, it is more difficult to cause conduct counter to the consensus morality. Therefore, the possibility that the absence of a legal duty to rescue will encourage non-rescue is directly proportional to and necessarily less than the possibility of encouraging rescue by creating a legal duty. Indeed, the disparity is substantial because (1) rescue cases carry strong moral overtones, a condition in which the efficacy of the law is most attenuated, and (2) rescue cases involve emergency action, a kind of conduct least likely to be influenced by abstractions like the absence of a legal duty to rescue, particularly since "habits" cannot be created for emergency situations.

STIMULATION OF RESCUE

The strongest argument in favor of creating a legal duty to rescue is that imposing such a duty would cause lives to be saved. The major premise for this argument is simply that "lives are of value," a premise granted for the purposes of this discussion of efficacy. The minor premise that "a legal duty to rescue would increase the incidence of rescue" is to be investigated here. Conceding the major premise is an admission that the purpose (not the effect) of the proposed legal doctrine is presumptively "good."¹⁹ Therefore, even if it cannot be shown empirically that the probability of rescue is increased, the argument still has force. Showing that no positive results can be attained weakens the claim, but to negate the claim it must be shown that there exist countervailing negative effects.

In order to weaken the stimulation-of-rescue argument, some may contend that there exists no judicially manageable formulation of a legal duty to rescue. However, a number of careful formulations have been developed.²⁰ France and Russia have long experience with such liability, both civil and criminal.²¹ "Workable" examples exist in a dozen or so other countries.²² There are many difficulties, but a legal duty to rescue, though involved,²³ is neither too nebulous for advocacy proceedings, nor

19. See note 10 *supra*.

20. An example of a proposed criminal statute appears in Note, *The Bad Samaritan: Rescue Reexamined*, 54 GEO. L.J. 629 (1966). Proposed civil rules are legion. An excellent example of these is presented in Rudolph, *The Duty to Act: A Proposed Rule*, in GOOD SAMARITAN, *supra* note 5, at 243.

21. See Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952).

22. These include Holland, Germany and Belgium, whose laws are discussed in Tunc, *The Volunteer and the Good Samaritan*, in GOOD SAMARITAN, *supra* note, 5 at 43.

23. A simplified formulation illustrating some of the elements might be:

foreign to American courts nor fatally violative of existing legal doctrines.²⁴

A second contention is the outright claim that a legal duty to rescue would in fact decrease the incidence of rescue. There are many quirks in human behavior, and though the claim is conjectural, it is not at all incredible. If it is costly to be a spectator of peril, one can cease being a spectator by becoming an actor or by simply "not seeing." Experience has shown that legal sanctions do not guarantee that the sanctioned conduct will decrease.²⁵ Clearly, prohibiting conduct is not like requiring conduct. Moreover, specifying legal duties entails specifying what will constitute defenses and exceptions. In rescue cases, where a qualified²⁶ duty requires affirmative action, the game-theory response is (1) to rescue, (2) to go through the motions of rescue, (3) to render oneself unable to rescue or (4) to be "unaware" of the peril. The last three options not only subvert the life-preserving purpose of the law but make voluntary rescue less likely. In a borderline case, a legal duty could be the value that tips the scales in favor of rescue. However, if a spectator chooses to "not see" the peril, he not only fails to rescue, but he fails to publicize the peril to a more decisive rescuer. The causal relation between law and conduct is rarely straightforward, but absent concrete evidence that a legal duty to rescue may inhibit rescue, the foregoing argument is proffered as cautionary only and is hereby abandoned.

The efficacy of a legal duty to rescue is related to a number of factors. A legal duty to rescue is at best difficult to enforce, and, as with most legal doctrines, efficacy depends upon enforceability. Also, to be efficacious a legal duty to rescue must influence conduct where a moral duty to rescue does not. Note that the pervasiveness and intensity of the moral duty to rescue is the genesis of the demand for a legal duty to rescue, but the potential efficacy of a legal duty to rescue decreases as the pervasiveness and intensity of the moral duty increase.

The most important element of a legal duty to rescue is the nature of the conduct required. There are many legal duties requiring affirmative conduct, but the duty to rescue is a unique case in that the conduct

When the peril and the means to rescue are known and there is no substantial risk to the putative rescuer and the harm is highly probable but preventable.

24. This last point is expressly addressed by Rudolph, *The Duty to Act: A Proposed Rule*, in GOOD SAMARITAN, *supra* note 5, at 243.

25. Possible examples are the use of alcohol and narcotics, prostitution and gambling. The possibility that legal sanctions will fail to decrease the conduct sanctioned is even greater when the conduct is inaction, as in rescue cases.

26. See, e.g., the qualifications in note 23 *supra*.

required is such that it cannot be performed unless a certain state of mind prevails. To illustrate, consider that a legal duty to pay taxes succeeds whether the taxpayer is reluctant or eager. On the one hand, rescue undertaken reluctantly is unlikely to succeed, and in many instances rescue cannot be undertaken at all. This is evident in the case where reluctance is a manifestation of cowardice.²⁷ On the other hand, a callous spectator may not care to rescue, but, like the disgruntled taxpayer, he is at least subject to coercion. The awe-struck spectator, however, is immune from legal pressure. Thus, the life-preserving aspect of a legal duty to rescue supports only a legal duty that attempts to deter callous failure to rescue. Consequently, the arguments concerning compensation for the injured and official encouragement of non-rescue also favor liability only for callous failure to rescue, for both these arguments are directly tied to stimulating rescue. This conclusion should not be surprising since callous failure to rescue is the outrageous conduct that raised the issue initially. The logic of the relationships among the four arguments favoring a legal duty to rescue requires that overinclusiveness in the definition of such a duty is indefensible.

In legal terms the implication is that a legal duty to rescue cannot be justifiably imposed as a life-preserving doctrine if the defendant's conduct is judged objectively, in terms of the reasonable man. To some degree the standard must be subjectivized in terms of the reasonable coward. But a legal duty to rescue which includes a subjective qualification must also include an affirmative defense that requires self-abasement by forcing the defendant to proclaim himself a coward. Moreover, subjectivizing the standard to exclude the coward from liability opens the defense to the callous. The first possibility is precisely counter to the policy of enhancing the status of the law; the second possibility subverts the policies of saving lives and compensating injured parties, since unenforceability greatly influences deterrence. Yet these are the very arguments that require a subjectively delineated legal standard.

The possibility remains, however, that differences in degree of all these effects may still allow a net increase in lives saved. The foregoing discussion indicates only that the net effect is minimal. The task remaining, then, is to append sound reasons showing the impropriety of a legal duty to rescue in order to overcome the original presumption granted to a life-preserving policy.

27. See note 17 *supra*. If the sheer sight of a train bearing down on someone is sufficient to render a spectator speechless, a legal duty to warn is logically irrelevant in terms of inciting conduct since speechlessness precludes warning.

PROPRIETY

The central thesis in discussing the propriety of a legal duty to rescue is that the legal system is constrained to operate only with regard to issues in which external conduct is relevant. Consequently, a legal distinction that classifies the citizenry solely by a criterion of state of mind is improper. Although it is possible that a legal doctrine can properly classify conduct by differentiating on the basis of state of mind,²⁸ the differentiation itself must rest on other external conduct. Thus, it is permissible for a legal doctrine rationally to infer a state of mind by scrutinizing conduct, but the conduct scrutinized cannot be the conduct that is the object of the legal doctrine. It would be logically circular to proscribe conduct only in the presence of a specified state of mind and then to infer the state of mind from that conduct. It would also be morally unpalatable as the ultimate invasion of individuality by a social institution.

In the specific case of the duty to rescue there is a singular vulnerability to these improprieties. First, the states of mind to be differentiated include cowardice, which is especially related to one's individual nature. In particular, cowardice is not susceptible to volitional restraint. Moreover, factors related to one's nature are insulated (but not isolated) from the impact of legal doctrines by substantive policies.²⁹ Secondly, it is not possible to infer state of mind from inaction.

It has previously been shown that a legal duty to rescue is justifiable only if it distinguishes callousness from cowardice. But the conduct from which states of mind can be inferred cannot properly or logically be the inaction of non-rescue. Given that rescue situations are emergencies, all other conduct is irrelevant to state of mind. Therefore, the law is precluded from creating a legal duty to rescue as a matter of propriety. Admittedly, this conclusion is deontological, for it assumes that morality is a function of state of mind and volition.

There still remains a countering teleological view. This utilitarian perspective, obviously adopted by most writers on the subject of the legal duty to rescue, permits moral evaluation without regard to state of mind. Thus, inaction in rescue cases may properly be the subject of legal doctrines under certain utilitarian standards. But this reverses the critical issue of efficacy, for teleologically a legal duty to rescue is not justifiable in terms of the utility of rescue, but only in terms of the utility of the legal duty. This reversal forfeits the presumption favoring life-saving

28. Kenny, *Intention and Purpose*, 63 J. PHILOSOPHY 642 (1966).

29. The conflicts in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), are illustrative of this kind of insulation.

policies.³⁰ Therefore, the impropriety of legal intervention is even more likely to override the minimal efficacy of a legal duty to rescue. If the presumption favoring the life-saving policy is lost, and the efficacy of a legal duty to rescue is problematical, the implication is that there exists insufficient justification for creating such a duty. Particularly since most advocacy of a duty to rescue is born of moral outrage, and moral outrage returns full circle to a deontological perspective.

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30. Consider the following utilitarian amplification on this point:

A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make anyone answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception.

J.S. MILL, ON LIBERTY 11 (A. Castell ed. 1947).

And the subsequent explanation of "caution":

There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: either because it is a kind of case in which he is on the whole likely to act better, when left to his own discretion, than when controlled in any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent. When such reasons as these preclude the enforcement of responsibility, the conscience of the agent himself should step into the vacant judgment-seat and protect those interest of others which have no external protection; judging himself all the more rigidly, because the case does not admit to his being made accountable to the judgment of his fellow creatures.

Id. at 11-12.