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# Foundations of the Duty to Rescue

Steven J. Heyman

*IIT Chicago-Kent College of Law*, [sheyman@kentlaw.iit.edu](mailto:sheyman@kentlaw.iit.edu)

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# Foundations of the Duty to Rescue

*Steven J. Heyman\**

I.	INTRODUCTION.....	674
II.	HISTORICAL FOUNDATIONS.....	682
	A. <i>Misfeasance and Nonfeasance in Private Law</i> .....	682
	B. <i>The Public-Law Duty to Prevent Criminal         Violence</i> .....	685
III.	THEORETICAL FOUNDATIONS I: EARLY NATURAL RIGHT THEORY AND THE SOCIAL CONTRACT .....	690
	A. <i>The Duty to Prevent Criminal Violence</i> .....	690
	1. The Public Duty.....	690
	2. The Duty to Individuals .....	695
	B. <i>The Duty to Prevent Noncriminal Harm</i> .....	699
	1. The Natural Duty of Individuals .....	699
	2. The Responsibility of the State and Its Citizens .....	703
	a. <i>The State's Duty to Preserve the                 Lives of Its Members</i> .....	703
	b. <i>The Duty of Citizens</i> .....	706
	i. The Public Duty.....	706
	ii. The Duty to Individuals .....	707
	C. <i>The Duty to Rescue and the Liberal         Tradition</i> .....	707
IV.	THEORETICAL FOUNDATIONS II: FORMALISM AND LATER NATURAL RIGHT THEORY.....	710
	A. <i>The Challenge of Formalism</i> .....	710

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\* Assistant Professor, Chicago-Kent College of Law, Illinois Institute of Technology. A.B. 1979, J.D. 1984, Harvard University. This paper was awarded Honorable Mention in the Ninth Annual Scholarly Papers Competition of the Association of American Law Schools, and was presented at the AALS Annual Meeting held in Orlando, Florida, in January 1994. I am grateful to Akhil Amar, Katherine Baker, Alison Baldwin, Randy Barnett, Anita Bernstein, Jacob Corré, Linda Hirshman, James Lindgren, Richard McAdams, Marshall Shapo, Ernest Weinrib, and Richard Wright for their contributions to this Article. Anne Asulin, Rachel Cowan, Gail Friedman, and Kristen Westman provided valuable research assistance. My work was supported by the Marshall D. Ewell Research Fund.

B.	<i>Hegel's Philosophy of Right</i> .....	713
1.	Right .....	714
2.	Morality .....	717
3.	Community .....	721
	a. <i>The Relationship Between Citizen         and State</i> .....	724
	b. <i>The Bond Between Citizens</i> .....	730
4.	Conclusion.....	732
C.	<i>Hegel and Formalism</i> .....	733
V.	TOWARD A LIBERAL-COMMUNITARIAN THEORY OF THE DUTY TO RESCUE .....	738
A.	<i>The Liberal-Communitarian Theory and Other Rationales for a Duty to Rescue</i> .....	738
B.	<i>The Contours of a Duty to Rescue</i> .....	746
1.	The General Duty.....	746
2.	Special Relationships .....	751
	a. <i>The Nature and Role of Special         Relationships</i> .....	751
	b. <i>The Relation Between Special         Duties and the General Duty to         Rescue</i> .....	753
VI.	CONCLUSION .....	755

#### I. INTRODUCTION

In 1908, James Barr Ames concluded his classic lecture on *Law and Morals* by posing the problem of a duty to rescue.<sup>1</sup> Suppose, he said, that you are walking over a bridge when a man falls into the water and cries out for help. Do you have an obligation to save him from drowning by throwing a nearby rope? As the law then stood, the answer clearly was no. "The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not."<sup>2</sup> Nevertheless, Ames asserted, it was difficult to see why the law should remain in this condition. The law was utilitarian; it existed to serve the reasonable needs of society.<sup>3</sup> We would all be better satisfied, he thought, if a person who refused to rescue another from death or great bodily harm, when he could do so

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1. James Barr Ames, *Law and Morals*, 22 Harv. L. Rev. 97, 111-13 (1908).  
2. *Id.* at 112.  
3. *Id.* at 110.

with little or no inconvenience to himself, could be punished and required to compensate the victim or his survivors.<sup>4</sup>

Over the century, Ames's view has achieved only limited success. Many scholars have sharply criticized the general rule against a duty to rescue.<sup>5</sup> Judicial decisions have steadily eroded the rule in two ways: by recognizing exceptions in which the law imposes a duty to aid strangers and by expanding the class of special relationships that give rise to affirmative duties.<sup>6</sup> Despite these developments, the absence of a duty to rescue remains the general rule in both tort and criminal law. Although the persistence of this doctrine sometimes is attributed merely to the practical difficulties involved in defining and enforcing such an obligation,<sup>7</sup> the true explanation appears to lie deeper, in uncertainty about whether a duty to rescue is justified in principle.

Three forceful arguments have been advanced against a legal duty to rescue. The first is historical: in the absence of an undertaking by the defendant or a special relationship between the parties, the common law imposed liability solely for misfeasance, or wrongfully causing harm to others, and not for nonfeasance, or failing to act for their benefit.<sup>8</sup> Of course, the mere fact that the law traditionally has taken a position does not mean that the position is sound or should be followed.<sup>9</sup> The historical objection implies, however, that

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4. *Id.* at 112-13. In order to accurately represent some of the views discussed in this Article, I shall follow their use of masculine language when describing those views. On the feminist critique of traditional approaches to the problem of rescue, see text accompanying notes 342-55.

5. See, for example, Restatement (Second) of Torts § 314 cmt. c at 117 (1965) (stating that "[s]uch decisions have been condemned by legal writers as revolting to any moral sense"); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56 at 376 (West, 5th ed. 1984) ("*Prosser and Keeton*"); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. Legal Educ.* 3, 36 (1988) (arguing that "[t]he 'no duty' rule is a consequence of a legal system devoid of care and responsiveness to the safety of others").

6. Under contemporary tort law, an actor has a duty to aid a stranger in two categories of cases: (1) when the actor's own conduct, although innocent, has caused either harm or an unreasonable risk of harm to another, see Restatement §§ 321-22; and (2) when the actor has voluntarily undertaken to act for the benefit or protection of another, see *id.* §§ 323-24. For the most part, the second category is limited to situations in which the actor's conduct has made the other worse off, either through detrimental reliance or by increasing the risk of harm. In general, therefore, these two categories represent an extension of the notion of misfeasance. In this respect they differ from duties based on special relationships, which constitute true affirmative duties to protect others from harm regardless of its source. Compare *id.* § 314A cmt. d (discussing the scope of these duties). On the relationships that give rise to such duties, see text accompanying note 387.

7. See *Prosser and Keeton* § 56 at 376 (cited in note 5).

8. See Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, in Francis H. Bohlen, *Studies in the Law of Torts* 33 (Bobbs-Merrill, 1926).

9. As Justice Holmes observed, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds on

the no-duty doctrine is so deeply woven into the fabric of Anglo-American law that it cannot be altered without radically transforming that law. Advocates of such change bear a heavy burden of persuasion.<sup>10</sup> Moreover, the historical argument suggests that the absence of a duty to rescue is consonant with—and indeed may be required by—the fundamental substantive values of the legal system.

The second objection focuses on these substantive values. It contends that a legal duty to rescue would run counter to the liberal principles that inform our legal order. Invoking the natural rights tradition of Locke and Kant, this argument asserts that the proper function of law is to protect individual rights against infringement. As long as a person refrains from injuring others, he should be free to act as he wishes. It is inappropriate for the law to require one person to act solely for the benefit of another. Although there may be a moral obligation to aid others in distress, the enforcement of moral precepts is beyond the legitimate province of law. While this argument has been articulated most forcefully by libertarian writers,<sup>11</sup> it reflects an understanding of the liberal tradition that is shared by many others as well.<sup>12</sup>

The historical and liberal arguments reject a duty to rescue as a matter of both tort and criminal law. A third objection, which focuses specifically on tort law, derives from the theory of legal formalism developed in recent years by Ernest J. Weinrib.<sup>13</sup> Also drawing on

which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

10. Compare Bohlen, *Affirmative Obligations*, in *Studies in the Law of Torts* at 37 (cited in note 8) (noting that "[i]t is inevitable that the duties which public policy imposes on various relations shall be ascertained not only by a balance struck between [the values on both sides of the issue,] but also by a regard for, and deference to, long established precedents and usages").

11. The best-known libertarian critique of a duty to rescue is Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 197-204 (1973). See also Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 Phil. & Pub. Aff. 230 (1980). See generally Robert Nozick, *Anarchy, State, and Utopia* ix (Basic Books, 1974) (contending that a legitimate state "may not use its coercive apparatus for the purpose of getting some citizens to aid others").

12. See, for example, Bender, 38 J. Legal Educ. at 33 (cited in note 5) (asserting that the absence of a legal duty to rescue reflects "liberalism's concerns for autonomy and liberty"); Robert Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 Colum. L. Rev. 196, 214 (1946) (attributing the rule to an ideology of individualism).

13. See Ernest Weinrib, *Rescue and Restitution*, 1 S'vara 59 (1990); Ernest Weinrib, *The Special Morality of Tort Law*, 34 McGill L. J. 403, 411 (1989); Ernest J. Weinrib, *Understanding Tort Law*, 23 Valp. U. L. Rev. 485, 516-17 (1989); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 Cardozo L. Rev. 1283, 1286-93, 1297-1301 (1989); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L. J. 949, 978 (1988); Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, 1 Can. J. L. & Juris. 3, 6 (1988); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 Colum. L. Rev. 472, 489 (1987). Weinrib's views are developed more fully in a forthcoming book entitled *The Idea of Private Law* (Harvard U., \_\_\_\_).

the natural right tradition, and especially on the thought of Kant and Hegel, Weinrib contends that the structure of private law, including the law of torts, is inherently negative.<sup>14</sup> Private law consists of commands forbidding individuals to invade the rights of others. On this view, imposing an affirmative duty to rescue would be inconsistent with the very structure of private law.<sup>15</sup>

Taken together, these three arguments constitute a powerful defense of the no-duty doctrine. They assert that imposing an affirmative duty to rescue would conflict with the historical character, the substantive values, and the formal structure of our legal system.

In this Article, I respond to these arguments and develop a rationale for a general duty to rescue. I begin by assessing the widely held view that the traditional common law imposed liability only for misfeasance and not for nonfeasance. As I show in Part II, this view is only partly correct. Although the common law generally imposed no *private* liability for failures to act, it did impose various affirmative duties as a matter of *public* law. Many of these positive duties related to the prevention of criminal violence. In particular, substantial authority supports the view that the common law imposed a duty (enforceable by criminal sanctions) to intervene to prevent a felony of violence in instances in which one knew that such an offense was being committed and had the power to prevent it. Thus, the traditional common law may well have recognized a duty to act in cases like the murder of Catherine Genovese<sup>16</sup> and the New Bedford

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In an excellent earlier article, Weinrib argued in favor of a duty to rescue on moral grounds. See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *Yale L. J.* 247 (1980) ("Affirmative Case"). More recently, however, he has developed the view that law is founded on a conception of right that is prior to a conception of ethics and that ethical considerations therefore cannot properly provide a basis for legal analysis. See Weinrib, 87 *Colum. L. Rev.* at 501-03. For a critique of Weinrib's legal formalism, see Part IV.

14. Weinrib also invokes Aristotle's conception of corrective justice to support his formalist account of private law. See, for example, Ernest J. Weinrib, *Corrective Justice*, 77 *Iowa L. Rev.* 403 (1992). For criticism of Weinrib's reliance on Aristotle, see Steven J. Heyman, *Aristotle on Political Justice*, 77 *Iowa L. Rev.* 851 (1992), and, from a different perspective, Richard W. Wright, *Substantive Corrective Justice*, 77 *Iowa L. Rev.* 625, 683-702 (1992).

15. For Weinrib, as for the libertarians, this structure reflects a particular conception of liberty—in Weinrib's case, a Kantian conception of the freedom of autonomous individuals. See, for example, Weinrib, 1 *Can. J. L. & Juris.* at 16-17 (cited in note 13).

16. In 1964, Catherine Genovese was stabbed to death over a half-hour period in the Kew Gardens section of New York City while neighbors watched from the safety of their apartments. Despite her screams and pleas for help, no one called the police during the assault. See Abraham M. Rosenthal, *Thirty-Eight Witnesses* (McGraw-Hill, 1964); Martin Gansberg, 38 *Who Saw Murder Didn't Call the Police*, *N.Y. Times* 1 (Mar. 17, 1964).

rape<sup>17</sup>—precisely the cases that have generated the greatest public outcry in recent years.

This common-law duty reflected a more general principle of the traditional legal system, which held that all individuals were entitled to protection by the government against violence and injury. In return for this protection, every individual owed a duty to the state not merely to obey the law by respecting the rights of others, but also, when necessary, to actively assist in enforcing the law and maintaining the peace. Ordinarily, of course, the government kept the peace through its own officers. When no officer was present, however, the common law held that “every person [is] an officer” for the preservation of the public peace.<sup>18</sup>

This exploration of the common-law position suggests a crucial insight into the justification for a duty to rescue. Both supporters and opponents of this duty often approach the problem from a private-law perspective, that is, in terms of the rights and duties of individuals viewed as private persons. From this perspective, however, such a duty is difficult or impossible to find, because private law treats individuals as private actors who are entitled to pursue their own interests, as long as they do not infringe the rights of others to do likewise. The common-law position suggests instead that the strongest starting point for the construction of a duty to rescue is to be found in public law, which governs the obligations of citizens toward the community and its members.

A similar point applies to the imagery of the debate over rescue. Academic discussion of the issue tends to focus on Ames's drowning hypothetical.<sup>19</sup> In that case, the danger arises purely from natural forces, not from any human agency (apart from the victim's own conduct). In addition, Ames stipulates that the parties are to be

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17. In 1983, a 21-year-old woman was repeatedly raped and assaulted by four men in a bar in New Bedford, Massachusetts. See *Commonwealth v. Vieira*, 401 Mass. 828, 519 N.E.2d 1320 (1988); *Commonwealth v. Cordeiro*, 401 Mass. 843, 519 N.E.2d 1328 (1988) (affirming convictions for aggravated rape). According to early police statements and news reports, the attack took place in front of at least 15 other patrons, none of whom sought to intervene or call the police, and some of whom even cheered on the assailants. See, for example, *The Tavern Rape: Cheers and No Help*, Newsweek 25 (Mar. 21, 1983). Although these initial reports proved exaggerated, see Jonathan Friendly, *The New Bedford Rape Case: Confusion Over Accounts of Cheering at Bar*, N.Y. Times A19 (Apr. 11, 1984), the incident provoked a strong public reaction, and led to the enactment of legislation in several states requiring bystanders in such cases to at least call the police. For further discussion of these statutes, see note 66.

18. Matthew Hale, 1 *Historia Placitorum Coronae: The History of the Pleas of the Crown* \*489 (photo. reprint 1971) (1736).

19. Ames, 22 Harv. L. Rev. at 112 (cited in note 1). See, for example, Mary Ann Glendon, *Rights Talk* 78 (Free Press, 1991); Restatement § 314 cmt. c (cited in note 5); Bender, 38 J. Legal Educ. at 33-35 (cited in note 5); Epstein, 2 J. Legal Stud. at 189-90 (cited in note 11).

regarded as strangers having no concrete relation to one another.<sup>20</sup> Although Ames himself advocated a duty to rescue, the way in which he formulated the problem is the most difficult in which initially to find such a duty. The paradigm case of a duty to rescue, I shall suggest, is not the drowning stranger but the criminal assault, as in the Genovese and New Bedford cases. In this situation, in which the threat arises from wrongful human conduct, it is easier to see that the parties do have a relationship—one of common citizenship—that can give rise to a duty to aid.<sup>21</sup>

Taking the common-law duty to prevent a felony as a starting point, I turn next to the theoretical foundations of a duty to rescue. As I show in Part III, this duty finds strong support in the classical liberal tradition, including Locke's theory of natural rights and the social contract. According to that theory, government is formed to protect its citizens against violence. In return for this protection, citizens undertake to assist the government in enforcing the laws, an obligation that would extend to preventing a violent crime.<sup>22</sup>

Social contract theory thus provides a philosophical justification for a core duty to prevent violence. As developed thus far, this obligation (like the common-law duty) is limited in two respects. First, it is owed to the state rather than the victim, resulting in criminal but not civil liability. Second, the duty is restricted to the prevention of criminal violence and does not extend to other forms of harm.

In the remainder of Part III, I show that the liberal tradition also provides a rationale for expanding the core duty to encompass both civil liability and noncriminal harm. First, I show that, under social contract theory, the individual's duty to prevent violence can be understood to run not only to the community as a whole but also to his

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20. Ames, 22 Harv. L. Rev. at 112 (cited in note 1) (specifying that the parties are "stranger[s]" whose "only relation [to one another] is that both are human beings").

21. For persuasive criticism of the "stranger" imagery in discussions of the duty to rescue, see Glendon, *Rights Talk* at 77 (cited in note 19). In addition to the image of drowning stranger, the debate over rescue is dominated by the image of the Good Samaritan. See *Luke* 10:26-37. This image often is invoked to suggest that the duty to rescue is an inherently moral or religious one that cannot appropriately be enforced by law. See, for example, *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809, 810 (1897). As this Article argues, however, the strongest basis for a legal duty to rescue is to be found not in morality but in the obligations of citizenship. On the moral argument for a duty to rescue, see text accompanying notes 337-41. For further discussion of the implications of the parable of the Good Samaritan, see note 307.

22. This individual duty is thus a counterpart to the government's duty of protection, which I have argued elsewhere was a central principle of the American constitutional and legal tradition, recognized and adopted by the Fourteenth Amendment. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L. J. 507 (1991).



fellow citizens. Thus, when an individual wrongfully fails to prevent a criminal assault, he breaches an obligation to the victim as well as to the state.

In other words, although we began with the public duty recognized by the traditional common law, in its fully developed form the duty to rescue is not a purely public one. Instead, it is what I shall call a social duty—an obligation owed not only to the community itself but also to the other members of that community. Such obligations, I shall claim, apply as a matter of private as well as public law, giving rise to tort liability to individuals as well as criminal responsibility to the state.

Next, I explore the nature of the harms covered by the duty to rescue. As I show, the natural right tradition gradually developed the view that the function of the state was not merely to protect against violence but also to preserve the lives of its members generally. Accordingly, the individual's duty to act on behalf of the state in an emergency includes the preservation of life against noncriminal as well as criminal harm.

Thus, the classical liberal tradition provides a rationale for a general duty to rescue. According to this view, the community has a responsibility to protect its members against criminal violence and other forms of harm. In return, a citizen has a duty to assist in performing this function by rescuing a fellow citizen in an emergency. This duty is owed not only to the community itself but also to the endangered individual, and thus gives rise to both civil and criminal liability.

In Part IV, I address the legal formalist objection to a duty to rescue in tort law through an exploration of Hegel's *Philosophy of Right*, which Weinrib views as containing the purest expression of the view that private law is negative in character.<sup>23</sup> For Hegel, however, private law is only the first stage in a dialectic that proceeds from law through morality to community. Although the obligations that derive from pure private law are negative, those that inhere in morality and community are positive. As I have suggested, the strongest basis for a duty to rescue lies in the individual's obligations as a member of the community. Finally, I argue that, for Hegel, these obligations run not only to the community itself but also to one's fellow citizens, thereby giving rise to individual rights that are enforceable within the system of private law itself. Thus Hegel's thought, like Locke's, supports a duty to rescue as a matter of both tort and criminal law. Hegel's

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23. See Weinrib, 10 Cardozo L. Rev. at 1286 (cited in note 13).

discussion of law, morality, and community provides an exceptionally rich framework for analysis, which confirms and deepens the account of the duty to rescue set forth in Parts II and III.

In short, this Article develops a theory of the duty to rescue that draws on the common-law and natural right traditions—the same sources that are invoked by the historical, liberal, and formalist arguments in opposition to such a duty. The account that emerges may be called a liberal-communitarian theory of the duty to rescue. It is communitarian in that it finds the justification for such a duty in the individual's responsibility toward the community and in her relationship with other individuals as members of the community. It is liberal in emphasizing that one of the community's paramount obligations is to protect the rights and promote the welfare of the individuals that compose it. In Part V, I state this liberal-communitarian theory in general terms and contrast it with other leading rationales for a duty to rescue, including utilitarian, moral, and feminist approaches.

My object in this Article is to develop a theory of the grounds for a duty to rescue, rather than to advance a practical proposal for establishing such a duty. Nevertheless, any such theory would be incomplete without considering the main features of that duty. Thus, the Article concludes by outlining the implications of the liberal-communitarian theory for the scope of the duty to rescue and for the broader legal framework within which it would exist.

This Article is intended as a contribution to the growing body of work that seeks to understand tort law in terms of right or justice rather than in instrumental terms.<sup>24</sup> At the same time, my hope is to contribute toward a re-orientation of this approach. Scholars in this area often seek to understand tort law purely in terms of private right

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24. See generally *Symposium: Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 Iowa L. Rev. 403 (1992). For an extensive listing of recent work in the area, see Wright, 77 Iowa L. Rev. at 627-29 & nn. 6-14 (cited in note 14).

Of course, a large and important body of literature addresses the problem of rescue from more instrumentalist perspectives, such as utilitarianism and law and economics. See, for example, Marshall S. Shapo, *The Duty to Act: Tort Law, Power, & Public Policy* 3-73 (U. of Texas, 1977) (supporting affirmative duties from a public policy perspective); Ames, 22 Harv. L. Rev. at 110, 111-13 (cited in note 1) (advocating a duty to rescue on utilitarian grounds); William M. Landes and Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83 (1978) (analyzing rescue and related issues in economic terms); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 Va. L. Rev. 879 (1986) (exploring rescue from economic and comparative perspectives); Weinrib, *Affirmative Case*, 90 Yale L. J. at 280-87 (cited in note 13) (developing and criticizing a utilitarian argument for a duty to rescue).

or "corrective justice."<sup>25</sup> A more fruitful approach, I shall suggest, is one that recognizes the interaction between private and public right—between the rights and obligations of private individuals and those that inhere in the relationship between citizens and the state. It is through this approach that we can find the strongest justification for a legal duty to rescue.

## II. HISTORICAL FOUNDATIONS

Nearly all contemporary discussion of the duty to rescue starts from the premise that the "common law has never imposed liability either in tort or in criminal law for failures to rescue" (in the absence of either an undertaking by the defendant or a special relationship).<sup>26</sup> This view, however, is seriously misleading. Although no general duty to rescue existed in private law, the common law often imposed positive duties as a matter of public law, including a duty to assist in preventing criminal violence.

### A. *Misfeasance and Nonfeasance in Private Law*

According to the traditional view, the early common law imposed tort liability only for misfeasance. As Francis H. Bohlen wrote in two influential articles, "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance."<sup>27</sup> "The early law," he asserted,

was a police officer rather than a child's nurse or guardian for the incompetent. While no man was allowed to *act* so as to injure others, the early law recognized no general duty of protection. This was quite a different thing: a conception appropriate to a highly organized civilization. As yet everyone was regarded as able to protect himself, as responsible for his own safety, the law

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25. Ernest Weinrib is the leading exponent of the corrective justice approach. See text accompanying notes 13-15.

26. Joel Feinberg, 1 *The Moral Limits of the Criminal Law: Harm to Others* 127 (Oxford U., 1984). See also, for example, Glendon, *Rights Talk* at 82 (cited in note 19) (observing that "[a]ffirmative legal duties to come to the aid of another were unknown, not only in early English law, but to most other primitive legal systems"); Epstein, 2 *J. Legal Stud.* at 191 (cited in note 11) (referring to "the general common law refusal to require men to be good Samaritans"); Charles O. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in James M. Ratcliffe, ed., *The Good Samaritan and the Law* 23, 23-24 (Anchor Books, 1966) (asserting, "Our common law has always refused to transmute moral duties into legal duties. . . . [I]t is clear at common law that nobody has to lift a finger—let alone spend a dime and dial a phone number or actually render aid—to help a stranger in peril or distress.") (citations omitted).

27. Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, in Bohlen, *Studies in the Law of Torts* at 293 (cited in note 8).

merely saw that he was not interfered with from without. He must take his own precautions, take upon himself the risks of what he may choose to do. Therefore, a mere failure to protect another from a threatened injury . . . was not actionable unless some obligation had been intentionally assumed.<sup>28</sup>

This view of the common-law attitude toward nonfeasance was based in part on the traditional theory of the development of trespass and case, the common-law forms of action that ultimately gave rise to the modern law of torts.<sup>29</sup> According to that theory, the only wrongs that early law was capable of recognizing were those resulting from direct force. For such injuries, the common-law remedy was an action of trespass, a category that included wrongs against the plaintiff's person and goods as well as his land. In the late fourteenth century, however, the common-law courts began to allow a new form of action, known as "trespass on the case" or simply "case." On the traditional view, this new form of action represented "a development from trespass, a conscious reaching out from the central idea of direct forcible injury."<sup>30</sup> Although trespass on the case allowed recovery for indirect wrongs, such as the creation of dangerous conditions, it nevertheless followed trespass in requiring that the harm have been caused by the defendant's wrongful act.<sup>31</sup> Thus, according to the traditional view, misfeasance continued to be fundamental to the early conception of tort.

Contemporary historical scholarship has decisively challenged this view of the rise of trespass and case, contributing to a revised understanding of the common-law position on misfeasance and nonfeasance. As S.F.C. Milsom and others have shown, it was not until the eighteenth century that the test for trespass was defined in terms of direct forcible injury.<sup>32</sup> In the early common law, "trespass" simply meant transgression or wrong.<sup>33</sup> As a general rule, however, the only

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28. Bohlen, *Affirmative Obligations*, in Bohlen, *Studies in the Law of Torts* at 37-38 (emphasis in original) (cited in note 8).

29. For an account of the traditional theory and its connection with the view that the common law imposed no liability for nonfeasance, see S.F.C. Milsom, *Not Doing Is No Trespass: A View of the Boundaries of Case*, 1954 Camb. L. J. 105, reprinted in S.F.C. Milsom, *Studies in the History of the Common Law* 91 (Hambledon, 1985). For further criticism of the traditional theory, see S.F.C. Milsom, *Historical Foundations of the Common Law* ch. 11 (Butterworths, 2d ed. 1981).

30. Milsom, *Historical Foundations* at 284, 309.

31. Milsom, 1954 Camb. L. J. at 107, reprinted in Milsom, *History of the Common Law* at 93 (cited in note 29).

32. See Milsom, *Historical Foundations* at 283, 312 (cited in note 29). The question was finally resolved in *Scott v. Shepherd*, 96 Eng. Rep. 525 (1773).

33. Milsom, *Historical Foundations* at 285 (cited in note 29). As Professor Baker observes, the use of "trespass" in this sense resembles its use in the traditional English translation of the Lord's Prayer ("forgive us our trespasses"). J.H. Baker, *An Introduction to English Legal History* 71 (Butterworths, 3d ed. 1990).

trespass actions that could be brought in the king's courts were those alleging a breach of the king's peace. For all other wrongs, subjects had to seek a remedy in the system of local courts.<sup>34</sup> This restriction did not reflect a substantive conception of the nature of wrongs, but simply a jurisdictional limitation on the king's courts.<sup>35</sup> When this limitation was abolished in the late fourteenth century, legal wrongs in general became actionable in the common-law courts—in an action of trespass if a breach of the peace was alleged, otherwise in an action on the case.<sup>36</sup>

Because actions of trespass were predicated on a breach of the peace, they typically involved misfeasance. Actions on the case, by contrast, imposed liability for nonfeasance as well, in situations in which a plaintiff could show injury resulting from the defendant's breach of an affirmative duty to act. In most instances, such duties were based on an undertaking by the defendant.<sup>37</sup> In a few contexts, however, affirmative duties were imposed by law or by custom having the force of law. For example, innkeepers were obligated to accept travelers and to safeguard their goods against theft.<sup>38</sup> Landowners had a duty to repair river or sea walls adjoining their property to protect against floods.<sup>39</sup> These two examples hold particular interest for our purposes, for they involve affirmative obligations imposed on individuals for the benefit of the public and its members, the breach of which gave rise to liability in tort.<sup>40</sup>

Thus, misfeasance was less fundamental to early tort law than the traditional view supposed. Nevertheless, liability for nonfeasance in the absence of an undertaking was exceptional. In particular, the

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34. See Milsom, *Historical Foundations* at 286-88, 300 (cited in note 29).

35. Baker, *Legal History* at 72 (cited in note 33). See also Milsom, *Historical Foundations* at 284, 300 (cited at note 29).

36. See Baker, *Legal History* at 464 (cited in note 33). As Professor Milsom notes, however, the decision to entertain actions on the case did not mean that every kind of action could be brought before the king's courts; defamation, for example, remained a matter of local jurisdiction until the sixteenth century. Milsom, *Historical Foundations* at 293 (cited in note 29).

37. See Baker, *Legal History* at 459-61 (cited in note 33).

38. See *id.*; J.H. Baker and S.F.C. Milsom, *Sources of English Legal History: Private Law to 1750* at 347 n.1 (Butterworths, 1986) (discussing the development of innkeeper liability for refusing travelers). Beginning in the seventeenth century, similar duties were imposed on common carriers. Baker, *Legal History* at 462 (cited in note 33). Both innkeepers and common carriers were held to a strict standard of liability for loss of goods. *Id.*

39. See Milsom, *Historical Foundations* at 301-04 (cited in note 29).

40. That these duties were imposed for the benefit of individuals, and not only for that of the community at large, is suggested by the language of the writs brought in these cases. For example, the writ might allege that the defendant had a duty to keep his river wall in repair "so that his neighbours come to no harm by his default." *Id.* at 303. For an example of such a case, see *Bernardeston v. Heighlynge* (1344), in Baker and Milsom, *Sources* at 338 (cited in note 38).

common law apparently imposed no duty, as a matter of private law, to rescue another from harm.<sup>41</sup>

### B. *The Public-Law Duty to Prevent Criminal Violence*

In contrast to private law, public law often imposed positive duties. In particular, the traditional common law recognized an obligation—or rather a family of related obligations—to prevent criminal violence.

Most relevant here is the traditional principle that every subject had a legal duty to prevent a felony. This doctrine may be traced as far back as Bracton in the mid-thirteenth century.<sup>42</sup> When discussing the criminal responsibility of various participants in homicide, Bracton observes that an individual “who, though he could rescue a man from death, failed to do so,” is free neither from guilt nor from punishment.<sup>43</sup>

In early modern times, the duty to prevent a felony is supported by a relatively strong line of authority beginning with the first modern treatise on criminal law, Sir William Staunford's *Les Plees del Coron*.<sup>44</sup> A typical statement of the rule appears in Sir William Hawkins's *Pleas of the Crown*, an important eighteenth-century treatise:

[T]hose who by accident are barely present when a Felony is committed, and are merely passive, and neither [in] any Way encourage it, nor endeavor to hinder it, nor to apprehend the Offenders, shall neither be adjudged Principals nor Accessories; yet if they be of full Age, they are highly punish-

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41. See Baker, *Legal History* at 470 (cited in note 33) (stating that “[a] man may know that his neighbour is in distress, but he is not bound in law to go and help him”).

42. See generally George E. Woodbine, ed., *Bracton on the Laws and Customs of England* (Samuel E. Thorne trans., Harvard U., 1968) (“*Bracton*”).

43. 2 *id.*, fo. 121 at 342 (stating, “Not only is he who strikes and slays liable, but he who orders him to strike and slay, for since they are not free of guilt, they ought not to be free of punishment; nor ought he to be free who, though he could rescue a man from death, failed to do so (*Nec etiam ille qui cum posset hominem a morte liberare non liberavit*)”).

44. See William Staunford, *Les Plees del Coron* ch. 45 at 40b (photo. reprint 1971) (1557), translated in *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33, 37 (judgment of Lord Denning):

If anyone happens to be present, when another is killed, or when a felony is committed, and did not come there in the company of the felons, nor was part of their confederacy, but nevertheless did not intervene, or disturb the felons, or raise hue and cry, he is not on that account to be held a principal or accessory, for it is not a felony in him but only an offense for which he can be fined like trespass.

Earlier in the work, Staunford quotes in full Bracton's chapter on homicide, including the statement on the responsibility of one who fails to rescue a man from death. See Staunford, *Les Plees del Coron* at 11b-13a.

able by fine and imprisonment for their Negligence, both in not endeavoring to prevent the Felony, and in not endeavoring to apprehend the Offender.<sup>45</sup>

Similarly, in his own great work on the criminal law, Sir Matthew Hale observes that "every man is bound to use all possible lawful means to prevent a felony," as long as he can do so "without hazard of himself."<sup>46</sup> If he does not, he is subject to fine and imprisonment.<sup>47</sup> This offense, which sometimes was classified as a species of misprision of felony,<sup>48</sup> was recognized by many other leading writers as well.<sup>49</sup>

The treatises of Staunford, Hawkins, Hale, and others played a major role in the development of English criminal law, and still are regarded by the English courts as important authorities in determining what the common law of crime was.<sup>50</sup> These writers therefore

45. William Hawkins, *2 A Treatise of the Pleas of the Crown* ch. 29, § 10 at 313 (photo. reprint 1978) (1716) (citations omitted).

46. Hale, *1 Pleas of the Crown* at \*484 (cited in note 18).

47. *Id.*

48. Treatise writers beginning with Staunford defined the offense of misprision of felony as failure to disclose the commission of a felony. See, for example, Staunford, *Les Plees del Coron* at 37b (cited in note 44); Edward Coke, *3 Institutes of the Laws of England* \*139; William Blackstone, *4 Commentaries on the Laws of England* \*121. Some writers classified the failure to prevent a felony as a species of misprision of felony. See, for example, Michael Dalton, *The Countrey Justice* 258 (photo. reprint 1973) (1619); Joel Prentiss Bishop, *1 Commentaries on the Criminal Law* §§ 652, 655 (Little, Brown, 4th ed. 1868). For some historical discussions of misprision of felony, see *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33; C.K. Allen, *Misprision*, 78 L. Q. Rev. 40, 49-54 (1962); P.R. Glazebrook, *Misprision of Felony—Shadow or Phantom*, 8 Am. J. Legal Hist. 189, 283 (1964).

49. See William Lambard, *Eirenarcha, or Of the Office of the Justices of the Peace* bk. 2, ch. 7 at 289 (rev., corr. and enlarged ed. 1614); Dalton, *The Countrey Justice* at 258 (cited in note 48); Michael Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases. To Which Are Added Discourses Upon a Few Branches of the Crown Law* discourse 3, ch. 1, § 5 at 350 (photo. reprint 1982) (1762) ("Crown Law"); Edward Hyde East, *1 A Treatise on the Pleas of the Crown* ch. 5, § 58 at 290 (1803); Bishop, *1 Commentaries on the Criminal Law* §§ 652-55 (cited in note 48).

A variant of the rule seems to have applied when the violence amounted merely to an affray or public fight rather than a felony. According to several writers, "it is the Duty of every Man to interpose in such Cases for preserving the Publick Peace and preventing Mischief." Foster, *Crown Law* at discourse 2, ch. 2, § 4 at 272. See also Dalton, *The Countrey Justice* at 28; James Wilson, *Lectures on Law*, in Robert G. McCloskey, ed., *2 The Works of James Wilson* 681, 682-83 (Harvard U., 1967) (citing Foster). To avert an escalation of the violence, however, it was sometimes said that those who intervened were not permitted to harm the affrayors. See, for example, Dalton, *The Countrey Justice* at 28. In addition, these writers do not specify whether a bystander who failed to intervene was subject to legal punishment. When an affray resulted in death, however, there was authority that bystanders were liable to punishment, presumably on the ground that they breached a duty to prevent a felony. See text accompanying note 52.

50. For example, in *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33, the House of Lords ruled that failure to report a felony constituted an offense at common law, relying in large part on the treatises of Staunford, Hale, and other authors.

provide considerable support for the view that the common law imposed a duty to prevent a felony.

Although the case law is scanty, this duty finds judicial support as well.<sup>51</sup> In a homicide case near the turn of the seventeenth century, the Chief Justice of the King's Bench is reported to have said that "if two be fighting, and there are more looking on, who do not endeavour to part them; if one be kill'd, the lookers on may be indicted and fined to the King."<sup>52</sup>

The duty to prevent a felony was merely one instance of a more general obligation of subjects to assist in preserving the peace.<sup>53</sup> It was well established, for example, that an individual who was present when a felony was committed had a duty to attempt to apprehend the felon.<sup>54</sup> If he was unable to do so on his own, he was required to raise hue and cry,<sup>55</sup> and all those of full age were bound to follow hue and cry to apprehend the felon.<sup>56</sup>

Subjects also were required to cooperate with the authorities responsible for keeping the peace. For example, every individual was required to render assistance when so requested by a peace officer to

51. As the passage from Staunford suggests, see note 44, the duty to prevent a felony was closely related to the duty to raise hue and cry to apprehend the offender. Thus, it is possible that among the many medieval cases imposing liability for failure to raise hue and cry, some were based in whole or in part on failure to act to prevent the crime.

52. Note, Noy 50, 74 Eng. Rep. 1019 (K.B. n.d.). Chief Justice Popham made the statement; another justice, Yelverton, agreed. The reporter identifies the case as *R. v. Wilburn*, but does not indicate the term or date of the case. The case appears among several decisions from the 44th and 45th years of the reign of Elizabeth I, or 1601 to 1603, suggesting that the case dates from approximately the same period.

Fitzherbert's *Abridgement* contains a note of a Year Book case from the early fourteenth century that appears to support the duty to prevent a felony. Anthony Fitzherbert, *Le Graunde Abridgement* 3 Edw. 3 (Eyre of Northamptonshire 1329-30), tit. Corone, pl. 293 (1514-16). According to Fitzherbert's digest of the case, a man was amerced because he had been present when another had been killed and had not rescued the victim. In the original Year Book report upon which Fitzherbert's note was based, however, the court asked the inquest whether they "suspected" ("*mescrustrent*") the man of any guilt, not whether he had "not rescued" ("*ne resc*") the victim. Donald W. Sutherland, ed., Y.B. 3-4 Edw. 3 (Eyre of Northamptonshire 1329-30), 97-98 Selden Society 176-77 (1983). The account in Fitzherbert's *Abridgement* most likely reflects an error in transcription or printing. Thus, the *Abridgement* case cannot be regarded as a judicial decision imposing liability for failure to prevent a felony. For a translation and analysis of these Law French texts, I am grateful to Jacob I. Corré.

53. See, for example, Charge of Tindal, L.C.J., to the Bristol Grand Jury (Jan. 2, 1832) (discussing the extent of the "obligation and . . . authority to preserve the peace of the King" that is "imposed by the law on every subject of the realm"), quoted in *Rex v. Pinney*, 172 Eng. Rep. 962, 966-67 n.(b) (K.B. 1832).

54. See, for example, Hale, 1 *Pleas of the Crown* at \*439, \*448-49, \*484, \*588 (cited in note 18); 2 id. at \*75-76; Hawkins, 2 *A Treatise of the Pleas of the Crown* ch. 12, § 1 at 74 (cited in note 45); id. ch. 29, § 10 at 313.

55. See, for example, Hale, 2 *Pleas of the Crown* at \*76 (cited in note 18); Hawkins, 2 *A Treatise of the Pleas of the Crown* ch. 12, § 5 at 75 (cited in note 45).

56. See, for example, Hale, 1 *Pleas of the Crown* at \*618 (cited in note 18); 2 id. at \*104; Hawkins, 2 *A Treatise of the Pleas of the Crown* ch. 12, § 4 at 75 (cited in note 45).



suppress an affray or a riot or to apprehend an offender.<sup>57</sup> When a person knew that a felony had been committed, he was obligated to report this crime to the authorities;<sup>58</sup> according to some writers, the same rule applied to a felony that one knew would occur in the future.<sup>59</sup>

The duty to assist in keeping the peace reflected a general conception of the rights and obligations of subjects under the common law. According to traditional doctrine, every subject owed allegiance or obedience to the sovereign, while the sovereign was under a reciprocal obligation to protect his subjects against violence and wrong.<sup>60</sup> For the most part, of course, responsibility for conserving the peace was entrusted to officers appointed by the king for that purpose.<sup>61</sup> In many situations, however, criminal violence could be prevented or offenders apprehended only by officers with the assistance of private individuals, or even by the latter alone. In such instances, it was held that "the law makes every person an officer" with the authority and duty to uphold the peace.<sup>62</sup> This duty constituted an important element of the allegiance owed by the subject in return for the protection that he received under the law.<sup>63</sup>

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57. See, for example, Hale, 1 *Pleas of the Crown* at \*495, \*588 (cited in note 18); 2 *id.* at \*86-87; D.E.C. Yale, ed., *Sir Matthew Hale's The Prerogatives of the King*, 92 *Selden Society* 61 (1976) ("Hale, *Prerogatives*").

58. See, for example, Hale, 1 *Pleas of the Crown* at \*618 (cited in note 18).

59. Lambard, *Eirenarcha* bk. 2, ch. 7 at 289 (cited in note 49); Dalton, *The Countrey Justice* at 211-12, 260 (cited in note 48); Hawkins, 2 *A Treatise of the Pleas of the Crown* ch. 29, § 23 at 317 (cited in note 45).

60. See *Calvin's Case*, 7 Co. Rep. 1a, 4b-5a, 8a, 77 Eng. Rep. 377, 382, 386 (1608); Coke, 1 *Institutes* at \*130a (cited in note 48). See also Heyman, 41 *Duke L. J.* at 513 (cited in note 22).

61. See, for example, Lambard, *Eirenarcha* at ch. 3 (cited in note 49); Blackstone, 1 *Commentaries* at \*349-59 (cited in note 48).

62. Hale, 1 *Pleas of the Crown* at \*489 (cited in note 18) (noting that when a felon cannot be arrested without killing him, this act is justifiable even if done by a private subject, "for in such case the law makes every person an officer to apprehend a felon"). For other examples, see Dalton, *The Countrey Justice* at 265 (cited in note 48) (stating that "every man is a sufficient Bailiffe and Officer to apprehend him that is pursued by huy [sic] & cry"); Hale, 1 *Pleas of the Crown* at \*485 (noting that in "case of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at least his killing of the attempter in case of necessity" is justifiable, to the same extent as if done in self-defense); 2 *id.* at \*76 (stating that when a person has committed a felony and A. knows it, he has a duty to arrest the felon, "for the law in this case makes A. an officer"); *id.* at \*77 (remarking that "the law makes him an officer in this case, as well as if he were a justice of peace or constable"); Thomas Smith, *De Republica Anglorum* 83-84 (1609), quoted in Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* 70 (Cambridge U., 1987) (observing that "every English man is a Sergeant to take [a] thief").

63. See, for example, 4 *Bracton* fo. 444b at 378 (cited in note 42) (indicating that "all who are in the allegiance (*ad fidem*) of the lord king" have an obligation to arrest one who has committed a capital crime); *Accessory*, 72 Eng. Rep. 402-03 (K.B. 1550) (per Harris, Sjt.) (recognizing "the duty of every man on his allegiance of revealing felonies") ("*le duty de chescu home sur son allegiance de discoverer felonies*"). Compare Hale, *Prerogatives* at 61 n.2 (cited in

Over time, the traditional approach of requiring citizens to assist in law enforcement fell largely into disuse. A major reason for this change was the development, beginning in the nineteenth century, of modern police forces with responsibility for the prevention of crime.<sup>64</sup> In recent decades, however, society has become increasingly aware that the prevention of crime cannot be adequately achieved through reliance on the police alone, but also may require efforts on the part of the broader community.<sup>65</sup> This recognition is reflected in the adoption by several states of laws requiring individuals who are present at the scene of a violent crime to notify the police or provide other assistance to the victim.<sup>66</sup> Thus the history that we have explored in this Part has renewed relevance to contemporary problems.

Two important points emerge from this history. First, it appears to critically undermine the conventional view that the common law never imposed affirmative obligations to prevent harm to others. Second, the common-law position suggests that the strongest ground for a duty to rescue lies not in private but in public law, which focuses

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note 57) (recognizing that the duty of allegiance includes "assisting and defending . . . the realm against violence, rebellion and invasion").

64. On the creation of modern police forces, see, for example, Lawrence Meir Friedman, *Crime and Punishment in American History 67-71* (Basic Books, 1993).

65. See, for example, *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 484 (D.C. Cir. 1970), discussed in the text accompanying notes 388-91.

66. Five states—Florida, Massachusetts, Ohio, Rhode Island, and Washington—recently have enacted legislation requiring individuals who witness violent crimes to notify the police. See Fla. Stat. Ann. § 794.027 (West 1992) (enacted 1984); Mass. Gen. Laws Ann. ch. 268, § 40 (West 1990) (enacted 1983); Ohio Rev. Code Ann. § 2921.22(A) (Baldwin 1992) (enacted 1972); R.I. Gen. Laws §§ 11-37-3.1 to -3.4 (Supp. 1993) (enacted 1983); Wash. Rev. Code Ann. § 9.69.100 (West 1988) (enacted 1970). The Florida and Rhode Island statutes apply only to sexual assaults; the remaining three laws apply to felonies or violent crimes in general. Wisconsin has adopted a somewhat broader provision, under which one who knows that a crime is being committed has a duty to summon law enforcement or other assistance or to "provide assistance to the victim" directly. Wis. Stat. Ann. § 940.34(2) (West Supp. 1991). Three states, Minnesota, Rhode Island, and Vermont, have gone further, imposing a general duty to provide "reasonable assistance" to any person exposed to grave physical harm. R.I. Gen. Laws § 11-56-1 (Supp. 1993) (enacted 1984); Minn. Stat. Ann. § 604.05 (West 1988 & Supp. 1994) (enacted 1983); 12 Vt. Stat. Ann. § 519 (1973) (enacted 1967). These duty-to-report and duty-to-aid laws generally provide that the obligation applies only when it can be performed without danger to oneself or others. Violation of these duties typically constitutes a misdemeanor punishable by fine and, in some states, imprisonment. Compare Colo. Rev. Stat. Ann. § 18-8-115 (West 1990) (declaring that every person has a duty to report suspected crimes to law enforcement authorities, but imposing no sanctions for failing to do so). As the enactment dates suggest, many of these statutes were passed in response to the New Bedford rape. See, for example, Wendy Fox, *Brother's Keeper by Force of Law? Issue of Requiring Witnesses to Report Crime Is a Complex One*, Boston Globe 24 (Apr. 3, 1983) (describing the legislative response to the New Bedford incident); Clara Germani, *State Laws Seek to Boost the "Good Samaritan" in Citizens*, Christian Sci. Monitor 3 (Sept. 22, 1983) (same). For a valuable discussion of these statutes and the experience of states under them, see Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 Wash. U. L. Q. 1, 5-8, 20-38 (1993).

on the rights and duties of individuals as members of the community. The duty to prevent a felony was a matter of public law in a two-fold sense: it was a legal duty that was owed to the sovereign and thus was enforceable by criminal penalties rather than civil damages, and it applied only to the prevention of criminal violence, rather than other forms of harm. Although it was limited in these two respects, the common-law rule was hardly insignificant. It would have imposed an obligation to act in precisely those situations that have become most notorious in recent years—cases in which an individual has been violently attacked while bystanders do nothing to interfere or to summon the authorities.<sup>67</sup> Thus, the common-law position may provide a starting point for the development of a more general theory of the duty to rescue.

### III. THEORETICAL FOUNDATIONS I: EARLY NATURAL RIGHT THEORY AND THE SOCIAL CONTRACT

Turning now from the historical to the theoretical foundations of a duty to rescue, this Part explores the thought of Locke and other writers in the classical liberal tradition. This tradition had, and continues to have, such a deep influence on Anglo-American law that it inevitably tends to shape the way that we debate the problem of rescue. It is often thought, however, that this tradition rejects positive rights and obligations with respect to others. In this Part, I shall attempt to show, on the contrary, that liberal natural rights theory not only provides strong support for a core public-law duty to prevent violence, but also suggests a basis for transforming that obligation into a more general duty to rescue—a duty that is not limited to criminal harms, and that is enforceable in tort as well as criminal law.

#### A. *The Duty to Prevent Criminal Violence*

##### 1. The Public Duty

Following earlier writers, Locke begins his analysis with the state of nature, the condition that would exist prior to the formation of civil society and government. By nature all individuals are free and

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67. See notes 16 and 17 and accompanying text.

equal.<sup>68</sup> Locke defines natural liberty as the freedom to dispose of one's person, actions, and possessions as one thinks fit, without depending on the will of any other individual.<sup>69</sup> Natural equality consists in the absence of "Subordination or Subjection," and in the equal right of all individuals to their natural liberty.<sup>70</sup>

As Locke emphasizes, natural freedom does not confer an arbitrary right to act as one pleases, but instead is liberty under law.<sup>71</sup> The law that both protects and bounds natural liberty is the law of nature, which Locke identifies with reason.<sup>72</sup> Precisely because individuals are naturally free and equal, the law of nature forbids one person to deprive another of his life, liberty, or property.<sup>73</sup>

For Locke, however, the obligations of natural law are not merely negative. The function of natural law is to direct human beings toward their natural good,<sup>74</sup> which consists above all in the preservation of their being. Human beings, however, are not merely individuals but also members of a species who share a common nature.<sup>75</sup> The foundation and end of the law of nature is therefore the general preservation of mankind.<sup>76</sup> Accordingly, Locke holds that an individual has a natural duty to preserve not only his own life but also the lives of others:

Every one as he is *bound to preserve himself* . . . ; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.<sup>77</sup>

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68. John Locke, *Two Treatises of Government* bk. 2, § 4 (Peter Laslett ed., Cambridge U., 1988) (3d ed. 1698).

69. *Id.*

70. *Id.* §§ 4, 54.

71. *Id.* §§ 6, 22.

72. *Id.* § 6.

73. *Id.*

74. Describing the nature of law in general, Locke asserts that "*Law*, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under the Law. Could they be happier without it, the *Law*, as a useless thing would of it self vanish." *Id.* § 57 (emphasis in original). Thus, the function of law in general is to direct human beings toward the good. In the case of natural law, this is the natural good of mankind, while in the case of positive law, it is the public good of the society. See *id.* §§ 3, 131, 135. See also *id.* § 229 (asserting that "[t]he end of Government is the good of Mankind").

75. See, for example, *id.* bk. 1, § 67; *id.* bk. 2, §§ 4, 6.

76. In his early work on natural law, Locke stresses that the law of nature is founded not on individual self-preservation but on the preservation of mankind. See John Locke, *Questions Concerning the Law of Nature* qu. 8, fol. 82 at 203 (Robert Horwitz, Jenny Strauss Clay, and Diskin Clay, eds. & trans., Cornell U., 1990); *id.* qu. 11, fol. 105-18 at 235-51.

77. Locke, *Two Treatises* bk. 2, § 6 (emphasis in original) (cited in note 68).

Thus, for Locke, the fundamental law of nature is the positive command to preserve mankind.<sup>78</sup> Indeed, in this passage Locke appears to derive the obligation not to harm others from this more fundamental positive requirement.

Locke does not clearly specify the ways in which individuals are obligated to preserve mankind. The context, however, suggests that he is referring in part to his theory of "the Executive Power of the Law of Nature."<sup>79</sup> According to this doctrine, in a state of nature every individual has the power to enforce natural law by restraining and punishing offenses against that law.<sup>80</sup> In addition to the right of punishment, which is shared by all, the particular victim is entitled to reparation for the injury he has suffered.<sup>81</sup> This is the natural origin of criminal and tort law, respectively.

Of course, Locke, like other natural right theorists, did not regard the state of nature as one in which human beings could flourish or even survive for long. Rather, the state of nature provides the normative background for the construction of a legitimate state, one that is founded on the consent of its members and that secures their natural rights. As an actual condition, on the other hand, the state of nature would be subject to grave defects. It would lack both an established law to govern controversies between individuals and a known and impartial judge to apply that law.<sup>82</sup> Moreover, individuals often would lack power to protect their own rights.<sup>83</sup> And although others may have a natural duty to render assistance, people are apt to be remiss when the interests of others are involved.<sup>84</sup>

These practical difficulties reflect deeper conceptual problems. According to Locke, by the law of nature all of mankind constitutes one community.<sup>85</sup> In enforcing the law of nature, an individual may

78. On the preservation of mankind as the fundamental law of nature, see *id.* §§ 16, 134, 135, 149, 159, 171, 183. In his *Thoughts Concerning Education*, Locke observes that "if the preservation of all Mankind, as much as in him lies, were every one's persuasion, as indeed it is every one's Duty, and the true Principle to regulate our Religion, Politicks and Morality by, the World would be much quieter, and better natur'd than it is." John Locke, *Some Thoughts Concerning Education* § 116 at 180 (John W. Yolton and Jean S. Yolton eds., Clarendon, 1989) (3d ed. 1695). For analysis of these passages in the *Two Treatises* and *Education*, see Nathan Tarcov, *Locke's Education for Liberty* 167-69, 251 n.148 (U. of Chicago, 1984).

79. Locke, *Two Treatises* bk. 2, § 13 (emphasis deleted) (cited in note 68).

80. *Id.* §§ 7-12.

81. *Id.* §§ 10-11.

82. *Id.* §§ 124-25.

83. *Id.* §§ 123, 126.

84. See *id.* § 125. Locke states, "For every one in that state [of nature] being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Mens." *Id.*

85. *Id.* § 128.

be regarded as acting on behalf of this "great and natural Community" to preserve its members against violence.<sup>86</sup> The defects of the state of nature—the absence of publicly recognized law, adjudication, and enforcement—result from relying solely upon individuals to perform these essentially public functions.

For Locke and the modern natural right tradition, the solution to these problems lies in the social contract, in which individuals agree to leave the state of nature and to form a civil society "for the mutual *Preservation* of their Lives, Liberties and Estates."<sup>87</sup> Through this compact, every individual transfers his power of enforcing the law of nature to the community, which thereby assumes an obligation to protect the rights of all of its members.<sup>88</sup> Although this obligation arises from the social contract, it ultimately reflects the law of nature. As applied to the community, "the *first and fundamental natural Law*" is "the *preservation of the Society*, and (as far as will consist with the publick good) of every person in it."<sup>89</sup>

The main outlines of social contract theory are, of course, familiar. For the purposes of this Article, it is crucial to focus on the specific rights and obligations that arise from that compact. According to Locke, the individuals who form the society gain the right to be protected by it in their life, liberty, and property.<sup>90</sup> To obtain this protection, each individual not only consents to obey the laws made by the community for the protection of its members, but also "engages his natural force . . . to assist the Executive Power of the Society" in the enforcement of those laws, to the extent required by law.<sup>91</sup> In this way, the rights of individuals come to be defended by "the united strength of the whole Society."<sup>92</sup>

Locke was not the only writer to formulate the social contract in these terms. It was a basic doctrine of contract theory, shared by authors as diverse as Hobbes, Pufendorf, and Rousseau, that individuals committed their force to the society or the sovereign so that

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86. Id. §§ 8, 11, 128.

87. Id. § 123 (emphasis in original).

88. See id. §§ 130-31.

89. Id. § 134 (emphasis in original).

90. Id. § 130.

91. Id. See also id. §§ 88-89.

92. Id. § 136. See also John Locke, *A Letter Concerning Toleration* 26 (James H. Tully, ed., Hackett, 1983) (William Popple trans., 1689) (observing that "the Magistrate is armed with the Force and Strength of all his Subjects, in order to the punishment of those that violate any other Man's Rights").

individual rights could be protected by the combined force of all the members of society.<sup>93</sup>

Classical social contract theory thus provides a philosophical framework in which we can understand the traditional common-law duty of individuals to prevent criminal violence. According to that theory, the state has an obligation to protect each citizen against violence. In many cases, however, the state cannot provide adequate protection without the assistance of individuals. In such cases, citizens have an obligation to assist the state in preventing violence. When an individual fails to fulfill this obligation, he violates a public duty owed to the state and therefore may be subject to criminal liability.

Several leading eighteenth- and nineteenth-century writers on criminal law understood the common-law rule in much this way. In his *Lectures on Law* in 1790, James Wilson, the framer and Supreme Court Justice, presented a natural rights account of American law in which he strongly praised the common-law duty to prevent crimes.<sup>94</sup> In this regard, Wilson followed the English jurist Sir Michael Foster, who declared that "the Duty of every Man to interpose in such Cases for preserving the Publick Peace" was "founded in the Principles of Social Duty and Political Justice."<sup>95</sup> As Joel Prentiss Bishop wrote in his mid-nineteenth-century treatise on American criminal law, one who wrongfully failed to prevent a felony was held to be "guilty of a breach of the duty due from every man to the community in which he dwells, and the government which protects him."<sup>96</sup>

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93. See Thomas Hobbes, *De Cive: The English Version* ch. 5, §§ 8-9, 11 (Howard Warrender, ed., Clarendon, 1983) (1651); Thomas Hobbes, *Leviathan* ch. 18 at 120-21 (Richard Tuck, ed., Cambridge U., 1991) (1651); id. ch. 28 at 214; Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* bk. 7, ch. 2, § 1 at 968 (C.H. Oldfather and W.A. Oldfather, trans., Clarendon, 1934) (1688) (Volume 2 of the Classics of International Law edition) ("*Law of Nature*"); id. § 5 at 972-73; id. § 13 at 984; id. ch. 3, § 1 at 1000; id. ch. 4, § 3 at 1012; id. bk. 8, ch. 3, § 1 at 1159; Jean-Jacques Rousseau, *The Social Contract* bk. 1, ch. 6, in Ernest Barker, ed., *Social Contract: Essays by Locke, Hume, and Rousseau* 179-82 (Greenwood, 1980); id. ch. 9 at 186. See also Blackstone, 1 *Commentaries* at \*251 (cited in note 48) (observing that civil liberty consists in "protecting the rights of individuals by the united force of society").

94. See Wilson, *Lectures on Law*, in McCloskey, ed., 2 *The Works of James Wilson* at 680-83 (cited in note 49). "In every citizen," Wilson declared, "much more in every publick officer of peace and justice, the whole authority of the law is vested . . . for the all-important purpose of preventing crimes. From every citizen, much more from every publick officer of peace and justice, the law demands the performance of that duty." Id. at 681. The variant of the rule that Wilson mentions is the duty to part the combatants in an affray without using violence oneself. See id. at 682-83.

95. Foster, *Crown Law* at 272 (cited in note 49).

96. Bishop, 1 *Commentaries on the Criminal Law* § 655 at 374 (cited in note 48).

## 2. The Duty to Individuals

Although the common law imposed a duty to prevent violence, that duty was owed exclusively to the state. In addition to providing a theoretical basis for this duty, Lockean social contract theory also suggests a rationale for transforming it into an obligation to individuals as well, and thus enforceable through civil as well as criminal liability.

As we have seen, the common law held that every subject was entitled to protection by the sovereign. In return, the subject owed a duty of allegiance that required him, among other things, to assist the sovereign in enforcing the laws through which protection was afforded.<sup>97</sup> This structure of rights and obligations can be represented as follows:

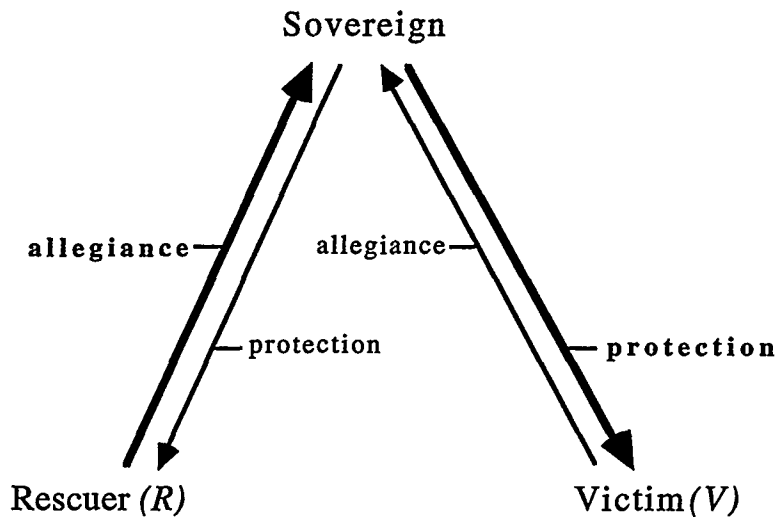


Figure 1. The Common-Law Model

Under this model, the sovereign has an obligation to the potential victim, *V*, to protect her against violent assault, while a potential rescuer, *R*, has a duty to the sovereign to assist in providing this protection. *R*'s duty, however, is owed solely to the sovereign, not to *V*. A

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97. See text accompanying notes 60-63.



breach of this duty therefore gives rise to criminal responsibility to the sovereign, but not civil liability to the victim.

This structure of rights and duties reflects the political theory underlying the common-law model.<sup>98</sup> According to that theory, the fundamental political bond is that between sovereign and subject. The relationship of subjects to one another is derivative, based on their status as subjects of the same ruler. Thus, the positive obligations that arise from fundamental political relationships—such as duties of aid and protection—run only between sovereign and subject, not between one subject and another.

Now consider the social contract model, which can be represented as follows:

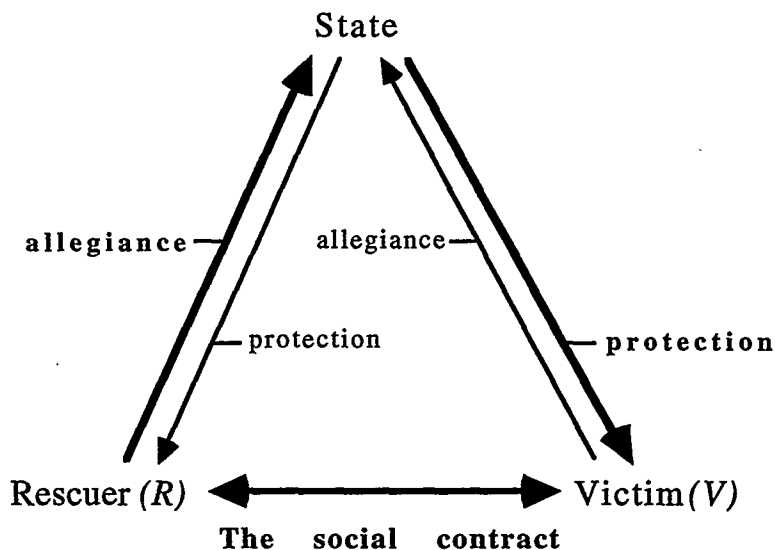


Figure 2. The Social Contract Model

Like the common-law model, social contract theory recognizes a reciprocal relationship between the citizen and the state. In contractarian theory, however, this relationship rests on a deeper and more

98. For a classic statement of this political theory, see *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608). A valuable discussion of this theory may be found in James H. Kettner, *The Development of American Citizenship, 1608-1870* at 7-8, 16-28 (U. of N.C., 1978).

fundamental relationship, the bond between the citizens themselves. This bond is formed by the social contract, in which individuals agree with one another to form a community. The most fundamental political obligations that citizens have are those that they have assumed toward one another through the social contract. When an individual breaches his obligations under that contract, he violates a duty owed to the other individuals who have consented to it.<sup>99</sup>

As we have seen, individuals enter into society for mutual protection. Through the social contract, each individual agrees to relinquish his power to enforce the law of nature on his own authority, but at the same time commits himself to assist the state in enforcing the law, insofar as the law directs him to do so.<sup>100</sup> This commitment is made to the other individuals who are parties to the social contract, and is made for their benefit, to ensure that the community will have sufficient power to protect each of its members. Under this model, when *R* fails to render aid as required by law, he violates a duty not only to the state but also to *V*. It is consonant with this model that he should be responsible not merely to the community through its criminal law, but also to the injured party in a civil action.

We can approach the issue of civil liability from another angle as well. Because the fundamental question is whether the breach of a public-law duty can result in private liability, the problem can be analyzed by analogy to the tort-law doctrine of statutory negligence or negligence per se. Suppose that a jurisdiction enacts a criminal statute requiring every citizen to aid in preventing a crime of violence if she can do so without substantial risk to herself (for example, by notifying the police). Subsequently, *R* fails to act to prevent a criminal assault on *V*, who suffers injury as a result. Under the doctrine of statutory negligence, *V* can recover damages against *R* only if the statute is held to impose a duty for the protection or benefit of the class of persons to which *V* belongs, that is, potential victims of criminal violence.<sup>101</sup> Under the common-law model, this would not be the case: the statute would be enforcing a duty that the individual owed only to the state, not to other individuals. Some positivist and utilitarian views would reach the same result, on the ground that the purpose of the statute is not to secure any right owed by the state to

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99. See, for example, Locke, *Two Treatises* bk. 2, § 97 (cited in note 68).

100. See text accompanying note 91.

101. See Restatement §§ 286, 288 (cited in note 5).

the victim, but rather to promote public order for the benefit of the community as a whole.<sup>102</sup>

In contrast to these views, the social contract model would hold that the purpose of the statute is not merely to promote social welfare but to protect the right of individuals to be secure against violence. In imposing a duty to prevent violence, the statute is not simply creating a positive-law duty toward the state; instead, it is enforcing an underlying obligation that runs directly from *R* to *V* under the social contract—an obligation that reflects a more fundamental natural duty to prevent violence. On this model, the statute would impose a duty for the protection or benefit of potential victims of criminal violence. Under the doctrine of statutory negligence, a breach of the statute therefore could give rise to liability in tort.

A striking example of a law imposing civil liability for breach of a duty to protect against violence is provided by section 6 of the Ku Klux Act of 1871.<sup>103</sup> The Act was adopted during Reconstruction to protect the rights of the newly freed slaves and their supporters against the wave of terrorism that swept the South after the Civil War.<sup>104</sup> Section 6 affords those injured by specified forms of racial and political violence a federal action for damages against “any person” who knew of and had the ability to prevent the attack but neglected to do so.<sup>105</sup> The congressional debate over section 6 indicates that the provision was premised on the fundamental obligation of the community and its members to protect against violence.<sup>106</sup> Echoing the common-law tradition, the Senate manager of the legislation, George F.

102. For a classic statement of the positivist position, see Thomas M. Cooley, *A Treatise on the Law of Torts* ch. 13 (Callaghan, 1879).

103. Ku Klux Act of 1871, ch. 22, § 6, 17 Stat. 15, codified with minor changes at 42 U.S.C. § 1986 (1988).

104. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* at 425-44, 454-55 (Harper & Row, 1988).

105. Section 6 as enacted provided:

That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act [now 42 U.S.C. § 1985, forbidding, *inter alia*, conspiracies to deprive any person or class of persons of their equal civil rights] are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured . . . for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; . . . and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action . . . .

Ku Klux Act, ch. 22, § 6, 17 Stat. at 15.

106. See, for example, Cong. Globe, 42d Cong., 1st Sess. 751 (1871) (remarks of Rep. Shellabarger); *id.* at 756-57 (remarks of Sen. Edmunds); *id.* at 761 (remarks of Sen. Sherman); *id.* at 824-25 (remarks of Sen. Edmunds). See generally *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 664-89 (1978) (discussing the legislative history of this provision).

Edmunds of Vermont, declared that, under this section, every citizen who knew of such contemplated outrages

is made a peace officer, and it is made his bounden duty as a citizen of the United States to render positive and affirmative assistance in protecting the life and property of his fellow citizens in [the] neighborhood against unlawful aggression: and if . . . he fails to do so, [he is made responsible for it to] his fellow citizen, who is thus wronged on account of his refusal to help him protect himself.<sup>107</sup>

## B. *The Duty to Prevent Noncriminal Harm*

### 1. The Natural Duty of Individuals

Although early modern natural rights theory was centrally concerned with the prevention of violence, it also developed a rationale for a broader duty to rescue, one that extended to other forms of harm. This rationale emerged from reflection on the problem of necessity: whether, in extreme distress, it was lawful for one individual to save his life through the property of another.

The modern debate on necessity began with Hugo Grotius, generally regarded as one of the founders of the modern natural right tradition.<sup>108</sup> Grotius approached the issue within the framework of his general theory of property. According to this theory, mankind originally held all property in common.<sup>109</sup> Private ownership arose as a result of a universal compact, express or implied, in which everyone agreed that individuals could appropriate things for their own.<sup>110</sup> This agreement, however, would have included an implied condition that private rights of ownership, being acquired rather than natural, would give way in a case of dire necessity, in which one person could preserve his own life only through the property of another.<sup>111</sup> In such cases, Grotius held, the property at issue reverted to common ownership and legitimately could be taken by the endangered person.<sup>112</sup>

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107. Cong. Globe, 42d Cong., 1st Sess. at 820 (remarks of Sen. Edmunds). See note 62 and accompanying text (discussing the common-law doctrine that everyone is an officer for the preservation of the peace).

108. On Grotius, see Richard Tuck, *Natural Rights Theories: Their Origins and Development* 58-81 (Cambridge U., 1979).

109. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* bk. 2, ch. 2, § 2 at 186 (Frances W. Kelsey, trans., Clarendon, 1925) (1646) (Volume 2 of the Classics of International Law edition).

110. *Id.* at 189-90.

111. *Id.* § 6 at 193-94.

112. *Id.*

Grotius's analysis was subsequently criticized by Samuel Pufendorf, whose works on the law of nature had a major influence on the thought of John Locke.<sup>113</sup> In essence, Pufendorf objected that the Grotian approach to necessity tended to undermine property and civil society by reverting to the state of nature.<sup>114</sup> Pufendorf held that *A*'s necessity did not create a right simply to take *B*'s property, but rather gave rise to a natural duty on *B*'s part to relieve the necessity.<sup>115</sup> This duty was one of humanity rather than one of justice in the strict sense.<sup>116</sup> Anticipating the later distinction between law and morality, Pufendorf held that duties of justice are perfect duties (with correlative perfect rights), enforceable by coercion in a state of nature and by the judicial process in civil society.<sup>117</sup> Duties of humanity, by contrast, are imperfect duties (with corresponding imperfect rights), the performance of which cannot be compelled, thus promoting the virtues of benevolence and gratitude.<sup>118</sup> Pufendorf recognized a crucial exception, however, in a case of extreme necessity: *A* should not be required to perish because of *B*'s refusal to fulfill his duty. In such cases, Pufendorf held, the duty of humanity becomes a perfect or quasi-perfect one, the fulfillment of which can be coerced.

Pufendorf's account of necessity reflects his general theory of natural law. Following Grotius, he held that the law of nature was based on the concept of *sociability*. Its fundamental principle was the preservation of human society.<sup>119</sup> In most cases, Pufendorf treats the

113. For a discussion of Pufendorf's influence on Locke, see Peter Laslett, *Introduction*, in Locke, *Two Treatises* at 75 & n.\* (cited in note 68).

114. Pufendorf, *Law of Nature* bk. 2, ch. 6, § 6 at 303-06 (cited in note 93). In particular, Pufendorf argued that Grotius's theory of reversion to the common (1) would allow an individual, if he were strong enough, to take possessions away from an owner who was equally in need, (2) would not require restitution to the owner when that became possible, and (3) would not permit an owner to distinguish between an individual who had fallen into distress through his own fault and one who had not. *Id.* at 304.

115. *Id.* § 5 at 302; *id.* § 6 at 304-05.

116. *Id.* Pufendorf adopts the Aristotelian distinction between universal justice, which encompasses the whole of virtue in relation to others, and particular justice, or justice in the narrow sense, which is fairness with respect to possessions. See Aristotle, *Nicomachean Ethics* bk. 5, chs. 1-2 (W.D. Ross trans. & J.O. Urmson rev.), in Jonathan Barnes, ed., *2 The Complete Works of Aristotle 1729, 1781-85* (Princeton U., 1984); Pufendorf, *Law of Nature* bk. 1, ch. 7, § 8 at 119 (cited in note 93). In these terms, duties of humanity fall within universal justice, while the obligations to fulfill one's agreements and not to injure others are matters of particular justice. See *id.*; *id.* §§ 14-15 at 127-28.

117. For the distinction between perfect and imperfect rights and obligations, see Pufendorf, *Law of Nature* bk. 1, ch. 7, § 7 at 118-19 (cited in note 93). For the identification of justice in the narrow sense with perfect rights and obligations, see *id.* § 8 at 119.

118. See *id.* bk. 2, ch. 6, § 5 at 302; *id.* § 6 at 304-05. On duties of humanity generally, see *id.*, bk. 3, ch. 3.

119. See Grotius, *Prolegomena*, in *De Jure Belli ac Pacis Libri Tres* §§ 6, 8, 12, 16 at 11-15 (cited in note 109); *id.* bk. 1, ch. 3, § 1 at 34; Pufendorf, *Law of Nature* at ix (cited in note 93); *id.*, bk. 2, ch. 3, § 15 at 207-10.

duty of humanity as an imperfect duty in order to promote the development of the social virtues of benevolence and gratitude.<sup>120</sup> To allow one of society's members to perish, however, would undermine the very basis of sociability. In such cases, therefore, the duty of humanity is appropriately treated as a perfect one.

Locke's discussion of necessity in the *Two Treatises* incorporates elements from both Grotius and Pufendorf. Like Grotius, Locke maintains that all property originally belonged to mankind in common; although individuals have a right to appropriate portions of it as their private property, these rights are subject to an implicit limitation and must yield to the rights of others in cases of extreme necessity.<sup>121</sup> In contrast to Grotius, Locke derives this limitation not from an original agreement, but rather from the will of God (which he generally identifies with the law of nature<sup>122</sup>) that mankind should be preserved.<sup>123</sup> "God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods . . . when his pressing Wants call for it."<sup>124</sup>

Like Pufendorf, however, Locke conceives of necessity as giving rise to a duty on the part of the property owner toward the distressed individual. Echoing Pufendorf's contrast between justice and humanity, Locke writes: "As *Justice* gives every Man a Title to the product of his honest Industry . . . so *Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise."<sup>125</sup> Thus, in a case of necessity, charity requires a property owner "to afford [Relief] to the wants of his Brother," who has a correlative right to such relief, such that "it cannot justly be denied him."<sup>126</sup>

To what extent would Locke make the natural duty of charity a legally enforceable one? Although he does not discuss the distinction

120. For a similar approach to charity from the perspective of virtue ethics, see Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 Mich. L. Rev. 983 (1990). Unlike Pufendorf and Locke, Hirshman does not view charity as a duty with correlative rights on the part of the beneficiaries.

121. Locke, *Two Treatises* bk. 1, § 42 (cited in note 68). Compare id. bk. 2, § 183 (maintaining that in case of a conflict between two different rights to the same property, the "Fundamental Law of Nature . . . , that all, as much as may be, should be preserved," requires that "he that hath, and to spare, must . . . give way to the pressing and preferable Title of those, who are in danger to perish without it").

122. See, for example, id. bk. 2, § 135 (arguing that civil laws must "be conformable to the Law of Nature, i.e. to the Will of God, of which that is a Declaration").

123. See id. bk. 1, § 41.

124. Id. § 42.

125. Id. (emphasis in original).

126. Id.

between perfect and imperfect rights and duties, this approach seems consonant with his position. On one hand, the contrast between justice and charity suggests that, in general, matters of charity are not properly subject to coercive enforcement. On the other hand, to allow another person to perish for want of relief would violate the fundamental law of nature that mankind should be preserved. In such situations, the duty of charity approaches a duty of justice.<sup>127</sup> Insofar as the duty of charity is a perfect one, it seems that Locke would make it legally enforceable in civil society, in accord with his general view that civil law should reflect and give force to the law of nature.<sup>128</sup>

Thus far, we have been considering necessity as the basis for a claim with respect to the *property* of another. It should be observed, however, that the approach adopted by Pufendorf and Locke, which transforms the right of necessity into a duty as well, raises the possibility that this duty is not limited to affording relief through one's property, but may also extend to one's actions. If the fundamental law of nature, whether understood in terms of sociability or of preservation, imposes a duty to save the life of another through one's property, it would be peculiar if that law did not require saving him through one's actions as well. Indeed, in an early work, Pufendorf formulated such a duty to rescue in broad terms:

[O]n the basis of the law of humanity, any one whatsoever is bound, when not under an equal necessity, to the extent of his power to come to the aid of a second person placed in extreme necessity, and necessity creates the power of claiming this aid in very much the same manner as we claim the things to which we have a right . . . . For . . . necessity . . . prevails over those reasons by which, otherwise, we are bidden not to claim by force what is due us by the law of humanity.<sup>129</sup>

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127. This interpretation helps to explain Locke's statement that in such a case relief may not "justly" be withheld. *Id.*

128. Locke observes:

The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to inforce their observation. Thus the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others. The *Rules* that they make for other Mens Actions, must, as well as their own and other Mens Actions, be conformable to the Law of Nature, . . . and the *fundamental Law of Nature* being *the preservation of Mankind*, no Humane Sanction can be good, or valid against it.

*Id.* bk. 2, § 135 (emphasis in original).

129. Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* bk. 2, obs. 4, ch. 6 at 243 (William Abbott Oldfather, trans., Clarendon, 1964) (1672) (Volume 2 of the Classics of International Law edition). In the *Law of Nature and Nations*, Pufendorf does not indicate clearly whether the duty of necessity applies to actions as well as property. Some of his remarks, however, imply that the two are on a par. See, for example, Pufendorf, *Law of Nature*, bk. 2, ch. 6, § 5 at 301-02 (cited in note 93) (observing that the introduction of private property enabled

Although Locke does not directly discuss this question, he suggests that the same doctrine that requires relief through property governs other cases of necessity as well.<sup>130</sup> All of these cases would seem to fall within the same general principle: the law of nature that mankind should be preserved.

Even Hobbes, whose conception of human nature and natural rights is the most individualistic of the early modern natural right theorists, suggests that there is a natural duty to aid another in distress. In Hobbes's account, the laws of nature are understood as precepts of reason with regard to self-preservation.<sup>131</sup> The first and fundamental natural law is that one should seek to establish peace, and thereby overcome the destructive war of all against all.<sup>132</sup> From this principle, Hobbes derives a number of other laws of nature, including the principle "[t]hat every man render himself usefull unto others," by yielding to them things that are necessary to their preservation and not required for his own.<sup>133</sup> As an illustration of this duty to be useful or sociable toward others, Hobbes cites the parable of the Good Samaritan.<sup>134</sup>

## 2. The Responsibility of the State and Its Citizens

### a. *The State's Duty to Preserve the Lives of Its Members*

Early modern natural right theory thus developed a conception of the natural duty of individuals to preserve the lives of others in necessity, including economic distress. As with the prevention of

individuals to make "a richer display of humanity and kindness to others, while before that time they could aid others only by their own personal service". See also *id.* at 302 (arguing that a right of necessity enables a man to take the property of another in a situation in which, *inter alia*, "there is no means whereby [another] person may come to the aid of the man who is in want either of money or assistance") (emphasis added).

130. See Locke, *Two Treatises* bk. 1, § 43 (cited in note 68). In this passage, Locke remarks that if one were allowed to "work[] upon anothers necessity" by withholding relief through one's property, the same would be true of "a Man's having his Stores filled in a time of Scarcity, having Money in his Pocket, being in a Vessel at Sea, being able to Swim, &c. . . . any of these being sufficient to enable me to save a Mans Life who would perish if such Assistance were denied him." *Id.*

131. Hobbes, *De Cive* ch. 2, § 1 at 52-53 (cited in note 93); Hobbes, *Leviathan* ch. 14 at 91 (cited in note 93).

132. Hobbes, *Leviathan* ch. 14 at 91-92.

133. Hobbes, *De Cive* ch. 3, § 9 at 66-67 (emphasis in original); Hobbes, *Leviathan* ch. 15 at 106.

134. Hobbes, *De Cive* ch. 4, § 7 at 79 (citing *Luke* 10, "the Parable of the Samaritan, who had compassion on the Jew that was wounded by theeves"). The illustration appears in a chapter of *De Cive* in which Hobbes seeks to show that his doctrine of natural law is consistent in content with the divine law set forth in scripture.



violence, however, this preservation may be achieved most effectively through collective action. For this reason, the natural right tradition comes to hold that this responsibility is assumed by the state under the social contract—that the function of the state is not merely to prevent violence, but to preserve the lives of its members generally.

Once again, this issue is discussed most often in connection with the problem of charity. As we have seen, individuals have a natural duty to alleviate the needs of others. Relying solely on individuals for this purpose, however, is inadequate, for much the same reasons that relying on individuals to prevent violence is inadequate.<sup>135</sup> In the absence of public law, there would be no means of authoritatively determining how much a particular individual is bound to give or to whom. Private charity is unreliable, providing no assurance that the basic needs of others will be met. In Hobbes's words, "as it is Uncharitableness in any man, to neglect the impotent; so it is in the Sovereign of a Common-wealth, to expose them to the hazard of such uncertain charity."<sup>136</sup> Requiring the poor to rely on private charity renders them improperly dependent on other individuals.<sup>137</sup> Finally, the alleviation of necessity may exceed the capability of private individuals, requiring the combined resources of the community.

As with the prevention of violence, these practical problems reflect deeper conceptual difficulties.<sup>138</sup> As discussed previously, Locke holds that all human beings naturally constitute a single community governed by the law of nature.<sup>139</sup> The natural duty to preserve mankind is one that belongs to individuals as members of this community. In particular, the duty of charity is based on the doctrine that all property originally belongs to mankind in common and that individuals appropriate common resources subject to the obligation to relieve the distress of others.<sup>140</sup> Thus, in fulfilling the duty of charity, an individual implicitly acts on behalf of the natural community of mankind, in the same way as an individual who enforces the law of nature against violence.<sup>141</sup> Rights of necessity ultimately should be regarded as claims against the community and its resources, not against private individuals as such. Thus, the problems with relying on private

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135. See text accompanying notes 82-86.

136. Hobbes, *Leviathan* ch. 30 at 239 (cited in note 93).

137. Compare Gordon S. Wood, *The Radicalism of the American Revolution* 234 (Alfred A. Knopf, 1992) (discussing the inconsistency of personal dependence with republican equality).

138. See text accompanying notes 85-86.

139. See text accompanying note 85.

140. See text accompanying notes 109-12, 121-24.

141. See text accompanying note 86.

charity are not merely practical, but reflect the underlying point that charity is ultimately a communal responsibility that should be performed through public institutions.

The tendency of modern natural rights theory is therefore to transfer the duty of charity from the individual to the community. As Hobbes puts it, those who by unavoidable accident "become unable to maintain themselves by their labour . . . ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes of the Commonwealth."<sup>142</sup> Locke agrees that "common charity teaches, that those should be most taken care of by the law, who are least capable of taking care for themselves."<sup>143</sup> Similarly, Blackstone writes that both the natural right to life and "the principles of society" (a phrase that recalls Pufendorf's fundamental principle of sociability) dictate that the poor should be able to "demand a supply sufficient for all the necessities of life from the more opulent part of the community," by means of laws enacted for the relief of poverty.<sup>144</sup>

Later natural right theorists more fully develop the view that the state's responsibility is not merely to protect individuals against violence, but to preserve the lives of its members generally. According to Kant, such preservation is an obligation incumbent upon the community by virtue of the social contract:

The general will of the people has united itself into a society that is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens.<sup>145</sup>

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142. Hobbes, *Leviathan* ch. 30 at 239 (cited in note 93).

143. John Locke, *Some Considerations of the Consequences of the Lowering of Interest, and Raising the Value of Money* (1691), in 4 *The Works of John Locke* 1, 11 (London, 12th ed., 1824). As Richard Ashcraft observes, Locke's draft proposal for reforming the poor law, although harsh in its treatment of the idle poor, also made clear that everyone must have food, clothing, and shelter, and made it a crime for any locality to allow a person to perish for want of relief. Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* 273 n.182 (Princeton U., 1986) (discussing John Locke, *Proposed Poor Law Reform* (1697), reprinted in H.R. Fox Bourne, 2 *The Life of John Locke* 377, 382, 390 (Harper & Bros., 1876)).

144. Blackstone, 1 *Commentaries* at \*131 (cited in note 48).

145. Immanuel Kant, *The Metaphysics of Morals* \*326 (Mary Gregor, trans., 1991) (1797).

As we shall see, Hegel extends this view even further, holding that the state has an obligation to secure not only the lives but also the general well-being of its members.<sup>146</sup>

*b. The Duty of Citizens*

*i. The Public Duty*

In the passage quoted above, Kant develops a structure of public right and obligation much like the one that I outlined in connection with the prevention of criminal violence.<sup>147</sup> By virtue of the social contract, the state has an affirmative obligation to preserve the lives of its members. This obligation includes not only the protection of life, liberty, and property against violence, but also the provision of means of sustenance to those unable to provide for themselves. In return for such preservation, individuals have an affirmative duty to assist the state in preserving the lives of their fellow citizens by contributing their property to this end.

By generalizing Kant's argument, we can develop a rationale for a general public duty to rescue. First, although Kant's discussion focuses on the state's duty to provide sustenance, he indicates that this duty derives from the state's more general obligation to preserve the lives of its members. That obligation would extend to preserving life in an emergency. Second, although this passage seeks to establish the individual's duty to pay taxes, Kant also recognizes the state's right to require citizens to perform services.<sup>148</sup> When generalized in these two respects, Kant's argument would recognize an obligation of citizens to perform actions necessary to enable the state to fulfill its duty to preserve the lives of its members.

This reading of Kant yields a general public duty to rescue parallel to the duty to prevent criminal violence outlined above.<sup>149</sup> The state is bound to preserve the life of an endangered person, such as one who is drowning. Although the state generally fulfills this duty through its own officers, on some occasions an officer will not be present or will require assistance. In such situations, the state reasonably may impose an obligation on every citizen present to assist in preserving the life of a fellow citizen.

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146. See text accompanying notes 272-91.

147. See Part III.A.1.

148. See Kant, *The Metaphysics of Morals* at \*325 (cited in note 145).

149. See Part III.A.1.

## ii. The Duty to Individuals

Thus far, this section has treated the general duty to rescue as a public one, that is, as a duty owed to the state. This duty can be extended to individuals, however, on the same grounds as the duty of citizens to assist in preventing criminal violence. Like the latter duty, the general duty to rescue is one that arises from the social contract. It is therefore a duty owed above all to the other parties to that contract, and is for their benefit. One who fails to rescue another from danger commits a wrong not merely against the state, but also against the individual whom he should have rescued. The appropriate remedy therefore includes civil liability to the victim, as well as criminal liability to the state.

*C. The Duty to Rescue and the Liberal Tradition*

In addition to suggesting a positive rationale for a duty to rescue—a rationale that will be developed further in the course of this Article—this exploration of the early natural right tradition provides the basis for a response to the liberal or libertarian argument against such a duty.<sup>150</sup> According to that argument, the liberal idea of freedom consists in the right to act as one likes as long as one does not infringe the rights of others. The appropriate function of law is to safeguard individual rights, not to require one person to act for the benefit of another. Although there may be a moral duty to be a Good Samaritan, such duties cannot properly be enforced by law. Accordingly, the imposition of an affirmative duty to rescue would violate the liberal values at the core of our legal order. As I have observed, although this argument has been expressed most forcefully by libertarian writers, it reflects an understanding of the liberal tradition that is widely shared.<sup>151</sup>

This Part has sought to challenge this understanding through a reading of Locke and other classical liberal writers. According to Locke, individual liberty is not absolute, but is limited by the law of nature. The content of that law is not exhausted by the prohibition against harming others. Instead, natural law also requires individuals to preserve mankind by preventing violence.<sup>152</sup> This obligation relates to matters of justice rather than morality. In addition, individuals have a natural duty to assist others in need. Although this

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150. See text accompanying notes 11-12.

151. See *id.*

152. See text accompanying notes 74-81.

obligation is generally one of charity or morality, it becomes a duty of justice in cases of extreme necessity.<sup>153</sup>

For classical liberal thought, then, affirmative obligations do not necessarily conflict with individual liberty. Indeed, even free and independent individuals in a state of nature would have obligations to aid and protect others, by virtue of their common membership in the natural community of mankind.<sup>154</sup> When individuals enter into civil society, the political community assumes responsibility for preserving the lives of its members against violence and other forms of harm. In return for this preservation, individuals undertake to assist the community in performing this function.<sup>155</sup> In this way, the natural duty to aid and protect others is transformed into a civic one. Once again, this is not a mere moral obligation, but a fundamental responsibility of citizenship that can provide the basis for a legal duty.

A similar point can be made in terms of the concepts of negative and positive liberty, rights, and obligations. It is often said that a liberal political order is based on the protection of negative liberty (freedom *from* interference or coercion) rather than positive liberty (freedom *to*, or self-determination), and on the protection of negative rights (rights against interference by others) rather than positive rights (rights to receive something from others, for example, governmental benefits).<sup>156</sup> As I have argued elsewhere, however, this view reflects a misunderstanding of the liberal tradition.<sup>157</sup> For Locke and most other early liberal writers, the idea of liberty had both positive and negative elements.<sup>158</sup> Thus, natural liberty was understood as the

153. See text accompanying notes 108-30.

154. See text accompanying notes 74-81, 85-86.

155. See text accompanying notes 90-92.

156. On positive and negative liberty, see Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 118 (Oxford U., 1969). In a series of opinions, Judge Richard A. Posner has argued that the Constitution was intended to be "a charter of negative rather than positive liberties," and that this view precludes finding a constitutional right to governmental services, including protection against violence. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), aff'd, 489 U.S. 189 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). For a critique of Posner's "negative liberties" thesis, see Heyman, 41 Duke L. J. 507 (cited in note 22).

157. See generally Steven J. Heyman, *Positive and Negative Liberty*, 68 Chi.-Kent L. Rev. 81 (1992).

158. Hobbes was an exception, defining liberty in a strictly negative manner as "the absence of . . . external Impediments to motion." Hobbes, *Leviathan* ch. 21 at 145 (cited in note 93). As Hobbes observes, this approach understands liberty in purely physical terms, and "may be applied no lesse to Irrationall, and Inanimate creatures, than to Rationall." *Id.* Hobbes's approach thus denies any distinctive value to human freedom. (Indeed, Hobbes takes the position that the human will is not free, but is determined wholly by a chain of natural necessity. *Id.* at 146-47.). Accordingly, Hobbes's definition of freedom as the absence of impediments does not imply that liberty should remain unrestricted. On the contrary, Hobbes holds that unrestrained liberty leads to the war of all against all, requiring the establishment of an absolute sovereign to

freedom to act as one wished (the positive element of liberty) *without* interference by others (the negative element).<sup>159</sup> One of the most fundamental aspects of positive liberty was the power to act for the preservation of oneself and one's rights.<sup>160</sup> Through the exercise of this power, individuals establish a community for the protection of their rights. The individual thereby obtains a positive right to protection by the community and its members; in return, he undertakes to act for their protection. In this way, individuals acquire positive obligations such as the duty to rescue.

In short, there is much in the liberal tradition that provides powerful support for a duty to rescue. On this view, affirmative obligations not only are consonant with individual liberty, but constitute an essential component of a legal order that is intended for the protection of liberty.<sup>161</sup>

restrict liberty for the sake of peace and preservation. Liberty in society consists only of the freedom to do those things that the sovereign has not forbidden. See *id.* at 148.

159. See, for example, Blackstone, 1 *Commentaries* at \*125 (cited in note 48) (defining natural liberty as "a power of acting as one thinks fit, without any constraint or control, unless by the law of nature"); Locke, *Two Treatises* bk. 2, § 4 (cited in note 68) (characterizing the natural liberty of individuals as the "perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man") (emphasis in original).

This analysis of the classical conception of liberty is consistent with Gerald C. MacCollum's view that liberty always takes the form of a triadic relation, in which subject X is free from constraint Y to do action Z. See Gerald C. MacCollum, Jr., *Negative and Positive Freedom*, 76 *Phil. Rev.* 312 (1967), reprinted in David Miller, ed., *Liberty* 100 (Oxford U., 1991). See also John Rawls, *A Theory of Justice* 202 & n.4 (Harvard U., 1971) (following MacCollum's account).

160. See Locke, *Two Treatises* bk. 2, § 128 (cited in note 68).

161. In addition to Locke, affirmative duties also find some basis in other classical liberal writers to whom contemporary libertarians often look for support. For example, Wilhelm von Humboldt—one of the first theorists to argue that the state's legitimate concern is solely with the negative rights and not the positive welfare of its citizens—holds that individuals have an obligation to aid in the prevention of criminal violence. See Wilhelm von Humboldt, *The Limits of State Action* 124 (J.W. Burrow, ed., Liberty Fund, 1993) (1854) (maintaining that, in fulfilling its duty of protection, the state may "make it legally binding on all the citizens to lend their assistance to the task, by denouncing not only crimes which are contemplated but not yet committed, but those which are already perpetrated, and the criminals concerned in them").

John Stuart Mill goes further, recognizing a duty to rescue as well as to contribute to the common protection and defense. In defining the sphere of action that concerns the interests of others and is therefore properly subject to legal control, Mill writes:

There are . . . many positive acts for the benefit of others, which [an individual] may rightfully be compelled to perform; such as to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow-creature's life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing.

John Stuart Mill, *On Liberty* 12 (David Spitz, ed., W.W. Norton & Co., 1975). See also *id.* at 70 (observing that although society is not founded on a contract, "every one who receives the protection of society owes a return for the benefit," including the duty to bear his fair share of "the labours and sacrifices incurred for defending the society or its members from injury or

IV. THEORETICAL FOUNDATIONS II: FORMALISM AND LATER NATURAL  
RIGHT THEORY

A. *The Challenge of Formalism*

The early natural right philosophy of Hobbes, Pufendorf, and Locke seeks to derive the standards of human conduct from nature itself. The function of natural law is to direct human beings toward their natural good.<sup>162</sup> Although these authors differ in their conceptions of this good—defining it variously as the preservation of the individual, of human society, or of mankind in general—they agree that it cannot be attained without mutual cooperation. Accordingly, these writers hold that individuals have a natural duty not only to refrain from injury, but also to assist one another in need. Thus, in formulating the obligations of individuals, early natural right theory does not draw a sharp contrast between negative and affirmative duties.

Later natural right theory takes an inward turn. For Kant and Hegel, the basis of right is to be found not in external nature, which they view as a realm of unfreedom, but rather in the freedom of the will. On this view, the end of natural right is not the natural good of human beings but the realization of their freedom.<sup>163</sup> In common

molestation"). "A person," Mill adds, "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." *Id.* at 12.

162. See notes 74-75 and accompanying text (Locke); text accompanying note 131 (Hobbes); Pufendorf, *Law of Nature* bk 2, ch. 3, § 15 at 207-08 (cited in note 93) (finding "the basis of natural law" in what conduct is necessary if man is "to live and enjoy the good things in this world that attend his condition"). Other early natural right authors take the same position. According to Blackstone, for example,

[the] precept, "that man should pursue his own true and substantial happiness" . . . is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's happiness, and therefore that the law of nature forbids it.

Blackstone, 1 *Commentaries* at \*41 (cited in note 48).

163. Compare Weinrib, 1 *Can. J. L. & Juris.* at 16 (cited in note 13) (observing that Kant's project "required a shift in natural law from its traditional preoccupation with the nature of man to a new attention to the nature of law" as the realization of freedom). Hegel explains the shift as follows:

The phrase "Law of Nature," or Natural Right, in use for the philosophy of law involves the ambiguity that it may mean either right as something existing ready-formed in nature, or right as governed by the nature of things. . . . The former used to be the common meaning, accompanied by the fiction of a *state of nature*, in which the law of nature should hold sway. . . . The real fact is that the whole law and its every article are based on free personality alone—on self-determination or autonomy, which is the very contrary of

with the earlier tradition, Kant and Hegel initially represent this freedom as the condition of free and independent individuals prior to the institution of the state. In this setting, natural right merely requires an individual to avoid injuring others, not to advance their good. This conception of natural right provides the basis of the Kantian and Hegelian accounts of private law, including the law of torts. Thus, later natural right theory appears to provide a much stronger basis for opposition to a duty to rescue than does the earlier tradition.

In recent years, Ernest Weinrib has developed a formalist theory of private law that draws in important part on the natural right thought of Kant and Hegel.<sup>164</sup> According to Weinrib, the function of private law is not to promote the individual or collective good, whether that good is understood in instrumentalist or noninstrumentalist terms. Instead, private law is based on a conception of individuals as autonomous, self-determining agents, whose freedom in the external world takes the form of rights to person and property. Private law is a normative framework for the external interaction of such individuals, a framework that protects the individual's external freedom to the extent consistent with the freedom of all. Accordingly, private law is inherently negative in the obligations it imposes—it forbids an individual to infringe the rights of others, but does not require him to act for their benefit.<sup>165</sup>

Thus, Weinrib contends, to impose an affirmative duty to rescue would conflict with the very structure of private law. This argument, it should be observed, focuses solely on private law. Nothing in Weinrib's view would preclude the adoption of an affirmative duty to rescue as a matter of public law. Such a duty, however, could not be recognized or enforced within private law. In this manner Weinrib constructs a powerful argument against a duty

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determination by nature. The law of nature—strictly so called—is for that reason the predominance of the strong and the reign of force.

G.W.F. Hegel, *Hegel's Philosophy of Mind* § 502 (J.N. Findlay, ed., and William Wallace and A.V. Miller, trans., Clarendon, 1971) (Part Three of Hegel's *Encyclopaedia of the Philosophical Sciences*, 3d ed. 1830, with additions first published in 1845) (emphasis in original).

164. See the sources cited in notes 13 and 14. Weinrib explores the Kantian and Hegelian bases of this position in Weinrib, 10 *Cardozo L. Rev.* 1283 (cited in note 13), and Weinrib, 87 *Colum. L. Rev.* 472 (cited in note 13). See also Weinrib, 77 *Iowa L. Rev.* at 421-24 (cited in note 14).

165. For a similar view, see Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 *Iowa L. Rev.* 515, 571-73 (1992); Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 *Cardozo L. Rev.* 1077, 1171-72 & n.133, 1173 n.134 (1989).



to rescue in private law based on his interpretation of the natural right theories of Kant and Hegel.

In this Part, I explore the later natural right tradition and its implications for a duty to rescue through a reading of Hegel's *The Philosophy of Right*. I shall focus on Hegel's work for two reasons. First, Weinrib relies on the first part of *The Philosophy of Right* as the "purest and most uncompromising" account of the negative character of private law.<sup>166</sup> If, on the contrary, one can show that Hegel's philosophy provides strong support for an affirmative duty to rescue—a duty that applies in both public and private law—it will do much to undermine the formalist position.<sup>167</sup> Second, and more generally, *The Philosophy of Right* is one of the richest and most powerful works in the natural right tradition. In many respects, it articulates the fundamental conceptions implicit in previous natural right thought, and develops them more fully than any other work.<sup>168</sup> In particular, as I shall argue, Hegel's account supports and deepens the argument for a duty to rescue developed in Part III of this Article.

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166. Weinrib, 10 *Cardozo L. Rev.* at 1286 (cited in note 13). See also *id.* at 1308 (asserting that "Hegel's account of abstract right is the most sustained attempt in Western legal philosophy to capture the distinctive rationality of private law").

167. As I have noted, Weinrib's argument against affirmative duties in private law also relies strongly on his reading of Kant's legal philosophy. See, for example, Weinrib, 87 *Colum. L. Rev.* at 489 (cited in note 13). I shall not explore Kant's views in depth in this Article. But compare text accompanying notes 145-49 (developing a Kantian argument for a public-law duty to rescue). Weinrib himself tends to treat the Kantian and Hegelian accounts of private law as essentially the same. See Weinrib, 77 *Iowa L. Rev.* at 421-24 (cited in note 14). In any event, to the extent that the Kantian account supports Weinrib's formalism, I believe that that account is vulnerable to Hegel's powerful critique of formalism, which is developed in the remainder of this Part.

168. For some valuable works on Hegel's political and ethical philosophy, see generally Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge U., 1972); Fred R. Dallmayr, *G.W.F. Hegel: Modernity and Politics* (Sage, 1993); Z.A. Pelczynski, ed., *Hegel's Political Philosophy* (Cambridge U., 1971); Z.A. Pelczynski, *The State and Civil Society: Studies in Hegel's Political Philosophy* (Cambridge U., 1984); Steven B. Smith, *Hegel's Critique of Liberalism* (U. of Chicago, 1989); Peter Steinberger, *Logic and Politics: Hegel's Philosophy of Right* (Yale U., 1988); Charles Taylor, *Hegel and Modern Society* (Cambridge U., 1979); Charles Taylor, *Hegel* (Cambridge U., 1975); Allen Wood, *Hegel's Ethical Thought* (Cambridge U., 1990).

For a broad range of perspectives on Hegel and legal theory, see generally *Hegel and Legal Theory Symposium*, 10 *Cardozo L. Rev.* 847 (1989), reprinted in part in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., *Hegel and Legal Theory* (Routledge, 1991); Benson, 77 *Iowa L. Rev.* 515 (cited in note 165); Peter Benson, *The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy*, 4 *Can. J. L. & Juris.* 257 (1991); Edgar Bodenheimer, *Hegel's Politico-Legal Philosophy: A Reevaluation*, 35 *Am. J. Juris.* 217 (1990); Drucilla Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 *U. Pa. L. Rev.* 1135 (1988); Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987); Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982).

*B. Hegel's Philosophy of Right*

Like some earlier authors, Hegel finds the basis of right in the freedom of the will.<sup>169</sup> More precisely, he defines right as any existence that embodies the free will.<sup>170</sup> Property is a right, for example, because it is one of the ways in which the free will embodies itself in the external world.<sup>171</sup>

In contrast to earlier writers, however, Hegel holds that the will is not fixed and static, but is formed (or rather forms itself) through a process of development.<sup>172</sup> Because right is an embodiment of the free will, it follows a parallel course of development.<sup>173</sup> *The Philosophy of Right* thus consists of a double movement: at the same time that it traces the development of the free will, or what today might be called the self,<sup>174</sup> it also traces the development of the concept of right.

Hegel presents this double movement as occurring in three stages. The individual begins as an independent person who embodies his freedom in the external world. At this stage, right takes the form of property, together with the other basic elements of civil law such as contract and wrong. External things, however, are inadequate as an embodiment of freedom. In the second stage, therefore, the self turns inward, and recognizes that the only true basis of freedom is the will itself. This is the stage of morality, in which freedom takes the form of inner reflection and self-realization. As long as the individual's life is purely inward, however, it cannot fully achieve the good. This result is attained in the third stage, community, in which the individual realizes his freedom through relationship with others. In this stage, right consists of the rights and obligations inherent in belonging to a community, beginning with the family and culminating in the state.

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169. G.W.F. Hegel, *Elements of the Philosophy of Right* § 4 (Allen W. Wood, ed., and H.B. Nisbet, trans., Cambridge U., 1991) (1821). For some earlier expressions of this view, see Blackstone, 1 *Commentaries* at \*125 (cited in note 48) (viewing natural liberty as rooted in "the faculty of free-will"); Kant, *The Metaphysics of Morals* at \*230 (cited in note 145) (defining right as "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom").

170. Hegel, *Philosophy of Right* § 29 (cited in note 169).

171. See text accompanying note 184.

172. See Hegel, *Philosophy of Right* §§ 10R, 10A (cited in note 169).

173. See id. § 2 (explaining that the method of the science of right is to "observe the proper immanent development of the thing [that is, the concept of right] itself").

174. The will may be identified with the self regarded as a normative agent. In the following discussion, the two terms are used interchangeably.

The structure of *The Philosophy of Right* reflects this three-stage development. Part I of the work is concerned with the realm of law, which Hegel refers to as abstract right; Part II, with the sphere of morality; and Part III, with that of community, which Hegel calls ethical life.<sup>175</sup> Thus, in reading *The Philosophy of Right*, we are also exploring one of the fundamental problems of modern legal thought: the relationship between law, morality, and community. Hegel's contribution to the debate over rescue is best understood in this context.

### 1. Right

Just as Locke began with the freedom of individuals in a state of nature, so Hegel begins with what he calls the immediate freedom of personality.<sup>176</sup> A person is a human being who is directly and inwardly conscious of his own inherent freedom and individuality.<sup>177</sup>

According to Hegel, the freedom of personality is abstract in two respects. First, an individual becomes conscious of his freedom by abstracting from all of the particular characteristics that define and limit him, thereby achieving an awareness of the free and infinite self within.<sup>178</sup> Second, however, this inner self is wholly empty and lacking in content (other than its own self-awareness). It has achieved its freedom only at the cost of excluding from itself all of the qualities that distinguish it from other selves.<sup>179</sup> The abstractly free self has not yet developed into a concrete individual with a distinctive identity of its own. Nor has it developed the social aspect of its nature through entering into relationships with others. Thus the freedom of personality is abstract in comparison with that of the fully developed self<sup>180</sup>—a self that will develop over the whole course of *The Philosophy of Right*.

For every form of freedom, there is a corresponding form of right, because (as we have seen) right is an embodiment of the free will.<sup>181</sup> How does the person give objective reality to his freedom?

175. On the meaning of "ethical life," see note 243.

176. See generally Hegel, *Philosophy of Right* § 34-40 (cited in note 169).

177. Hegel, *Philosophy of Mind* § 488 (cited in note 163); Hegel, *Philosophy of Right* § 35 (cited in note 169). Hegel's use of the terms "person" and "personality" combines (1) the jurisprudential sense of a legal or juridical person, one who is the subject of legal rights and duties, and (2) the philosophical sense of a rational being. See Michael Inwood, *A Hegel Dictionary* 229-32 (Blackwell, 1992).

178. Hegel, *Philosophy of Right* § 35 (cited in note 169). Compare id. § 5.

179. See Hegel, *Philosophy of Mind* § 488 (cited in note 163); Hegel, *Philosophy of Right* §§ 35, 37 (cited in note 169).

180. Hegel, *Philosophy of Right* § 38 (cited in note 169).

181. See text accompanying note 170.

Because that freedom is abstract and contentless, the will at this stage cannot generate its own content; hence that content can come only from outside. Accordingly, to give existence to his freedom, the individual must embody his will in the external world.<sup>182</sup> He starts by asserting exclusive control over his own body, the external side of himself.<sup>183</sup> Next, he embodies his will in particular external things, which become his property.<sup>184</sup> Through contract, a person acquires a right to property held by others;<sup>185</sup> more fundamentally, he attains recognition of his own status as a person and an owner of property.<sup>186</sup> Finally, the individual is entitled to defend and vindicate his rights of person and property when they are wrongfully infringed by others.<sup>187</sup> In this way, the concept of right initially develops into a system of private right that includes the basic principles of property, contract, tort, and crime. This is the system of abstract right, which corresponds to the abstract freedom of personality.

According to Hegel, abstract right is both formal and negative. It is formal because its basis is the abstract freedom of personality, which stands above any particular content.<sup>188</sup> Because it abstracts from content, formal right excludes all consideration of the particular characteristics, needs, or welfare of individuals.<sup>189</sup> Instead, its sole concern is to realize the formal freedom of individuals conceived of as persons and property owners. From this standpoint, particular interests or needs are irrelevant. To illustrate, if a landlord has a right to evict a tenant for nonpayment of rent, abstract right would allow him to exercise this right regardless of how great a particular hardship the tenant may suffer.<sup>190</sup>

Furthermore, abstract right imposes only negative obligations. Because it abstracts from the content of the will, formal right imposes

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182. Hegel, *Philosophy of Mind* § 488 (cited in note 163); Hegel, *Philosophy of Right* §§ 39, 41-42 (cited in note 169).

183. Hegel, *Philosophy of Right* §§ 43, 47-48 (cited in note 169).

184. *Id.* §§ 48-71.

185. *Id.* §§ 72-81.

186. *Id.* § 71R.

187. *Id.* §§ 82-103.

188. *Id.* §§ 36-37.

189. See *id.* § 37 (noting that "[i]n formal right, . . . it is not a question of particular interests, of my advantage or welfare, and just as little of the particular ground by which my will is determined, i.e. of my insight and intention"); *id.* § 229A (observing that abstract right "relates solely to the protection of what I possess; welfare is something external to right as such"); Weinrib, 10 *Cardozo L. Rev.* at 1286-93 (cited in note 13).

190. Compare Restatement § 46 cmt. g & illus. 14 (cited in note 5), which uses this hypothetical to illustrate the rule that an act that would otherwise constitute the tort of intentional infliction of emotional distress may be privileged if it constitutes the permissible exercise of a legal right.

no requirement to act for the sake of any particular end. Hence no positive duty exists to perform any particular action.<sup>191</sup> In addition, formal right abstracts from the moral and social relationships that could give rise to affirmative duties toward others.<sup>192</sup> In the realm of abstract right, individuals are viewed as inherently separate persons, each of whom has his own independent will and gives existence to that will in the external world.<sup>193</sup> Such persons are essentially external to and indifferent towards one another.<sup>194</sup> Accordingly, abstract right consists solely of commands to refrain from violating the personality and rights of others.<sup>195</sup> Within the bounds established by these negative commands, abstract right permits a person to act or dispose of his property however he chooses, without considering the interests of others.<sup>196</sup> The freedom that abstract right protects in this way is that of the arbitrary will.<sup>197</sup>

Weinrib therefore is correct when he contends that an affirmative duty to rescue cannot be justified within the structure of abstract right<sup>198</sup> as it is presented in the first part of *The Philosophy of Right*. Abstract right merely forbids me to invade another's rights to her person and property. I do not violate this purely negative duty by refusing to assist her, even when my assistance is necessary to save her from death or serious harm. In addition, although rescue may be required by the particular needs of the victim, these needs fall outside the realm of abstract right, which is concerned only with formal freedom.

The very harshness of this position,<sup>199</sup> however, should lead us to question whether it constitutes Hegel's entire teaching regarding affirmative duties. In fact, this is not Hegel's last word on the subject, but merely the first stage in a dialectic that will lead from abstract

191. See Weinrib, 10 *Cardozo L. Rev.* at 1288-89 (cited in note 13).

192. See Hegel, *Philosophy of Right* § 38 (cited in note 169).

193. *Id.* §§ 34, 40.

194. See *id.* § 112A.

195. *Id.* § 38 (stating that the requirements imposed by abstract right are "limited to the negative—not to violate personality and what ensues from personality. Hence there are only prohibitions of right, and the positive form of commandments of right is, in its ultimate content, based on prohibition.") (emphasis in original).

196. *Id.* (observing that, from a positive perspective, abstract right constitutes "a permission or warrant" to act as one chooses, within the bounds established by the rights of others) (emphasis in original); *id.* § 112A.

197. See G.W.F. Hegel, *Encyclopedia of the Philosophical Sciences in Outline* § 409 (Ernst Behler, ed., and Steven A. Taubeneck, trans., Continuum, 1990) (1st ed. 1817). See also Hegel, *Philosophy of Right* §§ 46, 75, 81 (cited in note 169) (discussing the role of the arbitrary will in property, contract, and wrong); *id.* § 151A.

198. Weinrib, 10 *Cardozo L. Rev.* at 1291-93, 1297-98 (cited in note 13).

199. Weinrib himself recognizes the severity of this position. *Id.* at 1293.

right through morality to community. This dialectic will provide powerful support for a duty to rescue.

This dialectic arises because abstract right, according to Hegel, is abstract in yet another sense: it is inherently one-sided and incomplete. In abstract right, the free will gives itself existence in the external world. External things, however, are inadequate as an embodiment of freedom, whose true basis is the will itself.<sup>200</sup> Thus, abstract right is defective because it is merely external. In addition, abstract right lacks independent reality; it is incapable of subsisting on its own. This point emerges from Hegel's discussion of crime.<sup>201</sup> Crime is the negation of right. To re-establish the reality of right, crime itself must be negated.<sup>202</sup> In the state of nature, this negation takes the form of vengeance by the injured party against the criminal. From the perspective of the criminal, however, this vengeance appears to be a new infringement, leading to an indefinite cycle of violence.<sup>203</sup> This paradox cannot be resolved without the development of an impartial will that would enable one individual to judge fairly between the adversaries.<sup>204</sup>

In this way, it becomes clear that abstract right is dependent for its reality on the subjective will. It can be destroyed by the criminal will, and can be established securely only through the activity of a will committed to upholding right for its own sake.<sup>205</sup> The will thus comes to recognize itself as the true basis of freedom and right. For Hegel, this recognition constitutes the transition from the sphere of abstract right to that of morality.<sup>206</sup>

## 2. Morality

Whereas abstract right focused on the objectification of freedom in the external world, morality focuses on freedom as the inner subjectivity of the will.<sup>207</sup> In the realm of morality, freedom finds its

200. See Hegel, *Philosophy of Right* §§ 106, 107A (cited in note 169).

201. See id. §§ 90-103.

202. See id. §§ 82, 92-93.

203. See id. § 102.

204. See id. § 103. The same problem—the lack of an impartial will to adjudicate controversies—exists with respect to lesser forms of wrong as well. See id. §§ 86, 89.

205. Hegel, *Philosophy of Mind* § 502 (cited in note 163).

206. Hegel, *Philosophy of Right* § 104 (cited in note 169).

207. It is important to note that what Hegel calls "morality" is broader than what ordinarily is meant by that term, that is, the morality of obligation. Instead, Hegel uses the term "morality" to refer to the whole realm of subjective volition and the rights and duties (as well as wrongs) that derive from it, including morality in the narrower sense. See Hegel, *Philosophy of Mind* § 503 (cited in note 163); Hegel, *Philosophy of Right* § 108R (cited in note 169).

existence not in external things, but in the self-determining activity of the will itself.<sup>208</sup> Right in this sphere therefore takes the form of what Hegel calls the right of the subjective will.<sup>209</sup> To translate Hegel's language into more familiar terms, the transition from abstract right to morality represents a movement from rights of property to rights of personality.<sup>210</sup>

Abstract right was founded on a conception of the individual as a juridical person, a formal status that abstracted from all particular characteristics. In morality, by contrast, the individual is conceived of as a "subject"—a human being who is aware of himself as a distinctive individual with his own particular identity, traits, and needs.<sup>211</sup>

Just as personality objectified itself in external things, the subjective will expresses itself through its actions.<sup>212</sup> Action involves the transformation of external reality in conformity with the subject's own purpose or end.<sup>213</sup> Initially, this end is given by the subject's particular needs, inclinations, and desires, the fulfillment of which constitutes his welfare or happiness.<sup>214</sup> The subject's right to act thus includes the right to pursue his own welfare.<sup>215</sup> Through reflection, the subject further recognizes that other subjects have the same ends that he has; thus the welfare of others is also an essential end of moral action.<sup>216</sup> Although welfare was irrelevant within the context of abstract right, it is central to the sphere of morality.

The respective demands of welfare and right, however, may conflict with one another. In approaching a conflict of this sort, moral theories generally assert the priority of one value over the other, or attempt to reconcile them by determining the appropriate domain of each. In contemporary philosophy, for example, deontological theories assert the priority of the right over the good, while utilitarian theories hold that the primary norm is the maximization of welfare.<sup>217</sup> Hegel

208. See Hegel, *Philosophy of Right* § 106 (cited in note 169).

209. See id. § 107.

210. A similar development is portrayed in Warren and Brandeis's classic article on the right to privacy, which represents the common law as gradually moving from the protection of physical rights to a greater concern with rights of personality, such as reputation and privacy. See Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). (This use of the term "personality" to refer to the internal, subjective side of human beings of course differs from Hegel's use of the term. See text accompanying notes 176-80.)

211. Hegel, *Philosophy of Right* §§ 105, 107A, 121 (cited in note 169).

212. See id. § 113. See also Dallmayr, *Modernity and Politics* at 112 (cited in note 168).

213. See Hegel, *Philosophy of Right* §§ 109-14 (cited in note 169).

214. Id. § 123.

215. Id. §§ 121, 123A, 124R.

216. Id. § 125.

217. See, for example, Rawls, *A Theory of Justice* §§ 5-6 (cited in note 159) (contrasting classical utilitarianism with the contractarian theory of justice as fairness).

takes a different approach: he views such a conflict as a dialectic between two opposing conceptions. In the course of this dialectic, each conception is revealed to be essential, but at the same time abstract and one-sided, expressing only part of the truth. The outcome of the dialectic is a richer, higher-order concept that unifies the two values and thus comes closer to the full truth.<sup>218</sup>

Hegel approaches the conflict between right and welfare from this dialectical perspective. On one hand, right appears to be prior to welfare. An intention to promote my own welfare (or even that of others) cannot justify an action that is wrong.<sup>219</sup> On the other hand, welfare must not be wholly sacrificed to right. To take the most extreme case, the preservation of my life is a precondition for my having any rights at all. If I were prohibited from infringing the rights of others to save my own life, I "would be destined to forfeit all [my] rights; and . . . [my] entire freedom would be negated."<sup>220</sup> For this reason, Hegel holds, an individual in extreme danger has a right to save his own life by violating the property rights of another.<sup>221</sup>

Abstract right, as originally presented, did not recognize a right of necessity. It focused solely on the formal right of the property owner and was indifferent to the particular needs of others.<sup>222</sup> In cases of necessity, however, Hegel holds that this position is overridden by that of morality, which represents a higher conception of freedom, in contrast to which right is merely formal.<sup>223</sup>

It is true that, at this point, we have merely established a *moral* right of necessity, rather than a legal right. Necessity will be established as a legal right, however, when we reach the third and final part of *The Philosophy of Right*, ethical life, which is the sphere in which positive law comes into existence.<sup>224</sup> As the unity of right and

218. For Hegel's account of dialectical method, see G.W.F. Hegel, *Hegel's Logic* §§ 79-82 (J.N. Findlay, ed., and William Wallace, trans., Clarendon, 1975) (Part One of Hegel's *Encyclopaedia of the Philosophical Sciences*, 3d ed. 1830) ("*Encyclopaedia Logic*"); G.W.F. Hegel, *Hegel's Science of Logic* 53-59, 431-43, 830-38 (A.V. Miller, trans., Allen and Unwin, 1969) (2d ed. 1832). For some studies of that method, see Hans-Georg Gadamer, *Hegel's Dialectic* (P. Christopher Smith, trans., Yale U., 1976); Michael Forster, *Hegel's Dialectical Method*, in Frederick C. Beiser, ed., *The Cambridge Companion to Hegel* 130 (Cambridge U., 1993).

219. Hegel, *Philosophy of Right* § 126 (cited in note 169).

220. Id. § 127A.

221. Id. § 127.

222. See text accompanying notes 188-98.

223. See Hegel, *Philosophy of Right* §§ 30, 106 (cited in note 169).

224. See text accompanying notes 277-81. Hegel clearly considers the right of necessity to be a legal and not merely a moral right. See Hegel, *Philosophy of Right* § 127R (cited in note 169) (observing that the right of necessity provides a basis for the "benefit of competence," a civil-law doctrine that allowed a debtor to retain as much of his resources as necessary to support himself); id. § 132R at 160 (treating the right of necessity as relevant to criminal responsibility).



morality, ethical life integrates the two in a way that gives priority to morality, the higher sphere, in cases in which it directly collides with abstract right.<sup>225</sup> Thus, the formalist account of abstract right must be modified significantly to accommodate Hegel's recognition of a right of necessity. That account will be modified further in the remainder of morality and ethical life, in which this right will be transformed into a duty on the part of others to relieve that necessity.

The dialectic of right and welfare reveals the abstract and limited character of both.<sup>226</sup> Welfare without right lacks justification; right without welfare is empty. The ultimate outcome of this dialectic is what Hegel calls the good, which he conceives of as the unity of right and welfare.<sup>227</sup> From this higher standpoint, welfare is not a good without right, and right is not the good without welfare.<sup>228</sup> In contrast to right, which is a merely abstract and formal universal, the good is "the *fulfilled* universal," or "*realized freedom*."<sup>229</sup>

With the good we come to morality proper, or the morality of duty. The good is a universal that encompasses not only my own right and welfare, but also the right and welfare of all others; it therefore constitutes the ultimate end of the will.<sup>230</sup> For this reason, the relation between the individual will and the good is one of obligation.<sup>231</sup> An individual has a moral duty to promote the good, including the good of others.<sup>232</sup> In particular, morality requires one to help others in need.<sup>233</sup>

Hegel underscores the resulting contrast between abstract right and morality.<sup>234</sup> Abstract right viewed individuals from the outside, as juridical persons who embodied their freedom externally in their persons and property. From this perspective, individuals were external to and indifferent towards one another; abstract right therefore consisted of negative commands to refrain from violating the rights of others.<sup>235</sup> Morality, on the other hand, represents "the will's inner attitude towards itself."<sup>236</sup> Following Kant, Hegel holds that the moral will is inherently universal.<sup>237</sup> Insofar as the wills of individuals

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225. See, for example, id. § 30R.

226. Id. § 128.

227. Id. §§ 128-30.

228. Id. § 130.

229. Id. §§ 128, 129 (emphasis in original).

230. Id. §§ 129-30.

231. Id. §§ 113, 131, 133.

232. Id. § 134.

233. Id. §§ 207, 242.

234. See id. § 112A.

235. See text accompanying notes 191-97.

236. Hegel, *Philosophy of Right* § 112A (cited in note 169).

237. See id. §§ 111, 133-35.

participate in this universal will, an inner unity exists among them. In morality, therefore, in contrast to abstract right, the will of the individual has a positive relation to the will of others—a relation that gives rise to positive, not merely negative, obligations.<sup>238</sup>

Hegel's account of morality might appear to provide a rationale for imposing an affirmative duty to rescue. This rationale is not yet an adequate one, however, because it overlooks the distinction between law and morality. Morality is rooted in the inner subjectivity of the individual. This subjectivity is inviolable and may not be coerced by law or otherwise.<sup>239</sup> In addition, the moral duty to aid others is too indefinite for legal enforcement.<sup>240</sup> Although morality enjoins one to promote the well-being of others in general, it does not specify to whom this duty is owed or how much must be done to satisfy the duty. Therefore, insofar as the obligation to aid others is a moral one, it may not be enforced by positive law.

These difficulties illustrate what Hegel regards as the fundamental limitation of morality: its abstract nature. Just as abstract right was only external, morality is merely internal.<sup>241</sup> It constitutes the perspective of the subjective will, which has not yet translated itself into reality. For this reason, Hegel holds, morality always remains at the level of an obligation or "ought," which has not yet achieved fulfillment in the real world.<sup>242</sup>

### 3. Community

The movement from abstract right through morality culminates in ethical life or community.<sup>243</sup> In this sphere, the subjective will

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238. See id. §§ 112, 112A. Hegel states:

In connection with formal right, we noted that it contained only prohibitions, and that an action strictly in keeping with right consequently had a purely negative determination in respect of the will of others. In morality, on the other hand, the determination of my will with reference to the will of others is positive—that is, the [universal will] is inwardly present in what the subjective will realizes. . . . In the context of right, any intentions which the will of others may have with reference to my will, which gives itself existence in property, are irrelevant. In the moral sphere, however, the welfare of others is also involved, and it is only at this point that this positive reference can come into play.

Id. § 112A.

239. See id. §§ 94A, 106A, 213.

240. See id. § 69R at 100 (indicating that matters that "cannot be precisely determined" cannot be "defined in terms of right and the law").

241. See id. §§ 33A, 141A.

242. See id. §§ 33A, 108, 141; G.W.F. Hegel, *Phenomenology of Spirit* §§ 596-630 (A.V. Miller, trans., Clarendon, 1977) (1807).

243. Hegel distinguishes between *Moralität*, which he equates with Kantian morality, and *Sittlichkeit*, a term usually translated as "ethical life." See Hegel, *Philosophy of Right* § 33 (cited in note 169). *Sittlichkeit* is derived from *Sitte* (custom) and refers to "the ethical norms embodied

recognizes that the good does not lie outside or beyond it, but instead is realized through the subjective will itself in its relationships with others.

According to Hegel, ethical life represents the concrete unity or synthesis of abstract right and morality, each of which is merely abstract when taken on its own.<sup>244</sup> Ethical life retains the unity among individuals that was central to morality.<sup>245</sup> In ethical life, however, this unity is not merely inward and abstract, as it was in morality, but is realized in the external world in the form of concrete relationships of community.<sup>246</sup>

The structure of these ethical relationships reflects the unity of morality and abstract right. Inwardly, they are constituted by the subjective disposition of their members toward one another;<sup>247</sup> outwardly, they have objective form as relationships of right.<sup>248</sup> The family provides a paradigm example. Its inner content is the subjective feeling of love that binds its members together; at the same time, it is an institution defined by the legal relationship among its members.<sup>249</sup>

In ethical life, as in morality, individuals have a positive relation to one another, giving rise to positive duties. In contrast to morality, however, ethical duties are not abstract and indeterminate, but instead are concrete obligations owed to particular individuals. These obligations reflect the two-fold nature of ethical life. Insofar as they relate to the inward, subjective dimension of ethical relationships, ethical duties are, like the duties of morality, beyond the scope of legal compulsion.<sup>250</sup> On the other hand, insofar as they relate to external

in the customs and institutions of one's society." Inwood, *A Hegel Dictionary* at 92 (cited in note 177). Hegel's use of *Sittlichkeit* is intended to be parallel to the Greek *êthika* (ethics), which bears a similar relation to *êthos*, the custom or way of life of a people.

244. See Hegel, *Encyclopedia* § 401 (cited in note 197); Hegel, *Philosophy of Right* §§ 33, 33A, 141R, 141A (cited in note 169).

245. See text accompanying notes 236-38.

246. See, for example, Hegel, *Philosophy of Right* §§ 158, 258 (cited in note 169) (discussing the unity of the family and of the state).

247. See, for example, *id.* §§ 158, 268.

248. See *id.* § 144 (discussing the objective aspect of ethical life). As Hegel expresses it, "the *ethical* is a subjective disposition, but of that right which has being in itself." *Id.* § 141R (emphasis in original).

249. *Id.* § 158-59.

250. *Id.* §§ 159A, 213. A good contemporary illustration of such improper state regulation is provided by those laws that have been held unconstitutional as invading the privacy of family relationships. See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding a law that forbade the marital use of contraceptives unconstitutional). Because they seek to coerce communication between spouses, laws that mandate spousal notification as a prerequisite for an abortion may be criticized on the same ground. Compare *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (holding that these laws impose an undue burden on the right to abortion).

things, ethical obligations can be the subject of legal duties enforceable within the system of abstract right.<sup>251</sup> In short, ethical relationships and duties come within the legal realm, "but only in so far as [they] contain the aspect of abstract right."<sup>252</sup>

As we have seen, however, abstract right imposes only negative obligations.<sup>253</sup> How, then, is it possible for a positive ethical duty to be enforceable within abstract right? According to Hegel, an ethical duty on the part of *A* to provide an external thing (a good or service) to *B* creates a right in the latter akin to a right of property. When *A* breaches this duty, he in effect withholds property that is owed to *B*, thereby violating the fundamental command of abstract right not to infringe the right of another.<sup>254</sup> When a violation of this command results in damage to another, it gives rise to a right to civil compensation.<sup>255</sup>

Once more, these points are well-illustrated by the family relationship, and in particular by the obligation of parents toward their children. Insofar as this obligation relates to the love that parents should feel for their children, it is inward and subjective, and therefore beyond the reach of external legal control.<sup>256</sup> On the other hand, insofar as the obligation relates to the material support that parents must provide, it gives rise to a corresponding right in the children to receive such support.<sup>257</sup> If the parents fail to fulfill this obligation, they deprive the children of something to which they are entitled, and thus infringe their rights.<sup>258</sup>

It might seem that Hegel's analysis of the enforceability of positive duties is needlessly complex, and that it would be more straightforward simply to hold that positive duties are enforceable in their own right, without first transforming them into breaches of

251. Hegel, *Philosophy of Right* §§ 159A, 213 (cited in note 169).

252. Id. § 213. See also id. § 213A:

In the higher relationships of marriage, love, religion, and the state, only those aspects which are by nature capable of having an external dimension can become the object of legislation. Nevertheless, the legislation of different peoples varies greatly in this respect. . . . In older legislations, there are . . . numerous rules concerning loyalty and honesty which are out of keeping with the nature of law, because they apply entirely to the realm of inwardness.

253. See text accompanying notes 191-97.

254. See Hegel, *Philosophy of Right* § 93R (cited in note 169). Hegel analyzes contract in the same terms. Through contract, an item that belonged to one individual becomes the property of another. If the seller fails to perform his part of the contract, he violates the negative commandment of abstract right by withholding something that is due another. See id. §§ 79, 93R.

255. See id. § 98.

256. See id. §§ 159A, 213A.

257. See id. §§ 159, 174.

258. See id. § 93R.

negative obligations of abstract right. Arguably, however, Hegel's approach accurately captures the nature of the juridical phenomenon under consideration. The positive nature of ethical duties and rights reflects the positive relationship between individuals in ethical life. Legal right, however, exists between individuals conceived of as external to and independent of one another, and ultimately involves the possibility of legal coercion. To conceive of individuals in this way is to view them from the perspective of abstract right (a perspective that is contained as an element within ethical life itself, viewed as the unity of abstract right and morality). Thus, to understand how ethical duties can be legally enforceable, we must view them as giving rise to individual rights that are enforceable within the system of abstract right.

This understanding of the character of ethical relationships and duties provides the key to developing a Hegelian account of the duty to rescue. As the next section shows, Hegel holds that an ethical relationship exists between the citizen and the state. Inherent in this relationship is the state's obligation to protect the citizen not only against criminal violence, but also against other contingencies that might threaten his life or well-being. At the same time, the citizen has a reciprocal obligation to assist the state in affording this protection. This obligation provides the basis for a public duty to rescue, that is, a duty owed to the state. If an ethical relationship exists between the citizen and the state, however, such a relationship also exists between the citizens themselves. Thus, as the succeeding section will argue, potential rescuers and victims participate in a relationship of community that gives rise to a duty to rescue that is owed directly by the rescuer to the victim, and that is directly enforceable as a matter of abstract right.

#### *a. The Relationship Between Citizen and State*

According to Hegel, the family is a natural ethical community based on an immediate feeling of love and unity among its members.<sup>259</sup> This unity is a limited and transitory one, however, because children grow up and leave the family, forming new families of their own.<sup>260</sup> In this way, the family dissolves into what Hegel calls civil society, a realm in which individuals (and family units) relate to one another as self-sufficient persons.<sup>261</sup> This is the realm in which abstract right

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259. *Id.* § 158.

260. *Id.* § 177.

261. See *id.* §§ 157, 181.

attains its real existence, as a system of property, contract, and enforcement rights among these independent individuals.<sup>262</sup>

In civil society, the unity of ethical life appears lost in the unlimited pursuit of private particular interest.<sup>263</sup> This appearance is misleading, however, for in pursuing their own self-interest, individuals often are unknowingly contributing to the common good. Through a process of education, individuals gradually come to recognize the universal good that underlies their particular interests.<sup>264</sup> The culmination of this process is the recognition that one is a member of the state. The state restores the unity of the family, but on a higher level. Whereas the family is based on feeling, the state is based on reason, on a rational consciousness that the state is a community that embodies the good of all.<sup>265</sup>

The state has the same two-fold structure as the family.<sup>266</sup> Outwardly, it is constituted by laws and institutions,<sup>267</sup> while its inner content consists in the disposition of citizens toward one another and the community. This disposition is one of trust: mutual trust between citizens, and the individual's trust that his ends find fulfillment in the community.<sup>268</sup> Hegel summarizes the ethical relationship between the citizen and the state, with its corresponding rights and obligations, as follows:

The individual . . . finds that, in fulfilling his duties as a citizen, he gains protection for his person and property, consideration for his particular welfare, satisfaction of his substantial essence, and the consciousness and self-awareness of being a member of a whole. And through his performance of his du-

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262. Id. §§ 209-29.

263. Id. § 181.

264. Id. §§ 187, 209.

265. See id. §§ 158A, 257-58, 260, 268.

266. See text accompanying notes 247-49.

267. See Hegel, *Philosophy of Right* §§ 269-71 (cited in note 169) (describing the political constitution). See also id. § 144 (describing the objective side of ethical life as constituted by "*laws and institutions which have being in and for themselves*") (emphasis in original).

268. See id. § 268. Hegel specifically connects the citizen's trust in the state with the latter's protection of personal security:

[People] trust that the state will continue to exist and that particular interests can be fulfilled in it alone; but habit blinds us to the basis of our entire existence. It does not occur to someone who walks the streets in safety at night that this might be otherwise, for this habit of [living in] safety has become second nature, and we scarcely stop to think that it is solely the effect of particular institutions. Representational thought often imagines that the state is held together by force; but what holds it together is simply the basic sense of order which everyone possesses.

Id. § 268A.

ties as services and tasks undertaken on behalf of the state, the state itself is preserved and secured.<sup>269</sup>

Thus Hegel, like Locke, views the relationship between the citizen and the state as involving reciprocal rights and duties.<sup>270</sup> However, while Locke tended to view these rights and duties in merely instrumental terms, as means to goods like protection and welfare, Hegel conceives of them as the external dimension of an inner, ethical relationship in which individuals find the fulfillment of their essential nature.<sup>271</sup>

Let us begin with the rights of citizens in relation to the state. At the outset of *The Philosophy of Right*, the individual was conceived of in terms of abstract personality, and right took the form of abstract right.<sup>272</sup> In the movement from the sphere of abstract right through morality to ethical life, however, the individual has developed from an abstract into a concrete person, whose particular characteristics and needs are no longer irrelevant but are an integral part of personality.<sup>273</sup> Right has undergone a corresponding transformation, from the formal freedom of abstract right to the realized freedom of the good, the unity of right and welfare.<sup>274</sup> The good is realized in ethical life, and ultimately in the state, the community in which individuals fulfill their nature.<sup>275</sup> Accordingly, Hegel holds that the state's obligations toward its citizens include both the protection of their formal rights and the securing of their particular welfare.<sup>276</sup>

The state protects the rights of individuals through legislation and adjudication, which together constitute the administration of justice.<sup>277</sup> In this manner, abstract right is translated into positive law. At this stage, right becomes actual, and not merely an abstract "ought."<sup>278</sup> Because abstract right constitutes what is right in itself, the law should accord with abstract right.<sup>279</sup> Thus the law incorporates the formal principles of abstract right, including the fundamental command forbidding infringement of the rights of others. In terms

269. Id. § 261R.

270. See text accompanying notes 90-91.

271. See Hegel, *Philosophy of Right* § 258R (cited in note 169) (contrasting the empirical or instrumental approach of social contract theory with his own view that individuals fulfill their nature in social life).

272. See text accompanying notes 176-206.

273. See Hegel, *Philosophy of Right* § 182 (cited in note 169).

274. See text accompanying notes 227-29.

275. See text accompanying notes 243, 269-71.

276. See Hegel, *Philosophy of Right* §§ 229-30 (cited in note 169).

277. Id. §§ 209-29.

278. See id. §§ 211-14. See also id. § 57R.

279. See id. §§ 312-13.

of content, however, the rights thus protected derive not only from the sphere of abstract right itself but also from ethical life, insofar as it gives rise to external rights.<sup>280</sup> In the tradition of natural right jurisprudence, Hegel emphasizes that the administration of justice is not a matter of discretion, but rather an obligation on the part of the state.<sup>281</sup>

In addition to protecting the formal rights of citizens, the state also has a duty to secure their particular welfare. This is the responsibility of what Hegel calls "the police," or what we would call the welfare state.<sup>282</sup> A principal function of the police is to ensure the security of persons and property, not only by preventing crime and bringing perpetrators to justice, but also by protecting against other kinds of contingencies that threaten harm to citizens.<sup>283</sup> The provision of basic fire, rescue, and emergency services seems to be an excellent example of the sort of function Hegel has in mind.<sup>284</sup>

Hegel further holds that the state has a duty to secure the livelihood of its citizens. Initially, it was the responsibility of the family, the natural ethical community, to provide for the needs of its members.<sup>285</sup> The rise of civil society, however, undermines the economic self-sufficiency of the family, and thus its ability to provide for those needs. More fundamentally, civil society tends to undermine the family itself by transforming its members into independent actors who must pursue their economic well-being in the larger society.<sup>286</sup> Individuals thus become dependent for their livelihood upon civil society, which takes the place of the family with respect to individual

280. See id. § 213. For further discussion of this point, see text accompanying notes 313-27.

281. See Hegel, *Philosophy of Right* § 219R (maintaining that "[t]he administration of justice should be regarded both as a duty and as a right on the part of the public authority"); id. § 258R n. † at 280 (condemning the view that the administration of justice is not "a duty on the part of the state" and "the most perfect means of guaranteeing right"). For a discussion of this obligation in earlier natural right jurisprudence, see Heyman, 41 *Duke L.J.* at 519-20 & n.67 (cited in note 22).

282. As Allen W. Wood notes, Hegel follows early nineteenth-century practice in using the term "police" to refer to "all the functions of the state which support and regulate the activities of civil society with a view to the welfare of individuals." Hegel, *Philosophy of Right* at 450 n.1 (editor's note on "The Police") (cited in note 169). The use of the term "police power" in American constitutional law to denote the government's power to promote the public health, safety, and welfare reflects a similar meaning. The term "police" was not limited to law enforcement until later in the nineteenth century. Id. See generally Christopher L. Tomlins, *Law, Police, and the Pursuit of Happiness in the New American Republic*, in 4 *Studies in American Political Development* 3 (Yale U., 1990) (tracing the development of the concept of "police" in eighteenth- and nineteenth-century America).

283. See Hegel, *Philosophy of Right* §§ 230-36 (cited in note 169).

284. Compare id. §§ 235, 236A (arguing that the state should provide various services for public welfare, such as street-lighting, bridge-building, and public health).

285. Id. § 238.

286. Id.



needs.<sup>287</sup> The society thereby assumes a responsibility both to provide education to enable individuals to earn their own living,<sup>288</sup> and to provide for the needs of those unable to provide for themselves, because of either their own incapacity or larger economic forces.<sup>289</sup> Hegel thus adopts the view nascent in Hobbes, Locke, and Blackstone, and more fully developed by Kant, that the state has an obligation to ensure the subsistence of its members.<sup>290</sup>

In sum, Hegel holds that the state has a duty not merely to protect the formal rights of its members, but also to secure their particular welfare, by protecting them against criminal violence, preserving them from other forms of harm, and ensuring that they have means of subsistence. These services, Hegel emphasizes, are not mere benefits that the state can bestow or not as it chooses, but rights inherent in belonging to the community.<sup>291</sup>

Like earlier writers, Hegel also holds that citizens owe reciprocal duties to the state.<sup>292</sup> In particular, the citizen is obligated to perform services necessary for the common good.<sup>293</sup> This obligation generally takes the form of a duty to pay taxes.<sup>294</sup> The principle of subjective freedom, which is central to morality and which lies at the foundation of the modern state, dictates that the state generally should not commandeer particular services, but should obtain them on a voluntary basis in exchange for payment.<sup>295</sup> As Hegel recognizes, however, there are exceptions to this general rule.<sup>296</sup> The nature of trial by jury, for example, requires that citizens have a legal obligation to perform jury service when called.<sup>297</sup>

Although Hegel does not directly address whether the law should impose a duty to rescue, a compelling argument for such a duty can be made on Hegelian grounds. As we have seen, Hegel would hold

287. See id. §§ 238, 239, 241.

288. Id. § 239.

289. Id. §§ 240A, 241-42.

290. See text accompanying notes 142-45.

291. See Hegel, *Philosophy of Right* §§ 229A, 230 (cited in note 169) (arguing that the right present in particularity, which derives from morality and is realized in the state, requires "that particular welfare should be treated as a right and duly actualized") (emphasis in original); id. § 238A (explaining that "if a human being is to be a member of civil society, he has rights and claims in relation to it, just as he had in relation to his family. Civil society must protect its members and defend their rights, just as the individual owes a duty to the rights of civil society.").

292. See id. § 261R.

293. See id. § 299.

294. Id.

295. See id. §§ 206R, 299R, 299A.

296. See id. § 299R (recognizing that "[s]ervices associated with the defence of the state against its enemies" are an exception).

297. Compare id. § 228R (advocating the adoption of trial by jury).

that the state is obligated to prevent harm to one of its members in an emergency situation. When none of its own officers are present, however, the state can act only through its citizens. If citizens had no duty to act in such cases, the state would fail to fulfill its obligation, thereby undermining its ethical relationship with its citizens. By virtue of this relationship, citizens have a responsibility to assist the state in fulfilling its functions, which themselves serve the purpose of securing the rights and well-being of citizens. For these reasons, the state may properly impose such a duty on its citizens. Finally, because this duty relates to outward matters—to external action and to the preservation of life and other outward interests—it can be made a legal and not simply a moral duty.<sup>298</sup>

One of Hegel's unpublished lectures on *The Philosophy of Right* provides powerful support for this position.<sup>299</sup> In this lecture, Hegel criticizes Fichte for proposing a pervasive police presence in society in order to prevent crime and promote the common good. According to Hegel, Fichte would require the police to constantly monitor the activities of individuals to ensure that they did not commit crimes. This monitoring not only would lead to an intolerable invasion of privacy, but also would require additional police to monitor the activities of the police themselves, and so on, leading to an infinite regress. The only solution, Hegel argues, is that "the universal should be essentially not external but an inward, immanent end, the activity of individuals themselves."<sup>300</sup> In other words, the preservation of law and order ultimately must be a product not of external state force, but of the activities of the citizens themselves.

Hegel's criticism of Fichte suggests a further response to the liberal or libertarian opposition to a duty to rescue, which was considered earlier.<sup>301</sup> According to that view, the sole legitimate end of the state is to secure the rights of individuals. This end requires the existence of state force to protect individuals against violence and wrong. To the extent that this force is insufficient to protect against violence, the state fails in its function. On the other hand, if the state had sufficient force for this purpose, that force would be so great as to leave no security against oppression by the state itself. As Hegel suggests, the only solution to this dilemma is for the force of the com-

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298. See text accompanying notes 254-57.

299. G.W.F. Hegel, 4 *Vorlesungen über Rechtsphilosophie* 617 (K.-H. Ilting, ed., Frommann Verlag, 1974), translated and discussed in Hegel, *Philosophy of Right* § 234 at 450-51 n.1 (editor's note) (cited in note 169).

300. Id.

301. See Part III.C.

munity ultimately to be conceived of not as external force but as the activity of the citizens in preserving their own rights against violence. For this reason, I would argue, imposing a duty to rescue (at least in the context of criminal violence) is more consistent with a libertarian or liberal position than is relying solely on state power to protect individual rights.

*b. The Bond Between Citizens*

Thus far, the Hegelian argument for a duty to rescue has focused on the ethical relationship that exists between the citizen and the state, and on the reciprocal rights and duties that arise from that relationship. It therefore might seem that the duty to rescue is a public one owed to the state alone and not to the potential victim. This conclusion, however, conceives of the state in an abstract way, as an external power that stands over and above the citizens. According to Hegel, when we view the state in a concrete way, we recognize that it is nothing other than the community of individuals that compose it.<sup>302</sup> The state is an ethical whole constituted by the relationship among its citizens, in much the same way that the family is constituted by the relationship among its members. Therefore, the citizen has an ethical relationship, and corresponding duties, not merely to the state as a whole, but also to his fellow citizens. When he violates an obligation imposed by the state for the good of another citizen, such as a duty to rescue, he commits a wrong not only against the state as a whole, but also against that individual.

The same point can be expressed in terms of Hegel's view of the relation between the particular and the universal, which he identifies in the present context with the individual and the state, respectively.<sup>303</sup> From an abstract perspective, the universal is separate from and stands above the particular: a sharp distinction exists between state and individual, public and private. The individual's duty to the state requires a sacrifice of his own particular interests in order to submit to the will of the universal. In contrast, Hegel views the universal not as separate from the particular but as immanent within it: the state exists only through the individuals that compose it. From this concrete perspective, fulfilling one's duty toward the universal does not inherently require a sacrifice of one's own particular interests; instead, as we have seen, in fulfilling that

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302. See Hegel, *Philosophy of Right* §§ 260-61 (cited in note 169).

303. The analysis in this paragraph is derived primarily from id. § 261R.

duty one attains the protection of one's rights and the satisfaction of one's material needs. The reason is that the duties that one owes the state are imposed for the benefit of its members, including oneself.<sup>304</sup> For example, when I perform my duty to assist in preventing criminal violence, I gain protection for my own person and property by upholding a legal order that affords me that protection. In performing this duty, however, I obtain protection not only for myself but also for my fellow citizens in general, and for the potential victim in particular. Thus, in fulfilling my duty to the state I also fulfill a duty owed to the victim. In other words, the duty to rescue is not simply a public duty but a social one, a duty owed to other individuals as well as to the community as a whole.<sup>305</sup>

Thus far, this section has presented a Hegelian argument for the duty to rescue based on the ethical relationship that exists between citizens. More precisely, however, it may be said that rescue plays a role in *creating* this relationship. This point emerges when one considers rescue in the context of Hegel's distinction between civil society and the state. As discussed earlier, civil society is the realm in which self-sufficient individuals pursue their own particular interests, while the state is a community of citizens who are conscious of being members of a whole.<sup>306</sup>

Initially, both the victim, *V*, and the potential rescuer, *R*, share the status of members of civil society who are pursuing their own particular interests. Once danger arises, however, the law calls on *R* to rise above this status and act in the capacity of a member of the state. When *V* is rescued in this way, he comes to recognize *R* not merely as a member of civil society, but also as a fellow citizen who makes the good of others, including *V*, his own. Accordingly, a relationship of citizenship based on interdependence and mutual trust is

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304. See id. § 261A (noting that "what the state requires as a duty should also in an immediate sense be the right of individuals, for it is nothing more than the organization of the concept of freedom").

305. Hegel's logic also helps to explain how the duty to rescue can be owed directly to both the state and the victim. From an abstract perspective, if this obligation is owed directly to the state, it must be owed to the victim only indirectly, and vice versa. This abstract view implies that the duty to rescue must be essentially either public or private, but not both. For Hegel, however, in a concrete ethical relationship such as that which exists among state, victim, and rescuer, each element has a direct and essential relationship with the other two. Thus, it may be true both (1) that the rescuer has a direct relationship with and a duty to the state, the performance of which indirectly benefits the victim, and (2) that the rescuer has a direct relationship with and a duty to the victim, the performance of which indirectly upholds the universal interests of the state. Compare Hegel, *Encyclopaedia Logic* § 198 (cited in note 218) (giving a similar account of the relationship between individual, state, and particular needs).

306. See text accompanying notes 263-65.

formed between *R* and *V*.<sup>307</sup> The duty to rescue thus may be viewed as providing a transition from the sphere of civil society to that of the state.<sup>308</sup>

#### 4. Conclusion

Hegel's *Philosophy of Right* provides powerful support for a legal duty to rescue. According to Hegel, right initially takes the form of abstract right. In this sphere, individuals are conceived of as juridical persons who embody their freedom in the external world in their persons and property. Abstract right is concerned with the external interaction of persons conceived of in this way. Its fundamental injunction is not to injure others. As the problem of necessity shows, however, abstract right is indifferent to the well-being or even the existence of individuals, rendering it inadequate as a conception of right. In contrast to abstract right, which is external and negative, morality is internal and positive. It is based on an inner unity among individuals, a positive relation that gives rise to an obligation to promote the good of others. Morality, however, is a matter of conscience, and thus beyond the scope of the law.

For Hegel, both right and morality are abstract when considered alone; they attain their full realization in ethical life or community. Like morality, ethical life involves positive relationships between individuals. In contrast to morality, however, these relationships are not merely inward but have external existence in the form of concrete social relationships. As members of these relationships, individuals have positive duties toward one another. To the extent that these duties relate to external things, they give rise to corre-

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307. Rescue plays a similar role in creating community in the parable of the Good Samaritan. *Luke* 10:25-37. Jesus tells the parable in response to the lawyer's question, "[W]ho is my neighbor?," *Luke* 10:29, for purposes of the biblical commandment to love one's neighbor as oneself. See *Leviticus* 19:18. In the parable, a man who has been beaten by robbers is ignored by a priest and a Levite, but is aided by a Samaritan. Jesus concludes by asking, "Which of these three, do you think, proved [literally, "became"] neighbor to the man who fell among robbers?," to which the lawyer replies, "The one who showed mercy on him." *Luke* 10:36-37. As many scholars have observed, the Samaritan was in no ordinary sense a neighbor to the man beforehand; the relationship of neighbor was created through his act of mercy. See Joseph A. Fitzmyer, ed., *The Anchor Bible: The Gospel According to Luke X-XXIV* 884 (Doubleday, 1985). For further discussion of the parable of the Good Samaritan and the Anglo-American law of rescue, see Steven J. Heyman, *The Good Samaritan*, in Paul Finkelman, ed., *Religion and American Law: An Encyclopedia* (Garland Press, forthcoming 1994).

308. Such transitions play an important role in *The Philosophy of Right*. As discussed earlier, for example, crime and avenging justice bring about a similar transition from the sphere of abstract right to that of morality. See text accompanying notes 201-06.

sponding rights that are enforceable within the system of abstract right.

Hegel understands the relationship between citizens and the state in these terms. The state has a positive duty to protect the rights and promote the well-being of its members, who in turn have an obligation to act for the preservation of the community and their fellow citizens. These duties are external ones and thus subject to legal enforcement. In this way, a duty to rescue can be justified on Hegelian grounds.

### C. Hegel and Formalism

Having explored *The Philosophy of Right*, we are now in a position to respond to Weinrib's formalist argument against a duty to rescue in tort law, insofar as that argument relies on Hegel. As Weinrib emphasizes, Hegel understands tort law in terms of abstract right.<sup>309</sup> Abstract right is formal. It regards individuals as juridical persons with formal rights to property and contract, rather than as particular individuals with substantive rights to welfare. Moreover, abstract right imposes only negative obligations. For these reasons, Weinrib contends that an affirmative duty to rescue cannot be recognized or applied within abstract right, including the law of torts.<sup>310</sup> Of course, Weinrib recognizes that the Hegelian theory of right is not limited to abstract right but also includes morality and ethical life.<sup>311</sup> He denies, however, that these "later developments in the dialectic of right" operate to revise Hegel's account of private law as abstract right.<sup>312</sup> Accordingly, while nothing in Weinrib's position would exclude the possibility of an affirmative duty to rescue based on the relationship between citizens and the state, he would insist that this duty could only be one of public law. Whatever sanctions properly might be imposed for the breach of this duty, they could not include liability under private law.

Weinrib's position misconceives both the nature of abstract right and its relation to ethical life. It is true that, in the first part of *The Philosophy of Right*, Hegel presents abstract right as a system of formal right, whose elements include the rights of property and contract, together with the right to enforce these rights against

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309. Weinrib, 10 *Cardozo L. Rev.* 1283 (cited in note 13).

310. *Id.* at 1291-93, 1297-98.

311. *Id.* at 1308.

312. *Id.*

wrongful infringement.<sup>313</sup> When viewed as an integral part of *The Philosophy of Right*, however, abstract right does not constitute a closed system, but interacts with other forms of right. Precisely because abstract right is merely formal, it is capable of enforcing rights regardless of the source or content of those rights (as long as they are external and thus properly subject to coercive enforcement). Thus, abstract right provides a means of enforcing all rights—not only those arising within the system of formal right itself (property and contract), but also those deriving from ethical life.<sup>314</sup> Indeed, abstract right provides the *only* means of enforcing these rights, for Hegel treats coercion as justified only within the context of abstract right.<sup>315</sup>

Thus, abstract right interacts with the higher sphere of ethical life. The stage in *The Philosophy of Right* at which this interaction occurs is the administration of justice. As we have seen, it is at this stage that abstract right, or what is right in itself, is translated into existence as positive law.<sup>316</sup> Law retains the formal structure of abstract right. At the same time, Hegel observes that right

comes into existence in terms of *content* when it is *applied* to the *material* of civil society—to its relationships and varieties of property and contracts in their endlessly increasing diversity and complexity—and to ethical relationships based on emotion, love and trust (but only in so far as these contain the aspect of abstract right . . .). Since morality and moral precepts concern the will in its most personal subjectivity and particularity, they cannot be the object of positive legislation. Further material [for the positive content of right] is furnished by the rights and duties which emanate from the administration of justice itself, from the state, etc.<sup>317</sup>

In other words, when what is right in itself is transformed into positive law, the formal principles of abstract right are “*applied*”<sup>318</sup> not

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313. See text accompanying notes 181-87.

314. See Hegel, *Philosophy of Right* § 93R (cited in note 169) (explaining that abstract right is violated by “failure . . . to fulfil rightful duties towards the family or state”); id. § 95R (indicating that abstract right encompasses crimes against the state as well as individuals).

315. See, for example, id. §§ 93-94 (discussing abstract right and coercion); id. §§ 159, 213, 213A (noting that ethical relationships are subject to law “only in so far as [they] contain the aspect of abstract right”).

316. See text accompanying note 278.

317. Hegel, *Philosophy of Right* § 213 (brackets inserted by the cited translation) (emphasis in original).

318. Id. “Application” (*Anwendung*) is a key term in this context, central to an understanding of Hegel’s conception of the relation between abstract right and ethical life. In methodological terms, Hegel distinguishes between the dialectical development of concepts, which he regards as the distinctive method of philosophical science, and the “application” of such concepts to particular content, which is characteristic of analytical thought in general and legal method in particular. See id. §§ 3, 31. Because such applications do not affect the conceptual structure of the subject (in this case, the Idea of right), Hegel discusses them only in passing. See

only to the rights of property and contract (as they have been modified by the complex relations of civil society), but also to the rights and duties arising from family relationships ("relationships based on emotion, love and trust") and from the relationship between individuals and the state.

Weinrib therefore is correct when he asserts that positive law retains the normative structure of abstract right, including its formal and negative character.<sup>319</sup> The basic norm of positive law, like that of abstract right, is the injunction not to infringe the rights of others. In the case of positive law, however, the substantive rights to which this norm applies are not only those of property and contract, but also those deriving from ethical life. As we have seen, ethical life gives rise to some positive rights to receive support or assistance from others.<sup>320</sup> Accordingly, although legal commands are negative in form, they operate to enforce some rights and duties that are positive in substance.<sup>321</sup> Indeed, in a passage that is fatal to Weinrib's position,

id. § 270 at 292 n.†. Nevertheless, he indicates that they are indispensable to a "comprehensively concrete" understanding of a body of positive law. Id.

In substantive terms, Hegel often uses the term "application" to describe the relationship between a lower and a higher sphere. See id. § 282R. For example, Hegel holds that art, religion, and science are spheres that transcend the state (and right in general). See Hegel, *Philosophy of Mind* §§ 553-77 (cited in note 163). Nevertheless, in some respects, art, religion, and science enter into the sphere of the state—for example, in the ownership of property by art museums, churches, and scientific institutions. In these respects, "the principles of the state are applicable to them." Hegel, *Philosophy of Right* § 270R at 292 n.† (emphasis in original) (cited in note 169). See also, for example, id. § 95R (explaining that, although the discussion of crime in the section on abstract right is limited to offenses against individuals, the same principles also "appl[y]" to subsequent developments in the idea of crime, including offenses against the state).

As the passage quoted in the text indicates, Hegel views the relation between abstract right and ethical life in these terms. Although ethical life transcends abstract right, the principles of abstract right "apply" to ethical relationships "in so far as [they] contain the aspect of abstract right." Id. § 213.

319. See Ernest J. Weinrib, *Professor Brudner's Crisis*, 11 *Cardozo L. Rev.* 549, 551-52 (1990); Weinrib, 10 *Cardozo L. Rev.* at 1308-09 (cited in note 13).

320. See text accompanying notes 250-52, 256-58.

321. Weinrib cites several passages in support of his contention that "the private law of civil society is identical with the norms of abstract right," and thus necessarily excludes positive rights that derive from the higher spheres of morality and ethical life. Weinrib, 11 *Cardozo L. Rev.* at 552 (cited in note 319). See, for example, Hegel, *Philosophy of Right* § 229 (cited in note 169) (remarking that the universal present in the law of civil society "is that of abstract right") (emphasis in original); Hegel, *Philosophy of Mind* § 530 (cited in note 163) (explaining that "inasmuch as [positive laws are] laws of strict right, they touch only the abstract will—itsself at bottom external—not the moral or ethical will"). See also Hegel, *Philosophy of Right* § 212 at 136 (T.M. Knox, trans., 1952) (1821) (asserting that positive law has obligatory force only by virtue of its conformity to what is right in itself). But compare Hegel, *Philosophy of Right* § 212 at 243 (cited in note 169) (translating the same passage in a substantially different way).

As the argument in the text tries to make clear, Weinrib's reliance on these passages is misplaced. Hegel's remarks indicate that positive law should incorporate both the formal principles of abstract right and its substantive content, that is, the rights of property and contract. His remarks do not imply, however, that the content of positive law can come *only* from the



Hegel expressly states that one can fail to fulfill external duties arising from ethical life either "by action or by default," and that this failure constitutes a violation of abstract right.<sup>322</sup>

This analysis makes clear how, contrary to Weinrib's view, an affirmative duty to rescue can be recognized and enforced by the system of abstract right. As I have suggested, a Hegelian account of the duty to rescue would focus on the positive ethical relationship between citizens. By virtue of this relationship, an individual has an obligation to assist a fellow citizen in danger, and the victim has a corresponding right to receive that assistance. Although this right arises from ethical life, it can also be viewed from the perspective of abstract right as a quasi-property right belonging to the victim as a legal person. *R*'s breach of this duty violates abstract right by withholding property or a service owed to another.<sup>323</sup> If this violation results in damage to *V*, he is entitled to recover compensation from *R* under tort law.<sup>324</sup> Thus, although the duty to rescue derives from public law, it is enforceable in private law.<sup>325</sup>

Weinrib might object that this account undermines the coherence of private law by importing into it norms from outside that body of law.<sup>326</sup> In one sense, it can be said that this ideal of the coherence of

sphere of abstract right. On the contrary, as we have seen, Hegel expressly states that positive law also gains its content from "ethical relationships based on emotion, love and trust" as well as "the rights and duties which emanate from the administration of justice itself, from the state, etc." *Id.* § 213.

322. Hegel, *Philosophy of Right* § 93R (cited in note 169) (emphasis added). See also *id.* § 294R at 333-34 (indicating that "[t]he wrong which is done by non-performance or positive infringement [of certain duties owed to the state] (i.e., by an action in violation of one's duty, which applies in both of these cases)" constitutes an infringement of abstract right).

323. See *id.* § 93R.

324. See *id.* § 98.

325. Although I focus here on Weinrib's claim that an affirmative duty to rescue cannot be applied within tort law, his position further implies that, within Hegel's framework, such a duty also cannot be enforced through criminal law. For Hegel, tort and criminal law are both subdivisions of abstract right. If, as Weinrib contends, abstract right can enforce only negative obligations, then an affirmative duty to rescue would be excluded under criminal as well as tort law. Of course, this interpretation also would mean that the law could not impose criminal liability for a failure to pay taxes, to serve in the military, or to perform any other positive obligation imposed by the state. Hegel clearly does not hold such an extravagant position. See, for example, *id.* § 93R (indicating that failure to perform rightful duties toward the state through "default" violates abstract right); *id.* § 294R at 333-34 (observing that non-performance of duty by a civil servant constitutes a crime). Hegel's recognition of the capacity of criminal law to enforce positive obligations decisively undermines Weinrib's contention that abstract right is incapable of enforcing such obligations. It thereby also undermines Weinrib's argument against affirmative duties in tort law, since that argument is based on his interpretation of abstract right in general.

326. According to Weinrib, "[c]oherence is the criterion of truth for the formalist understanding of a juridical relationship," such as the relationship between plaintiff and defendant in tort law. Weinrib, 97 *Yale L. J.* at 972 (cited in note 13). To be coherent, a juridical relationship must consist of doctrines and institutions that "exemplify a single theme" and thereby constitute a unitary whole, rather than "an aggregate of conceptually disjunct or

formal right is precisely what Hegel means to deny in his account of the application of abstract right to the material of civil society and the state. In another sense, however, the account that I have advanced here can be said to preserve the coherence of formal right more fully than Weinrib's own view. As I have explained, abstract right does not enforce ethical rights and duties *as such*, but only insofar as they can be viewed as quasi-property rights within the system of abstract right.<sup>327</sup> Abstract right enforces all individual rights regardless of their source or content. From this perspective, the coherence of formal right would be undermined by *refusing* to enforce ethical rights and thereby arbitrarily limiting its scope.

Hegel's account of the relationship between abstract right and higher forms of right reflects a more general stance toward legal formalism. As Weinrib emphasizes, *The Philosophy of Right* begins with a formalist account of right as abstract right. Although Hegel gives formalism its due, however, his work also constitutes one of the most powerful critiques of formalism ever articulated. According to Hegel, the formalist theory of law is based on an abstract conception of the self. In its full development, however, the self is not merely a juridical person but also a moral agent, a family member, a member of civil society, and a citizen of the state. Similarly, a fully developed conception of right must encompass not only formal right but also morality and the rights and obligations that arise from family life, civil society, and the state.

For Hegel, the realm of formal right cannot be understood entirely in its own terms, but must be viewed as part of the system of right as a whole. Formal right interacts with higher forms of right, and provides the means of enforcing them. In this way, the legal system comes to enforce positive obligations such as the duty to rescue.

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inconsistent elements that . . . happen to be juxtaposed." *Id.* at 968-69. For example, Weinrib maintains that the doctrines and institutions of negligence law (such as actual causation, duty, proximate causation, adjudication, and the award of damages as a remedy) can all be understood as expressions of a single idea: the bipolar relationship arising from the defendant's wrongful causation of harm to the plaintiff. *Id.* at 969. It follows from this conception that "no liability lies for failure to prevent or alleviate suffering" that arises independently of the defendant's acts. See Weinrib, 23 *Valp. U. L. Rev.* at 516-17 (cited in note 13). On this view, to recognize or enforce affirmative duties within negligence law would undermine the coherence of that body of law.

327. See text accompanying notes 253-58.

## V. TOWARD A LIBERAL-COMMUNITARIAN THEORY OF THE DUTY TO RESCUE

### A. *The Liberal-Communitarian Theory and Other Rationales for a Duty to Rescue*

Our exploration of the common-law and natural right traditions has suggested a justification for a general duty to rescue. According to this account, the state is a community whose ends include the protection of its members from criminal violence and other serious harm. Every citizen has a fundamental right to protection by the community.<sup>328</sup> In return, the individual has an obligation to assist in performing this function by acting when necessary to rescue a fellow citizen in danger. This duty is owed not only to the community at large but also to the other members of the community, especially the endangered person.<sup>329</sup> An individual who breaches this obligation

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328. In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the Supreme Court held that under the Fourteenth Amendment individuals have no right to protection by the state against private violence. I have argued elsewhere that *DeShaney* reflects a misunderstanding of the American constitutional and legal tradition through the end of Reconstruction. According to that tradition, the most basic obligation of government was to protect its citizens. See Heyman, 41 Duke L. J. 507 (cited in note 22). Apart from its misunderstanding of the history and language of the Fourteenth Amendment, *DeShaney* appears to be based largely on federalism concerns, that is, on a hesitancy to impose affirmative obligations on the states as a matter of federal constitutional law. Thus, the decision has little bearing on whether a state should recognize a duty of protection as a matter of its own constitutional (or nonconstitutional) law, or should impose on its citizens a reciprocal duty to assist in providing this protection. For further criticism of *DeShaney*, see Akhil R. Amar and Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992); Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271 (1990); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 S. Ct. Rev. 53; Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 Geo. Wash. L. Rev. 1513 (1989).

329. For some other arguments for rescue as an obligation of citizenship, see Glendon, *Rights Talk* at 78-89 (cited in note 19); Herbert Fingarette, *Some Moral Aspects of Good Samaritanism*, in *The Good Samaritan and the Law* at 213, 220-21 (cited in note 26). In her Storrs lectures, the late Judith N. Shklar expressed a similar view in terms of a theory of "active republican citizenship":

"Who does not prevent or oppose wrong when he can, is just as guilty of wrong as if he deserted his country." It is a notion that has special importance for any theory of republican citizenship, ancient or modern.

Passive injustice is more than failing to be just, it is to fall below personal standards of citizenship. . . . The normally unjust man is guilty of falling below law and custom by actively violating them and also by being unfair. The passively unjust man, however, does something different; he is simply indifferent to what goes on around him, especially when he sees fraud and violence. His failure is specifically as a citizen. It is not a matter of lacking general human goodness. . . . To prevent fraud and violence when we can do so is an act of citizenship, not of humanity.

can properly be held responsible both to the community through its criminal law and to the injured party in a tort action.<sup>330</sup>

As I have suggested, this account may be termed a liberal-communitarian theory of the duty to rescue. It draws substantially on the modern natural right tradition, which constitutes an important element of the background of contemporary liberal as well as communitarian thought. In common with liberalism, the theory emphasizes the fundamental need to protect the rights and promote the welfare of individuals. It holds, however, that this protection can be fully achieved only within a community whose members recognize an obli-

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Judith N. Shklar, *The Faces of Injustice* 40-42 (Yale U., 1990). The quotation in this passage is taken, with some modification, from Cicero, *The Offices* bk. 1, ch. 7 at 25 (Walter Miller, trans., Harvard U., 1921).

In emphasizing citizenship and community as the ground of a duty to rescue, I do not, of course, mean to imply that aliens should be excluded from the benefits of this duty. According to both the common-law and social contract traditions, the state's duty of protection extends not only to its permanent members, but also to aliens while they are present within the state's jurisdiction. Conversely, aliens owe a temporary allegiance to the state as long as they enjoy its protection. See *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377, 384 (1608); Locke, *Two Treatises* bk. 2, §§ 119-22 (cited in note 68). In effect, aliens are treated as temporary members of the community for purposes of protection. Compare Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (remarks of Senator Cowan during the debate over the Fourteenth Amendment) (remarking that "so far as the courts and the administration of the laws are concerned, I have supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection"). In this Article, I have suggested that the strongest basis for a duty to rescue lies in the community's duty of protection, and in the obligation of its members to aid in performing this function. Thus, aliens should enjoy the benefits of the duty to rescue, and, at least in situations in which they become residents of the community, should be subject to that duty themselves.

330. See text accompanying notes 99-100 (discussing social contract theory), 101-02 (drawing an analogy to the doctrine of statutory negligence), 302-05 (developing a Hegelian account of the ethical relationship between citizens). Some proponents of a duty to rescue rooted in public-law concepts would restrict that duty to criminal law. Anthony D'Amato, for example, takes the position that individuals owe no "personal duty" to strangers, but have an obligation as "members of society . . . to act responsibly" by rescuing fellow citizens in danger. For this reason, he argues that failure to rescue should give rise to criminal but not tort liability. Anthony D'Amato, *The "Bad Samaritan" Paradigm*, 70 Nw. U. L. Rev. 798, 804-09 (1975). Similarly, Mary Ann Glendon, drawing on the approach of many European legal systems, is inclined to view the problem of rescue "as one involving civic duties rather than private rights," with criminal rather than tort sanctions as the appropriate solution. Glendon, *Rights Talk* at 84-85 (cited in note 19).

As I have sought to show, however, the ideas of civic duty and private right need not be understood as mutually inconsistent approaches to the problem of rescue. A community is constituted not only by the bond between citizen and society, but also by the bond among citizens themselves. Likewise, civic obligations such as rescue are owed both to the community at large and to one's fellow citizens. In Glendon's words, they are responsibilities that "citizens owe to one another." *Id.* at 77. Although one object of the duty to rescue is to promote the common good, it does so by protecting the private rights and well-being of individuals. Compare text accompanying notes 335-36 (discussing the relationship between individual rights and the common good). For these reasons, one who wrongfully fails to rescue a fellow citizen should be answerable not only to the community for violating its norms of conduct, but also to that individual for the injury suffered as a result of the failure to act.

gation to act for the benefit of both the community itself and their fellow citizens.<sup>331</sup>

In response to this view, some might object that contemporary society is not characterized by the sort of community that could serve as the basis for a duty to rescue. As I have suggested, however, action on behalf of others plays a crucial role in *creating* relationships between individuals.<sup>332</sup> Thus, the recognition of a duty to rescue might not merely reflect but also promote a greater sense of community in contemporary society.

This liberal-communitarian or social duty theory can be understood more fully in contrast with other rationales for a duty to rescue. Following Ames, many writers have advanced the utilitarian argument that imposing such a duty would promote the welfare of society as a whole.<sup>333</sup> Like the liberal-communitarian theory, this utilitarian view supports a duty to rescue on the ground that it would advance the public good. The two theories differ, however, in their conceptions of that good. Utilitarianism identifies it with aggregate social welfare. This conception is abstract in two respects. First, it views the public good in abstraction from the rights of individuals. For utilitarianism, no necessity relation exists between social welfare and individual rights. Second, the utilitarian conception focuses on the welfare of society as a whole, and accords no intrinsic importance to the well-being of any particular individual (other than as it affects aggregate welfare). For these reasons, utilitarianism is subject to the criticism that, at least in principle, it would allow society to sacrifice even the most important interests of an individual to promote overall social welfare.<sup>334</sup> In contrast, the liberal-communitarian conception of the public good is a concrete one. On this view, the public good is not

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331. A duty to rescue or assist others draws support from both contemporary liberal and communitarian thought. For some liberal arguments in favor of such a duty, see Feinberg, 1 *Moral Limits* ch. 4 (cited in note 26); Rawls, *A Theory of Justice* §§ 19, 51 (cited in note 159) (presenting an account of a natural duty of mutual aid). For a communitarian view, see Glendon, *Rights Talk* at 78-89 (cited in note 19).

332. See notes 306-08 and accompanying text.

333. See, for example, Ames, 22 *Harv. L. Rev.* at 110 (cited in note 1); Weinrib, *Affirmative Case*, 90 *Yale L. J.* at 280-87 (cited in note 13) (formulating and criticizing a utilitarian argument for a duty to rescue). This argument may be traced back to Bentham, who suggested that "in cases where the person is in danger, [it should be] the duty of every man to save another from mischief, when it can be done without prejudicing himself." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 293 (J.H. Burns and H.L.A. Hart, eds., Athlone, 1970). John Stuart Mill grounded his argument for a duty to rescue on his own form of utilitarianism. See note 161; Mill, *On Liberty* at 12 (cited in note 161) (maintaining that "the ultimate appeal on all ethical questions" is utility, but "utility in the largest sense, grounded on the permanent interests of man as a progressive being").

334. See, for example, Rawls, *A Theory of Justice* § 5 at 26 (cited in note 159).

conceptually independent of the rights and welfare of individuals, but incorporates them as integral elements of the good.<sup>335</sup> In this regard the liberal-communitarian view follows modern natural right theory, which views the public good as intrinsically connected with individual rights.<sup>336</sup>

Perhaps the most common argument for a duty to rescue is based on the view that individuals have a moral obligation to aid others. This argument raises the fundamental question of the relationship between law and morality. Advocates of a duty to rescue frequently contend that the law should reflect moral norms.<sup>337</sup>

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335. This contrast between utilitarianism and a concrete conception of the good is drawn from Hegel's discussion of right and welfare. Compare Hegel, *Philosophy of Right* § 125 (cited in note 169) (articulating a conception of universal welfare), with id. §§ 128-30 (explaining Hegel's view of the good as the unity of welfare and right).

336. Locke clearly indicates that the public good includes the protection of the life, liberty, and property of individuals. See, for example, Locke, *Two Treatises* bk. 2, § 131 (cited in note 68) (arguing that "the power of the Society . . . can never be supposed to extend farther than the common good; but is obliged to secure every ones [Liberty and] Property") (emphasis in original); id. § 135 (asserting that the legislative power "is limited to the publick good of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects.") (emphasis in original). Similarly, Blackstone writes that "the public good is in nothing more essentially interested, than in the protection of every individual's private rights . . ." Blackstone, 1 *Commentaries* at \*139 (cited in note 48). See also note 335 and accompanying text (noting that Hegel's conception of the good includes the rights of individuals).

337. See, for example, Ames, 22 *Harv. L. Rev.* at 113 (cited in note 1) (describing the task of legal reform as that of "bringing our system of law more and more into harmony with moral principles"); Weinrib, *Affirmative Case*, 90 *Yale L. J.* at 263-64 (cited in note 13) (arguing that "the role of the common-law judge centrally involves making moral duties into legal ones").

In his 1980 article, Weinrib argued for a duty to rescue on the basis of a Kantian or deontological account of the moral duty of beneficence. See Weinrib, *Affirmative Case*, 90 *Yale L. J.* at 287-92 (cited in note 13). This duty, he observed, would extend not only to rescue in emergency situations, but also to the alleviation of poverty, starvation, and other threats to physical security. Such a duty, however, would be indeterminate both with respect to the extent of the actions required and with regard to "the linking of particular benefactors to particular beneficiaries." *Id.* at 291. Weinrib sought to resolve these difficulties by arguing that "what is required is to set up social institutions to perform the necessary tasks of coordination and determination." *Id.* These institutions, which are legislative and administrative in nature, ensure that both the burdens and the benefits of benevolence are distributed fairly. *Id.* at 291-92. (For a similar account, see Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *Stan. L. Rev.* 877 (1976).) In an emergency situation, however, the "peril cannot await assistance from the appropriate social institutions," and the moral duty to rescue properly focuses on the individual who is in a position to rescue. Weinrib, *Affirmative Case*, 90 *Yale L. J.* at 292.

My own approach to the problem of rescue—and especially to the relationship between the individual duty to rescue and the role of social institutions—is deeply indebted to Weinrib's 1980 article. At the same time, some fundamental differences exist between the two approaches. For Weinrib, the duty to rescue was based on an individual duty of benevolence, which was to be coordinated by state institutions; for the liberal-communitarian view, by contrast, the paramount duty is that of the community, a duty that is delegated to individuals in an emergency. It is this emphasis on the responsibility of the community that leads to a focus on the core problem of criminal violence and on the roots of a duty to rescue in the traditional common-law duty to prevent violence. Moreover, the liberal-communitarian theory views the duty to rescue as essentially one of right or justice, rather than as a moral duty, as Weinrib viewed it in his 1980

Opponents often acknowledge the existence of a moral obligation to rescue, but deny that law can properly enforce morality.<sup>338</sup>

The liberal-communitarian theory occupies a middle ground between these two positions, rejecting both the view that the role of law is to enforce morality and the view that law and morality are entirely distinct. Instead, it holds that moral duties are enforceable only to the extent that they can be transformed into duties of right or community. In this respect, the theory follows the natural right views that we have considered. For Pufendorf (and, I have suggested, for Locke), the obligation to aid others is generally a moral one, but it becomes a duty of justice when this assistance is necessary to preserve the life of another.<sup>339</sup> For Hegel, morality is inward and beyond legal compulsion; however, morality attains its concrete existence in the world in the form of social relationships, which involve positive duties.<sup>340</sup> As these authors recognize, although right and morality (and, for Hegel, community) are largely distinct spheres, they are not entirely static and separate from one another. In some circumstances, duties of morality overlap with or are transformed into those of right or community, and thereby become legally enforceable. The liberal-communitarian theory understands the duty to rescue in these terms. This duty is based not on morality as such, but on the rights of the endangered person and on the rescuer's obligation as a member of the community.<sup>341</sup>

article. Understanding the duty to rescue in moral terms exposes it to the objection that morality cannot properly be enforced through law. It was this consideration that led Weinrib, in his later work, to repudiate the duty to rescue in private law. See note 13.

338. See, for example, Epstein, 2 J. Legal Stud. at 200-01 (cited in note 11); Weinrib, 87 Colum. L. Rev. at 501-03 (cited in note 13). The best-known statement of this position appears in *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897):

Actionable negligence is the neglect of a legal duty. . . . With purely moral obligations the law does not deal. For example, the priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved. Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.

*Id.* at 810. See also *Home Office v. Dorset Yacht Co.*, 1970 App. Cas. 1004, 1027 (judgment of Lord Reid) (stating that "when a person has done nothing to put himself in any relationship with another person in distress or with his property mere physical 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.").

339. See text accompanying notes 113-28.

340. See text accompanying notes 239-52.

341. This view of the relation between law and morality can be further illustrated by considering some related issues. The problem is debated most often in connection with the legal regulation of sexuality. In general, it can be argued that private, consensual sexual conduct does

One of the most original contributions to the debate on rescue in recent years appears in Leslie Bender's article on feminist theory and tort law.<sup>342</sup> Drawing on Carol Gilligan's *In a Different Voice*,<sup>343</sup> Bender contrasts two different approaches to moral issues: a traditional or masculine perspective emphasizing "abstract, objective, rule-based decisions supported by notions of individual autonomy, individual rights, the separation of self from others, equality, and fairness"; and a "different voice," more characteristic of women's moral development, that "focus[es] on the particular context of problems, relationships, caring (compassion and need), equity, and responsibility."<sup>344</sup> Our legal system, Bender contends, has been dominated by the former perspective.<sup>345</sup> The traditional approach to tort law tends to "view accidents and tragedies abstractly, removed from their social and particularized contexts, and to apply instead rationally-derived universal principles and a vision of human nature as atomistic, self-interested, and as free from constraint as possible."<sup>346</sup> This approach is exemplified by the no-duty rule, which sacrifices care for others to "liberalism's concerns for autonomy and liberty."<sup>347</sup>

In place of the no-duty doctrine, Bender argues for a legal duty to rescue inspired by "a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation":<sup>348</sup>

In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of

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not violate the rights of any other person and violates no duty inherent in an individual's relationship with the community and its members. Thus, this conduct in principle is beyond the legitimate realm of legal regulation. See, for example, H.L.A. Hart, *Law, Liberty, and Morality* (Stanford U., 1963). The same is true of abortion, unless the fetus is considered a person (and thus endowed with rights), or sufficiently close to that status to justify the state's assertion of an interest in its preservation. (To the extent that such a right or interest exists, this does not necessarily mean that abortion can be outlawed, but rather that the issue is one that is properly subject to legal determination, to be resolved by weighing the conflicting rights and interests involved.) In contrast to these cases, the duty to rescue can be enforced through law because that duty is based on the rights and obligations of membership in the community.

Of course, much more discussion would be required to provide an adequate account of the relationship between law, morality, and community. In particular, it would be necessary to give a fuller account of when an obligation legitimately can constitute a duty of right or community. What has been said thus far, however, should be sufficient to indicate the basic approach I wish to take.

342. Bender, 38 *J. Legal Educ.* at 3 (cited in note 5).

343. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard U., 1982).

344. Bender, 38 *J. Legal Educ.* at 28 (cited in note 5).

345. See *id.* at 32.

346. *Id.* at 33.

347. *Id.*

348. *Id.* at 34.



individual autonomy by the imposition of an affirmative duty. If we think about the stranger as a human being for a moment, we may realize that much more is involved than balancing one person's interest in having his life saved and another's interest in not having affirmative duties imposed upon him in the absence of a special relationship, although even then the balance seems to me to weigh in favor of imposing a duty or standard of care that requires action. The drowning stranger is not the only person affected by the lack of care. He is not detached from everyone else. He no doubt has people who care about him—parents, spouse, children, friends, colleagues; groups he participates in—religious, social, athletic, artistic, political, educational, work-related; he may even have people who depend upon him for emotional or financial support. He is interconnected with others. If the stranger drowns, many will be harmed. It is not an isolated event with one person's interests balanced against another's. . . .

. . . Why should our autonomy or freedom not to rescue weigh more heavily in law than a stranger's harms and the consequent harms to people with whom she is interconnected?<sup>349</sup>

By connecting the problem of rescue to the feminist critique of law, and by emphasizing relationship as the basis of a duty to rescue, Bender makes an important contribution to the debate. As articulated in this passage, however, her conception of relationship or "interconnectedness" suffers from a crucial ambiguity. In the latter part of the passage, Bender focuses on the concrete social relationships that exist between the victim and those closely connected with him—his family, friends, and so on. This contextual notion of interconnectedness may well justify the imposition of affirmative duties on family members, friends, and so forth, based on their special relationship with the victim.<sup>350</sup> It does little, however, to justify the imposition of a duty to rescue *on a stranger*, someone who does not have a special relationship with the victim.<sup>351</sup> To establish such a duty, Bender falls back on a rather different notion of interconnectedness, one that asserts that all human beings are interconnected with each other, and that this connection provides the basis of a general obligation to rescue.<sup>352</sup> This conception of interconnectedness,

349. *Id.* at 34-35.

350. See part V.B.2.a (discussing duties arising from special relationships).

351. Although Bender does not articulate the argument this way, she might respond that society constitutes a web of relationships, and that a stranger is connected to the victim indirectly through this web. On this view, a potential rescuer *R* would recognize that the death of the victim *V* would cause (physical, economic, or emotional) harm to *V*'s friend or family member *U*, which in turn would cause harm to *T*, and so on, ultimately resulting in harm to *R* herself. It seems, however, that these ripples would dissipate rather quickly. Thus, this account provides a much less forceful rationale for a general duty to rescue than if one could establish a direct relationship between rescuer and victim.

352. Bender, 38 *J. Legal Educ.* at 34 (cited in note 5) (observing that "[i]n defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action").

however, is an abstract one. Indeed, it would seem to be precisely the sort of abstract, acontextual, universal conception that Bender rejects.<sup>353</sup>

Bender thus confronts a dilemma. If interconnectedness is conceived of in terms of concrete social relationships, it can provide the basis for affirmative duties within special relationships, but not between strangers. If she wishes to establish a general duty to rescue, on the other hand, she must rely on an abstract conception of interconnectedness that is not rooted in any concrete relationship or community. The root difficulty is that Bender (like almost everyone who has written about the duty to rescue) accepts Ames's formulation of the problem: whether a duty to rescue should exist between "strangers."<sup>354</sup> As I have argued, however, individuals who belong to the same society are not mere strangers but fellow citizens, a relationship that provides a basis for a general duty to rescue. Thus, in contrast to Bender's abstract conception, the liberal-communitarian view is based on a concrete conception of community.

Bender's view also suffers from abstraction in its portrayal of a sharp opposition between the feminist ethic of care and the liberal tradition. This opposition rests on a distorted view of liberalism. As we have seen, support for a duty to rescue can be found in a range of classical liberal thinkers including Hobbes, Locke, and Mill.<sup>355</sup> This distortion has unfortunate consequences, leading us to overlook the potential grounds for a duty to rescue that exist within the liberal political and legal tradition itself. At the same time, Bender's view suggests that the adoption of a general duty to rescue would involve so radical a change in existing institutions that it would be difficult or impossible to accomplish.

The liberal-communitarian theory thus overlaps with, and incorporates elements of, each of the other leading arguments for a duty to rescue. Like the utilitarian position, it considers a duty to rescue necessary for the public good. Like the moral argument, it recognizes a moral duty to aid others. And like the feminist view, it emphasizes relationship as the basis of affirmative obligations. Unlike these positions, however, the liberal-communitarian theory views the public good, morality, and relationship (insofar as they have implications for the creation of a legal duty to rescue) in terms of a

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353. See text accompanying notes 343-47.

354. Ames, 22 Harv. L. Rev. at 112 (cited in note 1).

355. See Part III. For an argument that this feminist view also presents a distorted picture of contemporary liberalism, see generally Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171 (1992).

concrete conception of community, a community that protects the rights and promotes the welfare of its members, who in turn have obligations toward both the community and their fellow citizens.

### *B. The Contours of a Duty to Rescue*

In this subpart, I briefly explore the implications of the liberal-communitarian theory for the scope of the duty to rescue and for the broader legal framework within which it would exist. My purpose is not to develop a detailed blueprint for such a duty, but rather to consider its main features. I shall begin with the general duty that would apply to all citizens, and then consider the place of special relationships within the theory.

#### 1. The General Duty

In defining the scope of a duty to rescue, several questions must be explored. First, what kinds of threatened harm to others give rise to a duty to rescue? Second, how much effort or risk must one undergo to rescue another? Third, when is rescue the responsibility of an individual, as opposed to that of the community and its officers? Once more, natural right theory may cast some light on these questions.

Let us start with the kinds of harm that give rise to a duty to rescue. According to Locke, individuals enter into society for the mutual preservation of their lives, liberties, and properties against violence.<sup>356</sup> As Locke further suggests, and Kant expressly argues, the community also has a responsibility to preserve the lives of its members in necessity.<sup>357</sup> When the community itself is unable to act, this responsibility devolves on the individual. Accordingly, the individual's duty should extend to cases of criminal violence against person or property, and to other dangers that pose a substantial risk of death or serious bodily harm to others.<sup>358</sup>

With regard to the second issue, advocates of a duty to rescue, following Ames, have generally proposed that the duty be limited to cases in which the rescuer can act "with little or no inconvenience to himself."<sup>359</sup> However, because the duty to rescue is established to

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356. See text accompanying note 87.

357. See text accompanying notes 143-45.

358. The inclusion of serious bodily harm in this formulation is consistent with the common-law position that treats force calculated to cause serious bodily harm as the equivalent of deadly force for purposes of self-defense and other privileges in tort and criminal law. See, for example, Restatement §§ 63-66 (cited in note 5).

359. Ames, 22 Harv. L. Rev. at 113 (cited in note 1).

protect the most fundamental rights and interests of individuals, it should not be limited to situations of "easy rescue," but should require one to do anything reasonably necessary to prevent criminal violence or to preserve others from death or serious bodily harm.

This broad duty, however, is subject to a crucial limitation. As discussed previously, Locke holds that an individual is bound to preserve the rest of mankind only "when his own Preservation comes not in competition."<sup>360</sup> Locke mentions the state's power to require individuals to risk their lives only in connection with "the Preservation . . . of the whole Commonwealth" in war.<sup>361</sup> Similarly, from a Hegelian perspective, although one can be required to risk one's life in defense of the community as a whole, no justification exists for requiring one particular individual to sacrifice his own existence to preserve that of another.<sup>362</sup> Accordingly, the duty to rescue would not require an individual to subject himself (or other innocent persons) to a substantial risk of death or serious bodily harm in order to rescue another.<sup>363</sup> This position is consistent with the common-law doctrine, which required an individual to prevent a felony only when he could do so "without hazard of himself."<sup>364</sup>

Finally, on the liberal-communitarian view, the primary responsibility for safeguarding person and property belongs to the community as a whole, and should be carried out with its own officers and resources. This duty devolves on the individual citizen only in an emergency when no officer is present. Furthermore, the citizen's duty to act in such cases would often be satisfied by calling for emergency assistance from the police, fire department, or rescue services. An individual would be required to intervene directly in an emergency situation only when there was no time to obtain governmental assistance.

In short, the duty to rescue that I have outlined here would require a citizen in an emergency situation to take action reasonably necessary to prevent either a crime of violence or a substantial risk of death or serious bodily harm to another, unless that action would

360. Locke, *Two Treatises* bk. 2, § 6 (cited in note 68). See text accompanying note 77.

361. See Locke, *Two Treatises* § 139. Likewise, Hobbes holds that individuals generally have no duty to risk their lives, even if the sovereign commands them to do so. The one clear exception Hobbes recognizes is the situation in which it is necessary that all bear arms in defense of the commonwealth. See Hobbes, *Leviathan* ch. 21 at 151-52 (cited in note 93).

362. See Hegel, *Philosophy of Right* § 324 (cited in note 169).

363. In his 1980 article, Weinrib reached a similar result, arguing on deontological grounds that a duty to rescue may require a rescuer to undergo substantial inconvenience, short of physical danger or fundamental interference with his own life purposes. See Weinrib, *Affirmative Case*, 90 *Yale L. J.* at 290 (cited in note 13).

364. Hale, 1 *Pleas of the Crown* at \*484 (cited in note 18). See text accompanying note 46.

involve a substantial risk of death or serious bodily harm to the rescuer or to others.<sup>365</sup>

When an individual discharges this duty to rescue, she acts on behalf of the community as a whole. For this reason, any resources that she reasonably expends on the rescue (beyond a de minimis threshold) should be recoverable from the community, through a mechanism established for that purpose. Similarly, if the rescuer suffers more than minimal injury to her own person or property in the course of the rescue, she should receive compensation from the community. Any other rule would compel some individuals to bear costs that should be borne by the community at large, simply because they happened to be at a place where rescue was required.<sup>366</sup> This principle of compensation should obviate the libertarian objection that a duty to rescue would require an individual "to act at his own cost for the exclusive benefit of another."<sup>367</sup> It should also respond, at least in part, to the problem raised by William M. Landes and Richard A. Posner—that a duty to rescue would discourage people from going to places where rescue might be required.<sup>368</sup>

For several reasons, fully establishing a duty to rescue of the sort outlined here would require legislation.<sup>369</sup> First, this duty is owed both to individuals and to the state and thus, in principle, is enforce-

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365. This discussion of the scope of the duty to rescue has followed Locke and Kant in assuming that the state's obligations to its citizens are limited to protection against violence and preservation of life in necessity. See text accompanying notes 356-58. Accordingly, the individual's duty to act on behalf of the community is limited in the same manner. As discussed previously, Hegel conceives of the state's function more broadly, as including the duty to prevent contingencies that threaten the welfare of individuals. See text accompanying notes 282-84. This view would lead to a somewhat broader duty to rescue, one that might include a duty to assist in preventing damage to property caused by other than criminal acts.

Within a Hegelian framework, however, each individual is entitled to his own particular welfare, and there is no reason why the welfare of the potential rescuer should be sacrificed to preserve the mere welfare (as opposed to the life) of the victim. Compare text accompanying notes 215-16. Compare also Humboldt, *The Limits of State Action* at 92 (cited in note 161) (arguing against the imposition of affirmative duties on others because the benefits derived by different individuals from their various pursuits are incommensurable).

For this reason, to the extent that a duty to rescue applies to the preservation of the mere property of others, it should not require any substantial effort on the part of the rescuer, but should be limited to a duty of "easy rescue." For example, although the law might require individuals to report a fire on the property of another, they would not be bound to devote any substantial time, effort, or resources to assist in putting it out, unless it posed a substantial threat to human life.

366. For similar reasons, the public should also provide compensation to third parties when their resources are appropriated or their persons or property injured in the course of the rescue.

367. Epstein, 2 *J. Legal Stud.* at 198 (cited in note 11).

368. See Landes and Posner, 7 *J. Legal Stud.* at 120-24 (cited in note 24). See also D'Amato, 70 *Nw. U. L. Rev.* at 803 (cited in note 330) (raising a similar problem).

369. As I suggest below, however, courts can establish a limited form of the duty to rescue without legislation. See text accompanying notes 372-75.

able by both civil and criminal liability. In the modern American legal order, however, courts have no power to create new crimes; this power lies exclusively with the legislature.<sup>370</sup> Thus, if a state desires to establish a duty to rescue with criminal sanctions, that duty must be created by legislation.

A second reason relates to the content of the duty to rescue. Stated in general terms, it is not a simple duty to prevent harm to others, but rather a duty to act on behalf of and at the direction of the community to prevent harm to others. In Locke's words, it is an obligation "to assist the Executive Power of the Society, as the Law thereof shall require."<sup>371</sup> A law of this sort would have to determine many specific issues of policy: in what cases citizens should be required, permitted, or forbidden to act; in what cases individuals should act on their own, as opposed to calling the authorities; what degree of risk rescuers should be required to run to prevent what particular kinds of harms; to what extent an individual who inflicts injury in the course of rescue should be privileged against liability for that injury; and so on. Positive legislation is required to resolve these issues.

Third, an individual who expends substantial resources or suffers significant injury in performing the duty to rescue would receive public compensation for the loss.<sup>372</sup> Because this compensation would involve the expenditure of public funds, legislation is required. Finally, the establishment of the duty to rescue would constitute a major change in current law. Accomplishing such change is often thought to be the province of legislatures rather than courts.

Thus, positive legislation would be required to establish a fully developed duty to rescue. One should not infer from this proposition, however, that the duty to rescue is merely a matter of legislative discretion. Instead, as I have explained, this duty is based on principles of right. As a matter of public right, an individual has a claim to protection by the state, as well as an obligation to assist in providing this protection for the benefit of others. A person who suffers injury due to a breach of this obligation is entitled as a matter of private right to recover compensation from the individual responsible. These rights and obligations are inherent in the relationship between the individual and the community and in the principles of corrective justice. Legislation is necessary not because

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370. See, for example, John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 190 (1985).

371. Locke, *Two Treatises* bk. 2 § 130 (cited in note 68).

372. See notes 366-68 and accompanying text.

the duty to rescue is a mere matter of positive law, but rather for the reasons discussed above.

It follows that, in cases in which those reasons do not hold, courts may be justified in recognizing an obligation to rescue even in the absence of positive legislation. For example, courts might recognize a limited duty to rescue that would be enforceable only in tort law, and that would apply only to cases of "easy rescue," in which one individual is able to rescue another with little or no risk or expense to herself or others. This duty would merely constitute a narrower version of the obligation that I have developed here, and would be based on the same rationale: the responsibility of individuals to act on behalf of the community to protect their fellow citizens from serious harm. This limited duty, however, would involve few of the difficulties that prevented the comprehensive duty from being established without legislation. First, because the duty to rescue is owed directly to other individuals as well as to the state, courts can recognize that duty as a matter of tort law regardless of whether the legislature has criminalized a failure to rescue. Second, cases of easy rescue pose few of the difficult issues of policy mentioned above.<sup>373</sup> Third, easy rescues involve no significant risk of injury or expenditure of resources that would require public compensation to the rescuer or others. Finally, although recognition of the limited duty would represent a major change in existing law, it would do so to a substantially lesser extent than adoption of the comprehensive duty.<sup>374</sup>

Of course, this limited duty would fall considerably short of the broader position that I have developed in this subpart of the Article. However, by articulating the rationale for a legal duty to rescue, and by enforcing this duty in the most extreme cases (those that fall within the scope of easy rescue), courts might spark a broader public and legislative debate over the issue. In this way, judges might contribute to the ultimate adoption of a comprehensive duty to rescue without exceeding their proper role.<sup>375</sup>

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373. See text accompanying note 371.

374. Indeed, some writers have suggested that recognition of a duty of easy rescue would constitute a natural extension of the trend toward broader liability for inaction in the context of voluntary undertakings and special relationships. See, for example, Weinrib, *Affirmative Case*, 90 *Yale L. J.* at 248, 268-79 (cited in note 13); note 6 and accompanying text (describing this trend).

375. Justice Ginsburg has articulated a similar approach to constitutional review. See, for example, *Excerpts from Senate Hearings on the Ginsburg Nomination*, *N.Y. Times* A12 (July 21, 1993) (opening statement of Ruth Bader Ginsburg before the Senate Judiciary Committee); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. Rev.* 1185, 1198-1209 (1992) (maintaining that "judges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . participate in a dialogue with other organs of government, and with the

## 2. Special Relationships

a. *The Nature and Role of Special Relationships*

Finally, let us turn to special relationships. It might seem that a theory that recognized a general duty to rescue would have no need to impose additional duties based on such relationships. This conclusion, however, overlooks the limited scope of the general duty to rescue. As discussed previously, this duty is limited to the sort of assistance that every member of the community should afford every other member—protection from imminent criminal attack or from a substantial risk of death or serious bodily harm.<sup>376</sup> When a special relationship exists, on the other hand, it may give rise to a broader duty.<sup>377</sup> For example, parents are obligated to protect their children against harm in general, not merely its most serious forms. Moreover, this duty is not restricted to emergency situations, but is ongoing.

Special relationships would constitute an integral part of a fully developed liberal-communitarian theory of positive duties. Such duties, I have argued, derive from community among individuals, while negative duties reflect the ways in which individuals are separate from and independent of one another. Community is not limited to the political realm, however. Indeed, at least in our own society, community exists to a much greater extent in the form of particular relationships and institutions. Again, the natural right tradition provides some insight into the nature of these relationships and institutions.

The paradigmatic special relationship is the family. For Locke, the family is a community whose ends include affection, mutual support, procreation, and the raising of children.<sup>378</sup> Accordingly, a husband and wife have a duty to support and assist one another,<sup>379</sup> as well as a natural obligation to preserve, nourish, and educate their offspring.<sup>380</sup> Similarly, Hegel views the family as a natural ethical

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people as well.”). For a classic statement of this approach, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).

376. See text accompanying note 358.

377. For the same reason, the theory developed here would continue to recognize affirmative duties arising from the actor's own conduct or voluntary undertakings. See note 6.

378. See Locke, *Two Treatises* bk. 2, §§ 78, 83 (cited in note 68).

379. See *id.*

380. *Id.* § 56. See also *id.* §§ 58, 60, 63, 66, 67, 78, 80. This obligation appears to be another instance of the general duty to preserve mankind. Compare *id.* § 6 (quoted in the text accompanying note 77) (articulating the natural duty to preserve mankind) with *id.* §§ 56, 60 (using similar language to describe the natural duty to preserve one's offspring).



community based on love.<sup>381</sup> The family is primarily responsible for the support of its members, who have a right to receive support.<sup>382</sup> Both of these views would recognize a duty of family members to protect one another from harm.

The Lockean and Hegelian views differ, however, as to the nature of other social relationships. For Locke, relationships other than that between parent and child are voluntary ones, formed for the mutual benefit of their members with regard to some particular end. These relationships are based on mutual agreement or consent, and the rights and obligations they involve are essentially contractual.<sup>383</sup> In addition to relationships of this sort, Hegel recognizes another category that he calls associations.<sup>384</sup> As Hegel uses the term, associations are organized communities of individuals who share a common interest or profession.<sup>385</sup> Contemporary examples might include universities, business corporations, churches, local communities, and other institutions or places where individuals work or spend a substantial portion of their lives. Like the family and the state, Hegel regards these associations as ethical communities (although limited ones) that have a considerable degree of responsibility for the well-being of their members.<sup>386</sup>

Hegel's account provides a stronger basis for duties arising from special relationships than does Locke's. Consider a situation in which a college student suffers a sudden heart attack at school and requires immediate medical assistance. In Lockean terms, one could argue that the implied contract between the student and the college required the latter to provide assistance in cases of emergency. This argument would fail, however, if the contract could not reasonably be interpreted in this way (for example, if the college required all students to sign a waiver of liability for any failure to provide such assistance). Moreover, it would be difficult to argue that other students had an obligation to call for help on the ground that there was an implied agreement between students to this effect. Under the

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381. See text accompanying notes 249, 259.

382. See Hegel, *Philosophy of Right* §§ 159, 171, 174, 238 (cited in note 169).

383. See, for example, Locke, *Two Treatises* bk. 2, §§ 78, 81-83 (cited in note 68) (treating marriage as contractual).

384. See Hegel, *Philosophy of Right* §§ 250-56 (cited in note 169).

385. See id. § 251. Hegel also refers to associations as "corporations." As Allen Wood notes, for Hegel the term corporation "includes not only a society of people sharing the same trade or profession, but any society which is officially recognized by the state but is not itself a part of the political state." Id. at 454 (ed. n.1 to § 250). Thus, the term "embraces employers as well as employees, and . . . also covers religious bodies, learned societies and town councils." Inwood, *A Hegel Dictionary* at 55 (cited in note 177).

386. See Hegel, *Philosophy of Right* §§ 252, 255 (cited in note 169).

Hegelian view, by contrast, one could argue that the college had an obligation based merely on its relationship with the student, and that, as members of the college community, other students also had an affirmative duty to provide aid or seek help.

To summarize, under the liberal-communitarian theory, affirmative duties arise not only from membership in the general community, but also from special relationships. These include family relationships, contractual (and other consensual) relationships, and limited communities such as universities and places of employment. In recent decades, American courts have recognized a wide variety of special relationships, including those between landowner and invitee, business and customer, employer and employee, school district and pupil, university and student, hospital and patient, and even one social companion and another, in addition to the traditional categories of innkeeper-guest and carrier-passenger.<sup>387</sup>

*b. The Relation Between Special Duties and the General Duty to Rescue*

What is the relation between the duties that arise from special relationships, on one hand, and the citizen's duty toward the state and its members on the other? This issue can best be approached in connection with the well-known case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*<sup>388</sup> In *Kline*, the United States Court of Appeals for the District of Columbia Circuit held that the landlord of a large apartment building had a special relationship with its tenants and a consequent duty to protect them from criminal acts by third parties. After stressing that only the landlord, not the tenants, had the ability to provide security in the common areas of the building, the court added that "even as between [the] landlord and the police power of [the] government, the landlord is in the best position to take the necessary protective measures."<sup>389</sup> Municipal police lack both the authority and the capacity to patrol the common areas of a private apartment complex. "[I]n the fight against crime," the court declared,

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387. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 482-83 (D.C. Cir. 1970) (listing special relationships); *Farwell v. Keeton*, 396 Mich. 281, 240 N.W.2d 217, 222 (1976) (recognizing a special relationship between social companions); *Peterson v. San Francisco Community College Dist.*, 36 Cal.3d 799, 685 P.2d 1193, 1201 (1984) (recognizing a special relationship between college and student); *Pitre v. Louisiana Tech Univ.*, 596 S.2d 1324 (La. App. 1992) (same). *Kline* adds the relationship between landlord and tenant to this list. See text accompanying notes 388-91.

388. *Kline*, 439 F.2d at 483-84.

389. *Id.* at 484.

"the police are not expected to do it all; every segment of society has obligations to aid in law enforcement and to minimize the opportunities for crime."<sup>390</sup> Thus, "[i]t is only just that the obligations of landlords in their sphere be acknowledged and enforced."<sup>391</sup>

As this case illustrates, a special affirmative duty, such as that of the landlord in *Kline*, may be based in part on the obligor's special relationship with other individuals, and in part on its duty to assist the state in protecting citizens from crime and other harm. What is the relationship between these two sources of special duties? From a Lockean perspective, different institutions, such as a residential community and the state, are established for different ends and give rise to different obligations.<sup>392</sup> Nonetheless, different duties may reinforce one another and lead to the same result in a particular case. Thus, in *Kline*, the strongest basis for imposing an affirmative duty would rely both on the landlord's relationship to its tenants and on its obligation to the state.

Once more, however, Hegel's thought arguably provides a more coherent account of the basis of special duties. Under the Hegelian view, institutions such as the family or a residential community are not entirely separate from the state, but stand in relationship with it. These institutions mediate between the state and individuals.<sup>393</sup> It is partly through these institutions that the ends of the state, such as the preservation of its citizens, are realized.<sup>394</sup> By performing its duty toward its tenants, the landlord also assists in preventing crime; by fulfilling its duty to the state, the landlord also provides security to its tenants.<sup>395</sup> The Hegelian view thus integrates the two facets of special obligations: the duty based on the special relationship between the parties and the duty owed to the state. From this perspective, these obligations are not two separate duties, but two aspects of a single duty.

To express the point another way, Lockean thought recognizes a sharp distinction between public and private. An individual's relation to the state and her relation to private individuals thus give rise

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390. *Id.* (footnote omitted).

391. *Id.*

392. In his writings, Locke frequently stresses that different institutions are formed for different ends and are separate and distinct from one another. See, for example, Locke, *Two Treatises* bk. 2, §§ 2, 77 (cited in note 68); Locke, *Toleration* at 26-28 (cited in note 92) (drawing a sharp distinction between civil and religious societies).

393. See, for example, Hegel, *Philosophy of Right* §§ 255, 262-66 (cited in note 169).

394. See, for example, *id.* § 252.

395. Compare Hegel, *Encyclopaedia Logic* § 198 (cited in note 218) (representing the relationship between individual, state, and particular needs in a similar way).

to entirely different duties. Hegelian thought, on the other hand, recognizes a range of institutions that mediate between public and private, between individuals and the state. These institutions, and the duties that inhere in them, have both a public and a private side. Under this view, the positive duties of parent to child, landlord to tenant, and employer to employee are neither wholly public nor simply private, but both.

In conclusion, under the theory developed in this Article, individuals not only have a general duty as citizens to assist the state in preserving the lives of their fellow citizens in an emergency, but may also have special duties based on their particular circumstances. These special duties derive partly from special relationships and partly from one's being in a special position to advance the ends of the state by protecting against harm. These special duties are not necessarily limited to emergency situations, but may require the actor to guard against harm in advance.

## VI. CONCLUSION

The modern debate over rescue has focused on Ames's formulation of the problem: whether a legal duty to rescue should exist in the absence of any concrete relationship between the parties.<sup>396</sup> When the issue is framed in this way, however, it is difficult to establish such a duty, because the strongest basis for affirmative obligations is to be found precisely in the relation between the parties.

This Article has argued that Ames's formulation obscures the most powerful argument in favor of a duty to rescue. The crucial point, I have suggested, is to recognize that rescuer and victim are not mere strangers, but members of a broader community. This insight derives from the common-law and natural right traditions, the same traditions that are often invoked to oppose a duty to rescue. Drawing on these sources, this Article has developed a theory of rescue that holds that the community has a responsibility to protect its citizens from both criminal violence and other forms of harm. In return, an individual has an obligation to assist in performing this function, an obligation that is owed not only to the community but also to its members, and that is enforceable in both criminal and tort law. In this way, we can justify a duty to rescue that is consonant with both the liberal tradition and the values of community.

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396. See text accompanying note 20.

