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JURISPRUDENCE OF RESCUE UNDER TORT LAW

Rajeev Kadambi

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RÉSUMÉ

Cet article traite de cinq grands thèmes. En premier lieu, l'idée de porter secours à autrui est concrétisée dans l'obligation d'agir de manière raisonnable, consacrée par le droit de la responsabilité délictuelle. En deuxième lieu, l'article explique comment la jurisprudence pèse les intérêts en présence -ceux de la victime, du sauveteur, et du défendeur- dans les situations de sauvetage. En troisième lieu, l'article soutient que les deux extrêmes de l'obligation de porter secours à autrui sont dans une certaine mesure présents en droit positif. En quatrième lieu, l'article propose une réponse à la deuxième thèse, en soutenant que le raisonnable doit aller au-delà de la pesée des intérêts en présence et s'induire des solutions de principes normatifs. En cinquième lieu, l'obligation de porter secours représente un point de jonction entre le droit privé et le droit public, car elle est basée sur la conception de l'Etat et la relation de celui-ci avec ses citoyens. L'article conclut que les principes relatifs à l'obligation de porter secours doivent dériver d'un ordre commun de valeurs et transcender la dichotomie droit public – droit privé.

ABSTRACT

The article deals with five broad themes. First, the idea of rescue is embodied in the duty to act reasonably in tort law. Second, the article explains the judicial array of balances in rescue situations, involving the victim, rescuer, and defendant. Third, the article argues that both extremes of the rescue obligation are somewhat reproduced in the prevailing law. Fourth, the article constructs a response to the second thesis, arguing that reasonableness must go beyond the plain judicial balancing approach and derive outcomes and meaning from normative principles. Fifth, rescues represent the junction of the public law and private law distinction because it is based on the conception of the State and the relation with its people. The article concludes that principles of rescue must be derived from a common order of values that transcend public and private law reasoning.

I. INTRODUCTION

The article explores the tension between duties under tort and obligations of rescue. Duty is the reasonable care to protect against harm to a person resulting from one's conduct. Rescue means saving someone or extricating another from danger. Given this scenario, it is hard to mark a precise balance of rights and duties. It is difficult to decide between what one *must* do as against what one "*could have"* done in situations of peril.[1] It is near this halfway point that we dwell on five broad themes. First, the idea of rescue is embodied in the duty to act reasonably. Second, it explains the judicial array of balances involving the victim, rescuer, and defendant. Third, it argues that *both* extremes are somewhat reproduced in the prevailing law on rescue. Fourth, it constructs a response to the second thesis arguing that reasonableness must go beyond the plain balancing approach and derive meaning from normative principles. Fifth, rescue is symbolic of the problematic separation of public law and private law because it is based on the conception of the State and its relationship with its people. Thus, the article concludes that principles must be founded on a higher order of normative values that must necessarily transcend public and private law reasoning.

The rejection of a legal duty to rescue has become ossified due to the imaginary distinction between directly causing harm to someone and bringing harm from one's inaction; or, what has been better described as a failure to confer a benefit to the imperiled person. The distinction is hard to demarcate and makes the line between duty and rescue intractable. Duties to rescue contest the traditional conception of duty arising solely from one's conduct. The notion of an exclusive private ordering of rights is questioned between individuals on the one hand and an infinitely maintainable duty in relation to strangers, on the other. This type of a duty sets the criterion of our social interactions: "how we must treat one another?"[2] This is the broad interest of duty that concerns the rescue doctrine.

The Common Law framework of tort is very individualistic, turning on the freedom of the individual. It reflects notions of "live-and-let-live,"[3] "let-it-be," or "leave-alone" through the principles of autonomy and self-responsibility by holding each limitedly responsible for the peril

[1]Arthur Ripstein, *Philosophy of Tort Law* in THE OXFORD HANDBOOK OF JURISPRUDENCE 656, 665 (JULES COLEMAN, SCOTT SHAPIRO, AND KENNETH EINAR HIMMA ED., 2004).
[2]*Id*., 656. Ripstein identifies two problems: "how should people treat each other?" And, "whose problem is it when things go wrong?" as fundamental questions in any society.
[3]*Id*., 660.

they bring. Seen this way, tort law is a social pivot governing the interactions of people among themselves. It sets reciprocal limits on each other's freedom in the Kantian sense, and likewise strikes a critical compromise from the public policy goals of tort law to regulate some form of "social coordination" (in the Rawlsian sense) among people and agencies.[4] Thus, it preserves a balance at the core between freedom and responsibility. Epstein correctly observes it as the "political function" of tort law.[5] This is the broad interest of rights it concerns.

Rescues reflect varying scales of affirmative duties. It is collapsed into a general category for heuristic purposes. In this article, rescue includes: the duty to warn, the duty to protect, the duty to prevent further harm, the failure to act, and the duty to aid by affirmative action. In this view, many legal systems have adopted versions of Good Samaritan laws that incorporate a spirit of altruism and social responsibility as part of their civil or criminal laws.[6] In addition, many branches of law have a fairly developed understanding of Good Samaritanism to the extent of awarding reward for assistance.[7]

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[4]See JOHN RAWLS, THE THEORY OF JUSTICE 18 (1971). Rawls discusses "reflective equilibrium" which connects principles and moral judgments. It is gathered from everyday practice capturing an intuitive sense of justice in people.

[5] Richard Epstein, *A Theory of Strict Liability*, 2 J.LEGAL.STUD., 160, 203 (1973).

[6] Martin Vranken, *Duty to Rescue in Civil Law and Common Law: Les Extremes Se Touchent*? 47 INT'L & COMP.L.Q. 934 (1998). (See for the French experience of this duty.) See F. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1965) (Many European countries, such as France, Germany, Spain, and Finland, impose criminal sanctions for violations of this duty in unique ways where the duty is seen as a social obligation.) See generally, Josef Hofstetter &. Wolfgang Marschall, *Amendment of the Belgian Code Pénal: The Duty to Rescue Persons in Serious Danger*, 11 AM. J. COMP. L. 66 (1962). Thos Shelton, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952). Compensation to Rescuers, 10 THE VIRGINIA LAW REGISTER, 671 (1904). VT. STAT. ANN., tit 12 § 519 (1973) (The law requires the duty of a defendant to rescue when there is grave physical peril involved to the victim without danger to oneself. Violation begets a fine of $100.) MASS. GEN. LAWS ANN.ch. 268 § 40 (West Supp. 1983) (Law mandates a duty to report when there is no danger created to the rescuer as long as it is practicable to a victim of rape, armed robbery, manslaughter. It imposes a fine between $ 500 and $ 2500 for violation.) MINN.STAT.ANN.ch 604.05, 609.02 (West Supp. 1986); R.I. Gen. Laws (West Supp., 1985) (Law mandates a duty to report sexual assault of another person. A violation results in a fine not exceeding $500 or imprisonment.) See also DANN DOBBS, THE LAW OF TORTS, 663 (West Group, 2000), (The author observes that all States have followed California in adopting such Good Samaritan laws rendering all licensed health care providers a reduced duty of care for emergency health care outside their regular practice. It implies that the quality of the aid of such a Samaritan is not a high or an otherwise equally professional standard.)

[7]*Post v. Jones*, 60 U.S. 150 (How. 1856), an early case of a whaling voyage to the North and South Pacific Ocean leading to a ship wreck on the cost of the Behring Straits, where the court determined the amount of salvage for the rescue. See, F.D. Rose, *Restitution for the Rescuer*, 9 OJLS. 167 (1989), the rescuer's reward and benefit in admiralty law and common law is based on principles and policies.

Parts II and III review three aspects: first, understanding the concept of rescue as hardwired in the fabric of duty itself.[8] The scope of this duty is explained in light of the arcane distinction between positive and negative duties. The section concludes that rescue properly understood is nothing but the duty to act reasonably in a given circumstance. Second, it discusses the rule of courts on the rejection of a plain and simple duty to rescue strangers. It elucidates the Doctrine of Rescue, which operates as a limited duty to rescue. Third, the section examines the range of interests involving the rescuer, victim, and defendant. It concludes that the duty to act reasonably strikes a just arrangement of rights and obligations, based on parties taking responsibilities for their own actions. This line of analysis is in the background of the policy protecting bona fide rescuers who incur risks to save the endangered person.

Part IV assesses arguments framed on the position for and against a duty to rescue. If justice is the underlying consideration of tort law, rescues raise the extent of peoples' participation in these just institutions. They reflect the larger humanitarian implications of interventions. A major concern is the relationship between individual autonomy and social responsibility. There arises an enormous practical obstacle in administering a duty on this account. It is concluded that either of them in an extreme does not soundly fit with the aims and functions of tort law. The law of rescue incorporates the logic of both these extremes in a self-executing manner without expecting too much from individuals, or too little from institutions of the State.

Part V is the obvious meeting point of the conflict resonating between the private law element of tort law and its ingrained public law-type norms. It critiques the simple balancing approach (discussed in part III) to suggest that the duty to act reasonably must derive content and meaning from a higher and unifying value of norms that transcend the public/private divide. It shows that deciding hard cases of rescue on balancing is substantively weak. By contrast, it requires substantive principles of freedom, equality, and dignity of the individual. This makes tort adjudication uniformly rights conscious.

[8]The cases and factual contexts cut across different jurisdictions. The article does not address the legal position as it prevails in any one country.

II. BOUNDARY BETWEEN DUTY AND RESCUE IN TORT TERMS

Duty derives meaning from variable circumstances, among them public policy, nature of the defendant's actions, and harm suffered by the plaintiff. The position of no-duty to rescue under law has been abundantly expressed in works before this. The content of duties and rescue overlaps as seen in cases employing a loose version of positive duty. This section argues that duties self-consciously include (in principle) the abstract idea of rescue. A rigid adherence to a duty to rescue or no-duty to rescue does not resolve these hard cases in light of an inevitable fusion of values. Law seeks to relate conduct and harm based on reasonableness. It implies, rescue applies only as far as it is reasonable. Therefore, the core of the rescue claim is the duty to act reasonably. In other words, rescue is hardwired in the duty to act reasonably.

A. Duty

Negligence law regulates the ideal conduct of people for the smooth function of a society. For example, it would be amusing should tort law talk about the reasonable dog or the reasonable cat, instead of persons. It balances imminent risks and harms by prescribing conduct for real people, measuring a standard of care set at the threshold of reasonableness. The purpose is to determine responsibility (or what the law calls *fault*). This is a conclusion of what is essentially a prescribed social obligation. A failure to perform the duty arises from a morally culpable fault.[9] Furthermore, fault separates negligence from strict liability as fault arises from unreasonable care.[10]

The allocation of risks, consequences, and resources between the injurer and victim seems clear in easy cases of breach of a simple notion of duty. In harder cases it strains the appropriate application of what is meant by being reasonable. For this reason, the reasonable standard guiding conduct is neither onerous nor feeble, but moderately pitched. Imposing too high a burden on the rescuer or too low an incentive instills fear or indifference. This sweeping

[9] Jules Coleman, *Moral Theories of Torts: Their Scope and Limits Part I*, 1 LAW AND PHILOSOPHY 371 (1982).
[10] The law is grounded on the rationale of enjoying one's right so as not to infringe upon another. Fault is important to allocate the burden of individuals as components in a society, where each takes care of one's conduct not to harm the other. In some cases this may require courts to impose liability even if there is no foreseeability. See the early case of *Rylands v. Fletcher* L.R. 3 H.L. 330 (1868).

coverage of reasonable conduct needs to be properly administrable in the case of a Good Samaritan rendering aid to an endangered stranger where s/he was not a cause of the peril.

Reasonable conduct strikes a fair balance, on the one hand, doing what we want to freely without setting too many restraints on our actions, and on the other, security of all those vulnerable from the consequences of one's actions. Ripstein terms this as the balance between liberty interests and security interests.[11] So, the standard of reasonableness strives for a fair balance between the interest of one's liberty and interests of security. This is referred to as setting "terms of arrangements."[12] Therefore, a duty will need to arrive at this equitable term of interaction between the interests of the rescuer and the interests of the victim to be legitimate.

Foreseeability is a legal device to limit liability. Let us examine the statement: "A owes a duty to B … not E or V" in the context of foreseeable versus unforeseeable harm. *A* does not owe a duty for any harm *E* complains, since *A* employing the standard of a reasonable person could not foresee responsibility to a distant harm. Justice Cardozo observed in *Palsgraf* that the ideas of negligence and duty are strictly correlative and duty extends to only those hazards that are foreseeable.[13] This is a simple yet complex notion of foresight, which, on a plain understanding, challenges rescue obligations. Since the rescuer could not foresee the harm, s/he does not owe any duty. The conduct of *A* to B was within expected reasonable bounds as s/he will be held responsible only for her limited actions, not for what she could not have known to cause not in her control.

A rescuer when having created no peril cannot foresee any need to act in aid. As Lord Reid remarks: "*the crowded conditions of modern life, even the most careful person cannot avoid creating some risks and accepting others*."[14] Living without risks in that sense is impossible. Arthur Ripstein terms the prescription of duty as "norms of conduct."[15] Norms of conduct limit our responsibility of unforeseeable injuries, as we cannot take precautions for risks that are too remote.

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[11] *Supra* note 1, 682.
[12] Arthur Ripstein, *Three Duties to Rescue: Moral, Civil, and Criminal*, 19 LAW AND PHILOSOPHY 751, 759 (2000). The issue of reciprocal duties is covered in part IV.
[13] *Helen Palsgraf v. Long Island Railroad Co*. 162 N.E. 99 (NY. 1928).
[14] *Bolton v. Stone* [1951] AC. 850 (HL.)
[15] *Supra* note 1, 667.

B. Balancing Duty and No-duty: Fading Distinction

The dilemma of how far a person must go to free another in peril is traditionally classified as positive and negative. The Common Law rejects a general duty to rescue under the guise of somewhat rigid distinctions such as commissions/omissions, action/inaction, acting/failure to act, active misconduct/passive misconduct—all meaning: misfeasance or nonfeasance. It emphasizes a sort of *action* that must characterize a *duty*. The question may be rephrased: what is the duty in a situation of peril? The Common Law concludes that this problem is essentially one about causation.[16] In this manner, the author aims to build upon this in part III, that the duty to rescue is in essence about acting reasonably.

Courts traditionally drew a line between causing harm and preventing harm, thereby rejecting a duty to rescue in general situations. It begs the question: how broadly can we define "act"? An allegation of misfeasance differs from nonfeasance in the same way that "wrong doing" differs from not doing a wrong. *Yania v. Bigan*[17] is a good example to illustrate this discussion. The defendant sought the victim's help in starting a pump. In doing so, the victim jumped from a height into water and drowned. The court held that the defendant did not have any duty to rescue the plaintiff from the water. But can one separate the initial act of the defendant taking the victim's aid and the second part of the victim falling and drowning from the point of view of the single event of the death of the victim? In this sense, the line between the defendant's omission and affirmative action of placing the victim in peril is vague.

The difference of causing and preventing injury has implications on the way the duty of rescue is treated. In *Bush v. Amory Mfg. Co*.,[18] an infant suffered injury coming in contact with dangerous machinery in a factory. The court found that the duty to do no-wrong is a legal duty and that the duty to protect another from wrong is a moral obligation not enforceable by law. It held no duty in this case for the defendant to warn the infant, as the infant was bound to exercise a degree of care and caution.[19] Similarly, when an infant-guest fell into a campfire where the defendant was socializing and failed to extinguish the embers, the defendant was held not

[16]Ernest Weinrib, *The Case for a Duty to Rescue*, 90 YALE. L. J. 247 (1980).
[17]155 A.2d 343 (Pa. 1959).
[18]44 A. 809 (NH. 1897).
[19]*Id*., 4.

negligent. There, the court held that there was no affirmative obligation to remedy the condition.[20]

As a consequence, courts have resisted finding a legal duty, labeling it instead as inaction.[21] This is best captured in *Union Pacific Railway Co. v. Adeline Cappier*.[22] The Defendant failed to provide any assistance after its railway car struck and killed a boy crossing the tracks, leaving him to bleed to death. The court found no negligence on behalf of the defendant and only an act of omission as there was no duty to rescue the boy in peril. Further, it shockingly noted that: "*with the humane side of the question the courts are not concerned.*"[23] But the inaction complained in this case was as much volitional to constitute as an action. It raises many doubts about intuitively calling something an omission, which makes not doing it an action not merely inaction.

Francis Bohlen wrote a seminal essay on the difference between misfeasance and non-feasance stating it is practical and obvious.[24] He famously wrote: "*there is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance*."[25] He observed that in misfeasance the condition of the victim is made worse. The tricky part of rescue duty is that it asks the defendant to extricate the infant by conferring a positive benefit.[26]

For reasons to follow, this distinction is ambiguous and does not yield a reliable yardstick to determine liability. This is well illustrated in the classic case of *Newton v. Ellis*.[27] The defendant, while working on a well, left a hole in the highway without any light during nighttime. The plaintiff's carriage fell into the hole, and the plaintiff sustained injuries. Applying

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[20]*Rockweit v. Senecal* 541 N.W. 2d 742 (Wis. 1995). See also *Strickland v. Ambassador Insurance Co.* 422 So. 2d 1207 (La. 1982) (Courts do not impose a general duty to come to the aid of one who is in peril, a person will not be held for inaction even though it could have saved the inured.)

[21]The failure of the defendant to respond to calls for assistance of the victim were held as immaterial as there was no legal right infringed by the failure to save in *Osterlind v. Hill* 160 N.E. 301 (Mass. 1928). Similarly, *Gautret v. Egerton* (L.R.) 2 CP. 371 (1867) held that the plaintiff must show wrongful act by breaching a positive duty.

[22]72 P. 281 (1903).

[23]*Id*., 4.

[24]Francis Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability-1*, 56 U. PA. L. REV., 217 (1908). Francis Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability-II*, 56 U. PA. L. REV 316 (1908). Bohlen argues that creating a duty to aid affirmatively should be a legislative prerogative.

[25]*Id*., Francis Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability-1*, 219.

[26]For instance, when fire caused damage to the plaintiff's property, and the water supply ran out in the water hydrant, the court held this is a contractual duty and not tortious since there was no commission of wrong. *Moch Co. v. Rensselaer Water Co.* 159 N.E. 896 (NY. 1928).

[27]119 Eng. Rep. 424 (K.B. 1855).

the rule of non-feasance, if the failure to put the light (negative duty) is severed from the positive action of excavation, it is non-feasance pure and simple.[28] However, the court held the defendant liable for non-feasance as the act of digging the hole and putting a light were both one single act. It did not find a difference between not putting the light and excavating the hole. This is an intricate distinction between misfeasance and non-feasance.

Courts resolve this anomaly by interpreting non-feasance amounting to misfeasance as a ground for negligence (referred in the following paragraphs as "pseudo-nonfeasance"). When there was a dangerous condition on a highway at night and an officer on patrol was aware of the condition but did not take any steps to warn the traffic, it was non-feasance amounting to misfeasance.[29] The same can be explicated when the truck driver failed to take adequate precautions to warn the traffic.[30]

*Soldano v. Howard O'Daniel*s[31] is a rare case in which the court found a duty to rescue. The bartender refused to permit a rescuer to call the police in a bid to save a gunshot victim. The court protected the right of a Good Samaritan from interference from a third person, holding the bartender had a legal duty to provide assistance. However, properly understood, this case is not about the duty to rescue inasmuch as it is about the duty not to interfere with a rescuer's duties.

The cases discussed in this section do not follow a chartered course. Epstein aptly remarks that it "follows the rules of physics and not the dynamics of social policy."[32] In some cases, courts hesitate imposing a duty and in others they readily find one. It can be inferred that whenever the inaction results in misfeasance of any kind, courts readily find duty. Such cases are instances of acts and also failures to act. For example, in *Yania* above, if the court applied this analysis, it may have reached a different conclusion about the defendant's liability. This is possible if the court looked at the conduct of the defendant as a whole to determine culpability.[33]

We examine this last point in detail here. To refer the problem of rescue as a failure to act is a misnomer. Recall that *Newton* was an illustration of a failure to act just as much as *Bush* was, but the failure to act in *Newton* was found to be culpable. Weinreb instructively advances

[28]*Id.* 427.
[29]*Schacht v. Queen* [1973] I.Q.R. 221
[30]See *Montgomery v. National Convoy & Trucking*, 186 S.C. 167 (1838). See also, *Pridgen v. Boston Housing Authority*, 308 N.E. 2d 467 (Mass. 1974).
[31]1990 Cal. Reptr. 310. See also, *Zelenko v. Gimbel Bros*., 287 N.Y.S. 134 (NY. Sup. Ct. 1935).
[32]RICHARD EPSTEIN, TORTS, 286 (1999).
[33]*Supra* note 16.

the rules of causation to conclude that the defendant's role in the peril as a whole must be considered. In what is a sound and convincing critique of a largely rigid classification, he proposes a fault-based notion imposing a duty to rescue. In *Bush*, there was no prior interaction between the parties, though in *Newton*, the exposure of the peril created a relationship. Weinreb calls such cases *pseudo-non-feasance*.[34] The feature of a true non-feasance is that the result would have happened even without the interference of the defendant—whereas, in pseudo non-feasance, the defendant is a direct cause for the injury. It can be concluded that the defendant's participation or role in the harm is the primary basis to draw the line between misfeasance and real non-feasance.[35]

Rescue is hardwired in the concept of duty, since the demarcation between positive and negative duty is as such illusory. Recall the question early in this section: what is the duty of rescue in a situation of peril? The result is founded in *reasonableness.*[36]

III. BALANCING FACTORS OF THE RESCUE DOCTRINE

At the outset, complex cases of rescue obligations present a trilemma concerning the actions of the defendant, injury to the victim, and conduct of the rescuer. The objective of balancing is to ensure that the three parts are treated fairly. The idea of rescue is conceptually prior to the question of whether there must or must not be a duty to rescue. In other words, it means rescue duties are woven in acting reasonably. There is very much a duty to rescue limited and responsive to the relative circumstances of the rescuer, victim, and the defendant's conduct. As a result, the typologies created here are an attempt to reduce the various scenarios into six kinds of *duties* of rescue.

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[34]*Id*., 254.
[35]*Id*., 255
[36]In the event a defendant does not participate in the peril, it is non-feasance as we traditionally know. This is because no loose notion of fault attaches to the defendant's conduct to act reasonably. *Montgomery* below is a case of pseudo-nonfeasance as the defendant did not act, but was responsible for the peril. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 72-73 (1984). Bentham states that seeing the nature of an act as positive or negative depends on its expression. That an act is positive can be expressed negatively and a negative act can be expressed positively. For example, not to be at rest can be stated as to move. Or to omit bringing food is said to be as starve. See also, J.S. MILL, ON LIBERTY 15 (1956). In the same vein, Mill doubts the distinction between causing evil to others by actions, as well as inactions, to find the person accountable for injury in both scenarios.

We demonstrate that the duty to act reasonably balances the various factors in these situations. It achieves two things: first, it gives an argumentative framework that incorporates the dynamics of a rescue duty. Second, the ranges depict that the law leans in favor of the bonafide rescuer who endangers her/his life to save the imperiled person. The analysis simplifies the reasoning to the burdens of liberty and security that duties aim to co-preserve. It is only a tentative framework, and balancing in turn must yield to a more substantive finding of norms.[37]

A. Balancing: Conduct of the Defendant (as Rescuer) and Interests of the Victim

In cases where the defendant has created the danger or harm, s/he must accept responsibility. The logic is that such a risk or harm is foreseeable. *Montgomery v. National Convoy &. Trucking Co.*[38] is a noteworthy illustration of the negligence of the defendant. The plaintiff claimed damages for the injuries suffered as a result of the carelessness of the defendants for a failure to warn approaching vehicles of the dangerous condition. The court held that it is incumbent on the defendants to take precautions, and since their omissions amounted to negligence, a duty existed.

While *Montgomery* represents a case where the court found the defendant liable for failure to use due care, the following is a case where the court did not find negligence, but the creation of a peril was sufficient to impose a duty. *L.S. Ayers & Co. v. Hicks*[39] held that the defendant store owed a duty of care to a visitor who was harmed while using the escalator. The court held that there was no general duty to rescue; it separated injury from aggravation of injury.[40] The court found that, although there was no negligence on the part of the defendant, the defendant's failure to provide assistance owing to the danger it created was reason enough to take reasonable care.[41]

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[37]See part V for a critique of the balancing approach.
[38]186 S.C. 167 (1838).
[39]*L.S. Ayres & Co. v. Hicks*, 40 N.E.2D 334 (Ind. 1942). See generally, P.A.L., "*Torts: The Duty to Rescue: 'Am I My Brother's Keeper?*'" 41 MICH. L. REV. 514 (1942).
[40]*Id.,* 4. It observed that principles of social conduct so recognized impose a legal duty, and the relationship of the parties impose obligations that otherwise do not exist. The occurrence of an accident creates a relation requiring a duty.
[41]See also *South v. National Railroad Passenger Corp.* 290 (N.W. 2.d. 819 (N.D. 1980)); *Union Pacific Railway Co. v. Adeline Cappier* 66 Kan. 649 (Kan. 1903); *Hammonds v. Haven* 53 A.L.R. 2d 992 (Mo. 1955). However, see *Saylor v. Parsons*, 122 Iowa 679 (Iowa 1904), where the court held that there was no legal duty of the employer to rescue the employee where there is no negligence on its part.

This is an interesting illustration of a tenuous rule of rescue based on the creation of harm. The rule is straightforward: if the defendant creates the harm s/he is responsible for its consequences. It corresponds to the individualistic theme pervading tort law. People's rights and duties are correlative in a manner that, as long as one does not cause harm to another, there is no duty. The moment, however, that there is any infringement, tort law steps in to protect the harmed by imposing a duty to act reasonably.[42] This also shows the overlap of duty and rescue in cases of the creation of a situation of peril. *L.S. Ayers* found the creation of a peril was a reason for imposing responsibility even if the conduct was not negligent.[43] This is tort law's way of balancing risk and harm.

A telling exposition of judicial balancing came up in *Podias* where it recognized a duty based on fairness and public policy.[44] The defendants were driving a car under the influence of alcohol when the driver lost control of the car and struck the victim. The defendants got out of the car but did not do anything to aid the victim. The court noted the gradual expansion of liability for inaction based on moral and policy reasons from "rigid formalisms."[45] It balanced the interest of the victim and the conduct of the defendant to decide liability. The defendants in this case were in a zone between wrongdoers and innocent bystanders. The court resisted formulating a rule of general application of judicial balancing that is peculiar in each case.[46]

It is important to keep in mind the challenge the harm principle poses to identify a rescue duty. By this, courts examine: how much risk invokes a reciprocating duty?[47] A simple example is the rule that the defendant is under a duty to stop and render aid to its victim where the defendant causes the accident.[48]

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[42]*Theobald v. Dolcimascola*, 690 A.2d 1100 (N.J. Sup. Ct. App. Div. 1997), *Pamela v. Farmer* 169 Cal. Rptr. 282 (Ct. App. 1980), *Kargul v. Sandpiper Dunes Ltd. P'ship*, 1991 WL 28051 (Conn. Sup. Ct. 1991), *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983).

[43]*Supra* note 33, 291. Epstein explains that that the defendant has the duty to mitigate the effects only when her/his actions could have prevented the injury or peril. This is why it is less stringent than a strict liability rule as it is only for the *new harm* that the defendant exposes.

[44]*Podias v. Mairs*, 926 A.2d 859 (N.J. Sup. Ct. App. Div. 2007).

[45]*Id.*

[46]*Id*.

[47]*Galanti v. U.S.A* 709 F.2d 706 (11th Cir. 1983) (The court held that no one has a duty to warn someone of a danger which they did not create.) See also *Wakulich v. Mraz* 751 N.E.2d 1(Ill. App. Ct. 2001), where the court dismissed the allegation that the defendants who provided alcohol to the victim whose condition deteriorated leading to death was negligent in providing due care.

[48]In many of these cases there are also statutes imposing this duty. For example, *Battle v. Kilcrease* 54 Ga.App. 808 (1936), failure to provide assistance by a hit-and-run driver was held liable. See also *Brooks v. Willig Truck Transporting Co.*, 40 Cal.2d 660 (Cal. 1953).

Courts interpreted a duty in special limited circumstances even if the defendant was not negligent. It protects the injured by transferring the responsibility for her/his safety to the injurer. The defendant shoulders a legal responsibility because of the peril s/he creates. This determination rests on the extent of reasonableness. It does not impose a duty for all risks that the defendant takes, but only for those linked to causing the particular injury to the victim.

B. Professional Rescuers: Balancing Risk/Harm and Interest of Rescuers

Professional rescuers such as firefighters, police persons and others routinely engage in rescues and oftentimes risk their life encountering danger. The doctrine of assumption of risk is an archaic device to prevent liability in all cases on the ground that the plaintiff voluntarily consented to the risk.[49] It implies that whenever a firefighter gets injured attempting to save life and property, s/he cannot recover from the owner; in essence, the owner owes no duty to a professional rescuer. However, the wholesale application of the rule is problematic in cases where the firefighter suffered injury due to the gross negligence of the beneficiary, which was extraneous to their occupational risk.

This section discusses cases dealing with the rescue doctrine in the context of professional rescuers. It is important to bear in mind *what is balanced*. The traditional cases disproportionately weigh the injury of the beneficiary and the status of the rescuer. They favor the adoption of the professional capacity of the rescuer to disclaim any injury suffered. In this view, the beneficiary is not responsible to avert any personal injury to the rescuer even if s/he may be the cause of it. However, in the meantime, courts progressively evolved a more sophisticated weight of risk or harm to the professional rescuer and the interest of the rescuer. The significant shift was in the focus away from the beneficiary to that of the rescuer. It is apparent from our discussion: when a person creates a peril s/he must be held responsible. This proposition is challenged in the situation of professional rescuers as they contractually undertake confronting risk. It raises the question: danger *to whom*? If it is danger in the normal course of events from the negligence of another person, then is it not the contractual duty of the rescuer to

[49]See Richard Zimmerman, *Negligence Actions by Police officers and Firefighters: A Need for a Professional Rescuers Rule*, 66 CAL.L.REV. 585 (1978). The author points out how courts mix assumption of risk and contributory negligence. He makes a strong case for developing a professional rescuer's rule in light of the rescue doctrine. This section re-deploys this central idea of the author; now in the context of balancing.

confront such risks. For example, if *A* negligently sets fire to her house, then the firefighter who was injured rescuing *A* cannot maintain an action for *A*'s negligence to cause the fire as s/he consented to the inherent risks of the profession—fighting fires. But consider, if *A* negligently leaves a loose railing unattended causing her/him to slip and fall during the rescue operation, then is the claim of the firefighter not maintainable? We have here two kinds of actions based on the risk to the rescuer. Loosely put, one is foreseeable; as it was assumed in her/his professional capacity, and the other is unforeseeable as it was unrelated to her/his function. Therefore, logically, the professional rescuer must be entitled to recover in the latter type.

The rationale of assumption of risk is expressed in the Fireman's rule. It provides that a firefighter has no cause against a negligent person causing the hazard.[50] Its aims are principled; it seeks to distinguish the role of firefighters as consenters to hazards whether natural or negligent.[51]

One court emphasized the Fireman's rule in a case where the police officer was injured attempting to arrest a minor who was illegally served alcohol at a party. The court invoked the Fireman's rule, stating that the risk prevents professionals who voluntarily confront hazards from recovering in tort.[52] The rationale employed is euphemistically speaking a lack of duty *to* care.[53] Similarly, when a police officer fell due to a false ceiling while investigating a school premises, the school was held not to owe a duty of care.[54]

The above cases illustrate the practical difficulties of the Fireman's rule. The rule unevenly operates to deny recovery for bona fide risks that the rescuer did not consent to. The injury suffered by the rescuers is not analogous to their main function of rescue. The interests weighed are the injury to the person and the status of the rescuer. The problem can be identified

[50] *Id.*, 595.
[51] See *Natasio v. Cinnamon*, 295 S.W.2d 117 (Mo. 1956), an interesting case of the extension of fireman's rule to a fireman who was off-duty. The court denied the claim to the plaintiff/wife stating that even though the rescuer was off-duty, upon responding to the fire, he occupied the status of a fireman on-duty.
[52] *Waters v. Sloan*, 571 P.2d 609 (Cal. 1977). The court upheld the principle: "[o]ne who knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby."
[53] See *Schrimscher v. State Compensation Insurance Fund*, 130 Cal. Rptr. 125 (Cal. 1976). The court declined to invoke the rescue rule as there was no proximate cause found and it applied the fireman's rule.
[54] The court found that the school owed a duty to warn of the hidden danger that was known, but was unknown and unobservable to the police. In this case, there was no evidence the school knew of the danger. See also, *Fanch v. Q.S.E. Foods Inc*., 60 Ill.2d 552 (III Ct. App. 1975); where the court held that the store owner had a same duty of care to the police officer on its premises as it owed to an invitee.

as the coverage of duty. So does the beneficiary owe absolutely no duty to rescuers when s/he imposes an additional danger due to their own negligence and not contemplated by the rescuer?

A more logical balance, consistent with the article's theme, is to resolve this by reasonableness. It flows from recognizing that we have a duty to rescuers, whether professional or ordinary, to act reasonably. Those risks then can be classified as arising *independen*t of the emergency duty of the rescuer.[55]

The guiding aim is to protect the rescuer from those risks that s/he had no warning or possibility to foresee. In an early case, *Haynes v. Harwood & Sons,*[56] the court held that assumption of risk does not apply when the injury was sustained owing to the defendant's negligence. The court applied the criteria of reasonableness to invoke liability as an exception to the Fireman's rule. In *Bartholomeow*, the police officer suffered an injury in the course of duty on the defendant's premises.[57] The court found the defendant did not manage its property as a reasonable person would in view of the probability of danger.[58] The invocation of a duty towards rescuers implies the protection for ordinary rescuers against unforeseeable risk.

The application of reasonability is more appropriate than employing the Fireman's rule, which unjustly impacts professional rescuers by denying protection. Reasonability demonstrates the concern for the amount of risk or harm and the interest of the rescuer. Likewise, some States even abolished the Fireman's rule, favoring a general application of duty where liability was based on a duty with an emphasis on reasonableness.[59]

C. Special Relations: Balancing Interest of the Victim and Status of the Rescuer

The duty to rescue enjoys widespread application when there is a special status between the plaintiff and defendant.[60] Some common relationships are: carrier-passenger, innkeeper guest-house, landowner-invitee, custodian-ward, employer-employee. Commentators have

[55]*Supra* note 45.
[56][1935] 1 KB. 146.
[57]*Bartholomew v. Klingler Co*. 126 Cal. Rptr. 191 [Cal. 1975]. The court observed that reasonable people do not ordinarily vary their conduct.
[58]*Id*., 5.
[59]*Baldonado v. El Paso Natural Gas Co.* 176 P.3d 286 (N.M. 2008). (The court declined to apply the Fireman's rule and [instead] interpreted the general standard of care.)
[60]*Supra* note 16. Wienrib points out that the special relation exception is slowly eroding the general no-duty to rescue rule.

covered instances of these duties when there is a special legal status. They posit that where there is a legal status, parties must have greater foreseeability in preventing harm even when the defendant is not the cause for that harm. Courts apply the negligence standard of due care to forecast the duty to rescue (such as employer-employee[61]or parent-child,[62] to name a few).

This section takes up four kinds of relations: doctor and patient, ship owner and sailor, friend, and occupier's liability. Not surprisingly, consistent with our previous analysis, courts under this category read rescue and care synonymously, holding actors to exercise reasonable care of ordinary skill and diligence. The expansive reading in this category of special relationships is a result of the special duty imposed on the defendants owing to its legal relationship with the injured.

The relation of doctor-patient came up in *Tarasoff v. Regents of the University of California*, where a patient expressed intention about killing the victim to the defendant-therapist.[63] The court held that in the case of a doctor and patient there was a special relationship and involved a duty to take reasonable care under the traditional negligence standard of ordinary care and skill.[64]

In another case, the court found the ship owners liable for negligence of the crew where the deceased plaintiff was an employee in the capacity as a deck hand who drowned during the performance of his duties.[65] The crew did not make proper attempts to rescue the victim, and later contended that they denied any duty to rescue the victim. The court found the ship owners had a legal obligation to save the life of their crew using reasonable means.[66]

The duty of a friend to affirmatively aid his/her companion came up in *Farewell v. Keaton.*[67] The court upheld the affirmative duty to render assistance when another's companion is in peril without endangering oneself. The court found a breach of legal duty: social companions were a special relation requiring the rescuer to act reasonably. However, in

[61]*Cladwell v. Bechtel*, 631 F.2d 989 (D.C. Cir. 1980) (duty of care is based on social policy).
[62]*A.R.H. v. W.H.S.*, 876 S.W.2d 687 (Mo. App. 1994) (relation of grand-mother and grand-child). See *Brandon v. Osborne Garrett and & Co. Ltd.* [1972] All. E.R. Rep. 703 (where the court held that the wife is a reasonable rescuer, where she tried to save her husband as a result of the negligent construction of the roof by the defendant.)
[63]551 P.2d 334 (Cal. 1976).
[64]*Id.*,22.
[65]*Harris v. Pennsylvania Railroad Co.*, 50 F.2d 866 (4th Cir. 1931).
[66]See also *Horsely v. MvcLaren* [1972] S.C.R. 441 (where the court upheld the special relationship between the owner of the boat and its passengers).
[67]240 N.W. 2d 217 (Mich. 1976).

Strickland v. Ambassador Insurance Co.,[68] the victim was killed trying to install up a mobile home with the defendant, and the court held that there was no duty on the part of the friend to aid the victim in peril as he did not create or participate in the peril.[69]

The field of occupiers' liability to trespassers, licensees, and invitees, dilutes the notion of private ordering of rights and duties. More will be said on this in the following section addressing the correlativity of tort law argued by Peter Cane and Authur Ripstein. For now, it adumbrates an exception to general rules of foreseeability.

In one case, a contractor was held liable for the injury of a police officer because of his failure to reasonably foresee the safety of the entrants on his property.[70] In *Pridgen v. Boston Housing Authority*,[71] the employee was aware that the boy was trapped in the elevator shaft, but did not shut off the power to stop the elevator from moving. The court found a duty to take reasonable care even to a trespasser when the act involved was a simple duty to prevent injury. It held that the owner is required to act the same way an ordinary and prudent person would have acted by exercising the appropriate degree of care. *Rowland v. Christian*[72] is another striking instance of the dilution of the class of special relationships for rescue.[73] The plaintiff-guest was injured as a result of the failure of the defendant to warn the plaintiff about her bathroom fixtures, which caused injury. The court held that there arises a duty on the defendant to warn:

> Reasonable people do not ordinarily vary their conduct ... on the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the land owner has a duty of care, is contrary to our modern social mores and humanitarian values."[74]

Hence, there is a duty to act reasonably to prevent danger to the victim when the parties are in legal relationships. These are simple and obvious cases of duty to rescue. The duty to rescue is similarly evaluated where there is a relation between the victim and rescuer. Thus,

[68]422 So. 2d 1207 (La. App. 1st Cir. 1982).
[69] See *Theobald v. Dolcimascola* 690 A.2d 1100 (N.J. Sup. Ct. App. Div. 1997). The parents of the deceased child sued the friends after the death of their child who committed suicide while playing Russian roulette. The defendants were present at that time but did not prevent the incident. The court found that there is no duty to prevent death by taking reasonable care, unless the defendant had participated in the risk in any manner.
[70]*Mile High Fence Co. v. Radovich* 489 P.2d 308 (Colo. 1971).
[71]308 N.E.2d 467 (Mass.1974).
[72]443 P.2d 561 (Cal. 1968).
[73]*See O'Leary v. Coenen*, 251 N.W.2d. 746 (N.D. 1977).
[74]*Id.,* 9.

reasonableness balances the interest of the victim and the status of the defendant in such a way that law imposes responsibility of special care in these situations.

D. Balancing: Interest of the Rescuer and Conduct of the Defendant

Professional rescuers were denied recovery for harm suffered on the ground that they voluntarily assumed the risk of injury.[75] The change in the position of law reflects protection to the rescuer for providing succor. The conduct of the defendant in creating the danger is critical to fasten any liability. The rationale is to prevent the incidence of loss where it falls, thus, preventing the rescuer from suffering for a bona fide act of courage.

The most important principle is the obligation owed to the rescuer. The defendant's liability to the rescuer is again founded on the responsibility for the creation of danger in the first place. It begs the question: is there a duty owed to anyone despite not directly being in range of the defendant's actions? In these cases, the rescuer acted in defiance of a risk and the defendant was expected to foresee the consequences of her/his peril. The complex balance between the interest of the rescuer and the conduct of the defendant is resolved by extending a duty-like situation towards rescuers. It is a duty to act reasonably. We proceed to examine the varied instances where this balance of duty has been deployed.

Wagner v. International Railway Co.[76] is the most famous rescue case where the rescuer and victim were treated as co-equals. The rescuer and his cousin were riding the defendant's electric railway, where his cousin suffered injuries as a result of being thrown from the train. Justice Cardozo wrote the famous passage:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. **The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer** (emphasis added).[77]

[75] Allen Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 252 (1971).
[76] *Wagner v. International Railway Co*., 232 N.Y. 176 (NY.1921). *See also, Gibney v. State*, 137 N.Y. 1 (1893). (The court awarded a widow damages for the death of her husband/rescuer who drowned trying to save a child from the water.) See, M.A.F., *Right of Rescuer to Recover from Tortfeasor for Injuries Sustained*, 9 VA. L. REV. 376 (1923)
[77] *Id.,* 4.

The defendant has a duty to act reasonably towards the rescuer if the condition of peril has been inflicted by her/him. In *Blanchard v. Reliable Transfer Co.*,[78] the rescuer suffered a psychological injury as a result of the rescue attempt. The court held that foresight creates duty and awarded damages for injury suffered during rescue arising from the negligent action of the defendant. Another striking illustration of foreseeability is *Videan v. British Transport Commission.*[79] There, the rescuer-father leapt to save his son from an incoming trolley, but in the process lost his life. The court held that injury to the child was unforeseeable. On the same lines, however, it found that the defendant owed a duty towards the rescuer to take reasonable care anticipating that an emergency can arise for the peril created and held him liable for the death of the rescuer.

There is an assumption of duty because of the peril created, where the law sees even the rescuer as a victim of the emergency. Similarly, a duty was found in *Baker v. Hopkins*,[80] where the rescuer-doctor died trying to save the two victims trapped in a well. Notwithstanding the negligence of the two victims, the court found that the defendant was responsible for negligent creation of the peril in the first place.[81] This principle is now firmly ingrained in tort law. In *Chadwick v. British Transport Commission*,[82] the rescuer suffered an attack after voluntarily rescuing victims in an accident that lead to his death. The court held that the defendants breached a duty of care to the rescuer as it ought to have foreseen that the rescuer will intervene in danger. In other words, the principle of tort that the tortfeasor takes her/his victim as s/he finds her/him applies to the rescuer as well.

Analogously, the recovery of the rescuer extends to cases where the defendant and the beneficiary are the same person.[83] The problem here is twofold: duty and causation.[84] In *Brugh v. Bigelow*,[85] the rescuer went to the aid of the defendant who negligently caused the accident and

[78]*Blanchard v. Reliable Transfer Co.*, 32 S.E.2d 420 (Ga. Ct. App. 1944).
[79][1963] 2 All. E.R. 860.
[80][1958] 3 All.E.R. 147.
[81]See *Horsley v. MacLaren* [1972] S.C.R. 441, *Haynes v. Harwood*, [1934] All.E.R. Rep. 103, *Baldonado v. El Paso Natural Gas Co.*, 143 N.M. 297, *Hammonds v. Haven*, 280 S.W.2d 814, *Mile High Fence Co. v. Radovich*, 489 P.2d 308, *Saylor v. Parsons*, 122 Iowa 679, *Galanti v. U.S.A.*, 709 F.2d 706, *Brandon v. Osborne Garrett & Co. Ltd.*, [1924] All.E.R. Rep. 703, *Perppich v. Leetonia Mining Co.*, 118 Minn. 508, *Sayers v. Harlow Urban Dist. Council* [1958] 2 All.E.R.342, L.S. *Ayres & Co. v. Hicks*, N.E.2d 334, *Jones v. Boyce*, 171 E.R. 140 (1816).
[82]*Chadwick v. British Transport Commission*, [1967] 2 All. E.R. 945.
[83]Recall that section A dealt with the defendant/tortfeasor and the rescuer being the same person.
[84]See Margaret Groefsema, *Torts: Liability of Negligent Driver to One Who Goes to His Rescue*, 43 MICH. L. REV. 980 (1945). Note, 14 U. CHI. L.REV. 509 (1947).
[85]16 N.W. 2d.668 (Mich. 1944).

in the process suffered injury. The court found that the rescuer can recover from the defendant who was both the beneficiary and also the wrongdoer. This is unique as there is no explicit foreseeability for imposing a duty towards the rescuer, since the tortfeasor is none other than the beneficiary. Recovery for the rescuer is based on continuity of the wrong of the defendant and averting its consequences. It does not demand a precise link between the two, but put this way, it captures causation.[86]

A rescuer is in a different relationship with the defendant. Her/his interests and the conduct of the defendant are balanced using the duty approach. Reasonableness is judged in light of the defendant's conduct, which explains responsibility. Thus, the interest of the rescuer is paramount, making them a distinct class. The factors weigh the transfer of the loss from the rescuer to the careless person.[87] The balance of reasonableness ensures that the defendant is not overburdened when the rescuer's attempt was rash or reckless. At the same time, it protects the rescuer who risks her/his life in earnest by enlarging the requirement of foreseeability of a strict nature in such cases. The objective of this prong of the doctrine is to arrive at a standard of care towards rescuers.

F. Balancing: Interest of the Rescuer and the Victim in Relation to the Conduct of the Defendant

The last section dealt with cases covering the duty to the rescuer coextensively with the victim. In other words, where there is negligence, the defendant is responsible to the rescuer. The cases discussed here, however, show that even in the absence of negligence towards the victim, the defendant may still be accountable to the rescuer. This is premised on foreseeability of peril. Irrespective of the damage caused by the defendant to the victim, he is nonetheless liable to the rescuer. In sum, it proves that the defendant has a duty to a rescuer. The rescuer's interest outweighs even the victim's in relation to the defendant.

The principle of law is that the duty to a rescuer is independent of the victim's claim against the defendant. Recall *Videan*,[88] involving the child rescued by his father from the train.

[86]But see *Schrimscher v. Bryson,* 58 Cal. App. 3d 660 (2nd Dis. 1976); the court held that the action of the third party could not be foreseen as the succeeding event broke the chain of causation.
[87]*Supra* note 79, 255.
[88][1963] 2 All.E.R. 860.

The court held that there was no negligence against the child as the injury was unforeseeable. Nevertheless, it found the defendant liable to the rescuer. In the event of an emergency, rescues are deemed foreseeable. Lord Denning wrote: "[I]*f a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others*."[89] Simply put, it reckons creation of peril as sufficient justification to impose a duty to rescue. This implies that the right of the rescuer is an independent right not derived from the victim.

The balance is in favor of the rescuer who is protected against any personal harm or loss for this act of good faith. Let us imagine, a rescuer does not understand the technicality of negligence law, since the decision to rescue is spontaneous without deliberating legal consequences. As a result, to separate the duty owed to the victim and the rescuer implies again that rescuers are a distinct class. It avoids treating the rescuer with the victim and instead applies a discriminatory analysis. *Videan* does not describe the extent of the duty to the rescuer. The duty is predicated on reasonableness. The defendant will not be asked to answer for the rescue service if the condition was not perilous or is unconnected with the defendant's actions. In sum, where the defendant creates peril, s/he must foresee rescue.

G. Balancing: Interest of the Victim and Conduct of the Rescuer

It is said that there is no general duty to rescue a victim. But supposing the rescuer acting out of bona fide intent ends up causing further harm to the imperiled person, or the rescuer otherwise acted rashly or negligently resulting in an injury to oneself, is there an action for negligence against the rescuer? It is a tight line. On the one hand, it can disincentivize potential rescuers by placing high standards, and on the other, it expects a minimum conduct of diligence, not something foolhardy from rescuers. Courts have arrived at this balance by measuring the rescuers conduct on the ground of reasonableness.

Let us revert to the opening sentence about no general duty: is that really so straightforward? Consider that the requirement of reasonableness from a rescuer logically must imply that there is a duty to the victim in the first place; from where can reasonableness be expected otherwise? Hence, this is a definite albeit loose categorization of a duty to rescue,

[89] *Id.*, 8.

which exists and applies when the rescuer embarks on a duty (as in the illustration above). We continue on the relevant cases to return to this in the next section about the *Rescue Paradox*.

The general rule is captured in *Perpich v. Leetonia Mining Co*.,[90] where the rescuer-employee tried to save another employee and sustained serious injuries in the process. The court held that the rescuer was not contributorily negligent, nor rash or reckless and could recover from the defendant. Likewise, in *Wagner*,[91] the act of the rescuer saving his child was held reasonable in light of the emergency. Justice Cardozo observed: "*The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets a man…It is enough that the act, whether impulsive or deliberate [ ], is the child of the occasion.*[92] *Safety is a premium when assuming risks to protect life*."[93]

The ambit of reasonableness came up for discussion in *Horsley v. MacLaren*,[94] where the defendant invited guests on his boat, and one of the guests accidently fell overboard. As it turned out, the plaintiff-rescuer lost consciousness and died during a rescue attempt, and another passenger dived into the water to bring him on board. The question came up whether both the rescuers' conduct was reasonable in light of the emergency. The court noted that the defendant owed a special duty towards its guests for creating the situation of peril: conduct of both rescuers was reasonable, not wanton or foolhardy. The court found that the defendant's conduct amounted to an error of judgment, not negligence. The decision underscores that the rescuer's duty towards the victim needs to be reasonable and not one amounting to reckless disregard of safety.

A major component of the rescue doctrine is the duty of the rescuer. Courts have time and again calibrated the standard at a bare minimum. It demonstrates that having this duty is an important safeguard for the victim and also the rescuer.

In one case, the rescuer died trying to save the child from the incoming train.[95] The court drew a distinction between rash and reckless negligence and an effort to save life, which has inherent risks itself. The court held:

[90]137 N.W. 12 (Minn. 1912).
[91]232 N.Y. 176 (NY. 1921).
[92]*Id.*, 4.
[93]See generally, Comment, 22 YALE. L. J. 413 (1913).
[94][1972] S.C.R. 441.
[95]*Eckert v. Long Island Railroad Co.*, 43 N.Y. 502 (NY. 1871).

> The law has so high a regard for human life that it will **not impute negligence to an effort to preserve it**, unless made under such circumstances as to constitute rashness in the judgment of prudence persons (emphasis added)."[96]

Similarly, in *Hammonds v. Haven*,[97] the plaintiff tried to warn the incoming car of the tree fallen across the roadway, but in the process was struck by this approaching car. The court held that the plaintiff was not contributorily negligent by trying to rescue someone from imminent danger.[98]

In spite of minimum expectations from the rescuer, courts also need to balance the interest of the victim from not being left in a condition worse-off than before if her/his chances could have been improved by the rescue. In *Zelenko v. Gimbel Bros. Inc.*, the defendant placed the plaintiff, who was ill, in an infirmary for several hours without any medical care, where he died.[99] The court found that the defendant, by assuming the rescue, failed to do what an ordinary person would do.[100] It follows that the defendant must do what a reasonable and prudent person would have done.[101]

The law does not require too much from the rescuer as long as s/he acted diligently. It protects the victim from being left in a worse-off condition as a result of her/his intervention. Reasonableness decides in whose favor the balance in each case will turn, such that both the rescuer and the victim are not arbitrarily treated. It balances efficiency and fairness, ensuring the rescuer is not grossly inefficient and the victim gets a fair deal.

G. Analyzing the Rescue Doctrine

The rescue doctrine represents the range of micro balances, allocating interests of the three parties. In this section, we cover two things: first, to examine the balancing tests as a useful

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[96] *Id.*, 3.
[97] *Hammonds v. Haven,* 280 S.W.2d 814 (Mo.1955).
[98] See also, *Blanchard v. Reliable Transfer Co.* 32 S.E. 2d 420 (Ga. 1944 (rescuer's attempts to rescue victims of an accident was found reasonable). *Guca v. Pittsburgh Railway Co*. 80A.2d 779 (Pa. 1951), *L.S. Ayers*, 40 N.E.2d 334 (Ind. 1942). See also, *Saylor v. Parsons*, 122 Iowa 679 (Iowa 1904).
[99] *Zelenko v. Gimbel Bros. Inc.*, 287 N.Y.S. 134 (NY. 1935).
[100] See also, *Anderson v. Atchinson*, 68 S.Ct. 854 (1948).
[101] See *Harris v. Pennsylvania Railroad Co*., 50 F.2d 866 (4th Cir. 1931). The court found that the crew did not make any reasonable efforts to save the life of the victim overboard. See also, *Jones* [1814-1823] All.E.R. Rep. 570, *Brooks* 40 Cal. 2d 669.

starting inquiry; second, to discuss the implication of the rescue doctrine in context of the fundamental principle of negligence law: the duty to act reasonably. It concludes that the rescue doctrine, when re-conceptualized as an example of reasonableness, is a satisfactory norm of conduct to achieve individual and social responsibility.

The micro balancing in rescue cases advance the discussion in the earlier chapter on duties. It requires an understanding of the interests of risks and harm that are involved in duties to aid. We later criticize this method as lacking direction. But first, we discuss the claim that that dividing the analysis this way makes conclusions somewhat principled.

It is noteworthy that the balancing approach has been used by courts to deny responsibility of the defendant owing to the un-foreseeability of harm. *Posecai v. Wal-Mart Stores Inc*.[102] affirmed the use of the balancing approach. The plaintiff was robbed at the parking lot of the defendant's store and sued the store for the failure of its duty to protect him from third persons. The question to determine negligence is whether there was a duty to the plaintiff? The court discussed the four ways to determine foreseeability and ultimately found the balancing test most suitable.[103] It balanced the foreseeability of harm and the burden of duty in such a way that the greater the foreseeability and gravity of harm, the greater the duty of care. It implies that when there is a high degree of foreseeability, there will be a corresponding duty to take security precautions. The court found that the defendant did not have the requisite degree of foreseeability for the imposition of duty.[104]

Likewise, *Wiener v. Southcoast Childcare Centers Inc*.[105] found no liability of the defendant day care center when a car drove through the fence of its premises because such an incident was unforeseeable. Indeed, these decisions raise questions about the future of the balancing approach. Is the balancing approach a guarantee of principled adjudication (since it rests on identifying factors on a scale)? Is balancing just weighing relative merits, or is it something more methodologically certain?

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[102]752 So.2d 762 (La. 1999).

[103]*Id.* The other three ways to resolve foreseeability discussed were the specific harm rule (unless the owner is aware of the imminent harm), prior similar incident test (history of previous criminal conduct), and totality of circumstances test (additional factors such as nature and location of the property). The results of foreseeability vary under each of these three types.

[104]See also, *M. v. Pacific Plaza Shopping,* 863 P.2d 207 (Cal. 1993). The plaintiff/employee was raped in a mall, the court found that the defendant was not liable to provide security guards.

[105]88 P.3d 517 (Cal. 2004).

The balancing test focused on foreseeability and corresponding duty. These are inadequate to measure the exact interests and risks of the two sides. It examines the issue through the defendant's perspective, seeing if the defendant could have foreseen the harm rather than balancing the harm of the injured. In *Posecai,* the court failed to specifically weigh the harm of the victim. It instead compared foreseeability of the harm (from the defendant's perspective) to duty. This is clearly inadequate, as it reverts to the doctrinal conundrum of duty. It reinvents the old failing to look at whose interests require balancing. In sum, the balancing approach followed by the courts is arbitrary and irrational.

The rescue doctrine settles the balances based on the duty to act reasonably. For example, the rescuer has a duty to act reasonably towards the victim, as also, the defendant has a duty to act reasonably to foresee the rescuer's intervention. It is premised on reasonableness as a standard norm of conduct. Thus, reasonableness here attempts to harmonize the umbrella of conflicting demands: liberty and security, autonomy and social welfare, risk and harm.

So, is there is a generalized duty to rescue? It is a strange and paradoxical principle that is set out here. It can be termed as the *Rescue Paradox*. There are two general principles from previous sub-sections: i) you do not normally have a duty to strangers, but you have a duty to foresee the rescuer who intervenes in case you commit a tort. Hence, there is a duty *to* the rescuer. ii) You do not have a duty to rescue, but if you rescue, you must perform your duty reasonably. Hence, there is a duty *of* the rescuer. If a person embarks on a rescue, the duty must be discharged reasonably. There is no compulsion to rescue or a liability attached upon a failure to act. In this manner, we gather a somewhat loose notion of duty to rescue entrenched in tort law.

The Rescue Paradox explains some of the nuances in the rescue doctrine that courts have developed in balancing the various interests highlighted above among the three parties. The paradox describes the tight-line between having a duty and exercising a conditional duty. In other words, the duty to rescue in its present form is not compulsory, but is at the option of the individual to decide to act in a given situation—thereby making it conditional. It is triggered only by the decision of the person who decides to rescue. Once a person embarks on this duty, then s/he is required to act reasonably with ordinary care and knowledge. If the person decides not to intervene, there is no liability. In other words, the duty to rescue is a self-regulating kind of duty.

Thus, tort law balances duty and no-duty to rescue by utilizing this paradox to remain rescue friendly.

The last feature of the rescue doctrine is its rationale of self-responsibility. The defendant is answerable to the rescuer because s/he is responsible for the harm resulting from her/his actions. This is taken up in the following chapter discussing the theme of Peter Cane and Arthur Ripstein: tort as a set of ethical principles setting standards of personal responsibility. The rescue doctrine captures the essence of self-responsibility: the person who brings the peril will then have to answer for it. For example, if a person causes the accident then s/he has a duty to rescue the imperiled person. In summary, the rescue doctrine is consistent with the formative principle: defining freedom by limiting duties to the consequences of one's (in)actions.

IV. THE RESCUE DEBATE

The discussion has so far concentrated on the principles of rescue by demonstrating a limited duty to aid explained through the Rescue Paradox. The following sections examine the extreme nature of the arguments for and against imposing a duty to rescue. Apathy towards such a duty sets the precedence of reducing people as selfish and self-interested. By contrast, imposing a mandatory duty to rescue has the opposite effect of changing the "terms of interaction" between the parties.[106] There is considerable disagreement in enforcing the lines in such cases and it redeems the coldness that law can display in some occasions of grave and imminent peril. Scholars are divided in two camps over whether rescues must be a duty in emergencies or a convenience. It is properly conceived in this article that the problem cannot be resolved from these extreme positions. The duty to act reasonably mediates the duty to rescue. Such a determination will need to balance the interests of freedom and responsibility along with the need for a well-ordered society that collectively shares the well being of its individuals.

[106]Term borrowed from Arthur Ripstein.

A. Position against a Duty to Rescue

Peter Cane describes the framework of tort law as a system of ethical rules and principles of personal responsibility of conduct.[107] As a result, the duties to aid strangers become hard to accommodate. It is no doubt ethical, but whether we can attribute personal responsibility to rescue remains a puzzling question. The arguments against such a duty revolve around the foundation of tort law as correlative principles where both parties agree to an equal and fair allocation of burdens. Imposing the duty to rescue upsets this balance somewhat by making one party perform a duty s/he did not have a chance to accept. The line of arguments echoes the *laissez faire* theme "live and let live," upheld in *Bush v. Amory Mfg. Co.*, [108] where the court observed: "[I]f they [defendant] did nothing, let him entirely alone, in no matter interfere with him, he can have no cause of action against them for any injury that he may receive."[109] The case against a duty to rescue can be argued under the following: 1) structure of correlativity, 2) division of responsibility, 3) economic benefit of a no-duty rule, and 4) practical obstacles.

1). Structure of Correlativity

Rescue duties conceal the basic structure of tort law as a branch of private law featured by correlativity.[110] It implies that one person's obligations correspond with another person's right.[111] It does not accept negligence "in the air."[112] Thus seen, correlative analysis is the bilateral allocation of rights and obligations between parties so that neither one party is at an upper hand. The objective of this approach is to explain the terms of interactions of parties in such a way that it maximizes the potential of individual's to control their own lives without interfering with others.

Duties to rescue turn on the balance between freedom and responsibility.[113] In the extreme, imposing a rescue duty compromises freedom and not having such a duty hampers

[107]PETER CANE, THE ANATOMY OF TORT LAW (1997) 1. Peter Cane describes the functions of tort law as both backward looking and forward looking. The backward looking (extrinsic) functions are concerned with the resolution of disputes of parties in trouble. The forward looking (intrinsic) function is to guide peoples' conduct. It assists people in planning their life to minimize any friction.
[108]69 N.H.257 (NH. 1897).
[109]*Id*., 4.
[110]*Supra* note 12.
[111]*Id.*
[112]See *infra* note 115.
[113]*Id*., 15.

responsibility. Bilateralism balances the negotiation of two given individuals, commonly done through the duty to act reasonably. Reasonable people disagree on the compulsion to rescue. Accordingly, the central idea of correlativity embodied under reciprocity, and freedom and responsibility, is examined.

1) Reciprocity

People set reciprocal limits on each others' freedom. This is in essence a Kantian maxim forming the basis of tort obligations. It flows from this that one party cannot set the terms of interactions unilaterally.[114] The duty to act reasonably performs the function of determining those exact limitations between the parties whose interests are involved. Tort law guides optimal conduct by preserving mutual respect for freedom. It lets you pursue your ends as long as you do not encroach on others.

The famous case of *Palsgraf v. Long Island Railroad Co*.[115] accurately captures the reciprocity thesis. A passenger was carrying a package of fireworks at the railway platform which burst and caused injury to the plaintiff. The court found the defendants not liable, as they could not reasonably apprehend the danger. It held that the wrong must be shown as directed against the injured person. Justice Cardozo noted in an important passage that the plaintiff must show wrong to herself by a violation of her legal right and not merely a wrong to someone else at large. The underlying assumption is that negligence is a "term of relation that is foreseeable."[116]

Palsgraff is a classical illustration that the duty is owed to an individual, not the world at large. It is termed as the private ordering of rights.[117] Let us work with the concept of duty to act reasonably to analytically demonstrate how this functions. Take these two statements: "*A* owes a *duty* to act reasonably to *E*" and "*A* must be reasonable to *E*." The second statement misconceives a duty. *A* does not need to be reasonable to *E* in the absence of any *duty* owed to *E*. Recall that in the first statement *A* owes a duty to act reasonably to *E* because there was a *duty* relation to begin with. The first statement fittingly describes that acting reasonably depends on a notion of duty owed to another person. By contrast, it is not that duty owed to a person flows

[114] See also *supra* note 12.
[115] 248 N.Y. 339 (NY. 1928).
[116] *Id*., 5.
[117] *Supra* note 12, 765.

from acting reasonably. A person cannot be expected to act reasonably to the entire world unless there is a causal connection that is the essence of a relation we can term duty.

Acting reasonably sets the baseline of an agreed standard of interaction. Arthur Ripstein points out that reciprocal engagement balances the interests in liberty and security.[118] It mandates the ideal care and investment in security from harm which is ordinarily foreseeable.[119] The rescuer's rights are infringed if law expects every person to rescue as there would be no forewarning or chance for rescuers to take precautions to guard against potential risks to their life. As a matter of principle, it prevents the victim or defendant from setting the terms of interaction unilaterally at the cost of the rescuer's autonomous free will.[120]

The discussion of private ordering of rights is incomplete without considering this rejoinder: is not a tortious action also a wrong against society at large that justifies punishment? Incursions of rights are violations against the society, not only violations of individual rights. This is evident in the dissenting opinion in *Palsgraf*,[121] which found that it was a duty owed to the world at large to refrain from threatening the safety of others.[122] This view is further bolstered in cases involving liability to trespassers by owners of the premises. The law as enlarged rejected the private ordering of rights to impose a duty on the part of occupiers towards trespassers.[123] *Baldonado* found there is a universal standard of care across people that make citizens accountable for reasonable actions.[124] Cases have even gone so far to challenge the notion of status of the parties by expecting a general level of conduct from reasonable people.[125] However, though this counter-point raises some important questions, it challenges the private ordering of rights and duties that is so fundamentally ingrained in the grammar of tort law. There

[118]*Id*., 761. It prevents the cost of injuries to lie where they fall. Ripstein observes which interests are protected depends on the judgment of which interest is more valued.
[119]See *Haynes* [1934] All.E.R. Rep. 103 and *Cladwell* 631 F.2d 989 [1980].
[120]This notion muddies the line between tort and contract. *Supra* note 5. Epstein notes in his article *A Theory of Strict Liability*, that, even if parties had contracted among themselves, then it forces people to abstain from situations where they may be obliged to rescue. They will do this to minimize losses on their part. Posner criticized this that it is not a contract, but the fact that one day a rescuer will require to be rescued herself/himself makes rescues inherently reciprocal and logical. See Richard Posner, *Epstein's Tort Theory: A Critique,* 8 J. LEGAL. STUD.460 (1979). This point is taken in the following section which discusses Ernest Weinreb's critique of the contract model.
[121] The judgment by Andrews has all the ingredients of a classical dissent. He writes: "because of convenience of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a point. This is not logic. It is practical politics."
[122]*Id.*, 7.
[123]*Fancil*, 60 Ill. 2d 552 [1975]. See also *Videan* [1963] 2 All.E.R. 860.
[124]176 P.3d 286. The same was a holding in *Pridgen*, 308 N.E.2d467 [1974] (individual rights and duties in relation to all other members of society).
[125]See *Bartholomew*, 126 Cal. Rptr. 191 and *Rowland* 443 P.2d 561.

has to be a balance between private ordering and public functions mediated by the duty to act reasonably.

2) Freedom and Responsibility

Tort law signifies the bill of rights of private law. It facilitates the goal of making people self-determining individuals. It occupies the cleavage between the individual and society. Modern tort cases lean heavily on the freedom of the individual to pursue their own ends.[126] Ripstein terms this as "preconditions to lead a self-directing life."[127] The norm of personal responsibility for action is the basis for claims to succeed. It is precisely this notion that makes rescue hard to reconcile. It enlarges personal responsibility to wider social goals. Imposing too much responsibility can impinge freedom, and infusing too little responsibility results in a society lacking in social integration.

Rescues entail that one take responsibility for something one did not give prior consent. The predicament of "whose problem is it when things go wrong" is unsolved in these hard cases. For example, imagine a person dying on the road from starvation for no fault of the defendant nearby. Even if the defendant were not to stop to render aid, the person would have died anyway. Calling on the defendant to administer aid is requiring something not in the normal course of her/his actions. The defendant can simply say that the dying person is not her/his problem, but the problem of the State. The scenario illustrates the shifting limits of freedom and responsibility. Conversely, if the defendant ran over the stranger, s/he is legally under a duty to rescue the injured stranger. This is because the vulnerable person is no more a legal stranger, but one to whom s/he owes a duty. This shifts responsibility onto the defendant at the cost of freedom because s/he is responsible for the peril s/he brings.

Rescue demands that the rescuer take responsibility over other peoples' lives. Accepting this proposition marks all kinds of confusion: it makes it our role to confer charitable benefits. It means that a person accepts another's loss out of no causal linkage, but rather, humanitarian grounds. Suppose a person is dying in a far off place, it can potentially imply that you are

[126] *Supra* note 12. See further, *Supra* note 107, 15. Cane describes the balancing nature as "freedom to" and "freedom from."
[127] *Supra* note 12*,* 764.

answerable for failing to aid that person. Or the fact that a rescue is easy is not by itself justifiable to impose such a duty. It makes someone else's problem your problem.

In this context, Richard Epstein expounds tort law as a normative theory taking into account common sense notions of individual responsibility.[128] He famously argued for the replacement of negligence liability with strict liability, positing that liability should be based on causation likened to harm.[129] In this background, he proves that strict liability better explains the no-duty rule than negligence liability. The rationale behind this is that negligence fails to accommodate a coherent distinction between acts and omissions. The rule of strict liability obviates any such need basing liability on the harm created by the defendant. According to Epstein, this rule better justifies the exceptions to a no-duty to rescue by stressing that it is the creation of peril that determines the responsibility to provide aid.

Epstein's account is a convincing justification to apply the duty to rescue rule in the scenarios discussed in this article. In fact, as noted, the duty to rescue in situations embodies the logic of strict liability, making people responsible for the consequences of their activity whether or not they intended harm. It importantly defines the boundaries of one's liberty to another: persons enjoy complete liberty as long as they do not bring harm to another.[130] It sets the tight rope of freedom. For these reasons, tort law appeals as a bill of rights of private law.

2). Alternative Social Mechanisms

The modern State consists of multiple functions and social networks to forge unity and maximize the well being of individuals in society. The argument as advanced by Ripstein (and Rawls) is that society acts through these institutions to moderate peoples' demands; and the duty to rescue must be carried out by such bodies.[131] The transfer of social responsibility to these

[128] *Supra* note 5, 151.
[129] The rapid expansion in the application of strict liability in American products liability cases has now caused some scholars to question the distinction between doctrinal categories of negligence and strict liability See Richard Cupp & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence Liability: An Empirical Analysis* 77 NYU. L.REV. 876 (2002). The authors conduct an empirical study of how jurors respond differently to negligence language versus strict liability language in products liability cases. They conclude that the use of negligence language results in significantly better results for the plaintiffs than did strict liability language.
[130] *Id*., 203.
[131] *Supra* note 12, 756.

institutions leaves parties to mutually define rights and responsibilities. This is in essence the idea of the social contract.

The task of these just institutions is to foster social cooperation. This mechanism divides responsibilities of individuals' freedom and governance of public resources. By these means, the function of rescuing people in peril falls in the domain of State made law, especially criminal law. Individuals take collective responsibility for any wrong done against it as a trustee. The failure on the part of the individual is justifiable as it is the role of institutions to provide benefits in hard cases. Rescue is a part of the public function like police or military where just institution covers the costs and it is not imposed on strangers.[132]

Ripstein makes an interesting argument favoring a duty of easy rescue under Criminal Law premised on the responsibility that the society owes as a whole to rectify the wrong.[133] His conclusions are based on the principle that demanding rescues is a violation of freedom. Thus, he concludes, Criminal Law is in a better position to enforce this duty than tort law. It is outside the scope of this article to make a comparative assessment of its suitability under criminal law, but it is an interesting line of reasoning.

3). Economic Benefit of a No-Duty Rule

An influential thesis that shifts away from philosophical underpinnings of tort law is one about economic efficiency. It dispenses with the notion of causation stressing on allocation of resources as a means of fixing liability.[134] It presents an economic model of causation justifying the limited duty to rescue rule. In the economic model, the rescuer is seen as an altruist not concerned with reward or compensation.[135]

[132]Daniel Shuman, *The Duty of the State to Rescue the Vulnerables in the United States* in MICHAEL MENLOWE & ALEXANDER SMITH ed., THE DUTY TO RESCUE: JURISPRUDENCE OF AID 131 (1993).
[133]See for a comparative analysis of Bad-Samaritan statutes in Europe, Alberto Cadoppi, *Failure to Rescue and the Continental Criminal law* in MICHAEL MENLOWE & ALEXANDER SMITH ed., THE DUTY TO RESCUE: JURISPRUDENCE OF AID 93 (1993).
[134]See William Landes & Richard Posner, *Causation in Tort Law: An Economic Approach,* 12 J. LEGAL. STUD.109 (1983).
[135]William Landes & Richard Posner, Salvors, *Finders, Good Samaritans, and Others Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL. STUD. 83 (1978). Liability for non-rescue decreases the tendency of altruistic rescue out of fear or liability. The authors argue against compensation for rescues. On this see, 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), discusses the carrot and stick approach to encourage rescues.

The argument proves that a system of liability even if it succeeds in bringing down transaction costs is inefficient because of the high cost factor. When a rescuer performs an action requiring inputs lesser than the hazard, s/he is liable to share the loss of the victim.[136] However, this also drives altruistic rescuers out of any potentially rescuable situations. The substitution of activity brings down the cluster of altruistic rescues. Rescuers will evade victims to avoid any burden of extra costs.

An additional concern regarding administering the duty is the safety net in the form of insurance to cover for such peculiar situations. This is evident from the kind of precautions that people may stop taking if there is a legal obligation to rescue. It may induce people to invest less in their own safety on the assurance that a Good Samaritan will save them. HM. Malm refers to it as the "free-rider problem."[137] It may lead to people being disinterested in personal protection relying as a matter of right on someone to answer their call of distress.

The economic rationale leaves many questions unanalyzed especially when costs of rescue are meager involving something easy as calling emergency services. It fails to account for the intuition of the people to rescue.[138] Rescuers do not weigh the cost of someone's life during an emergency with trifle inconveniencies that they might incur from acting instinctively. The argument does not explain that rescuers often decide to rescue on the basis that one day they might need the same service when they are endangered.[139] It spreads the risk and cost to all members by creating a kind of resource pool of society acting for its members in emergencies.[140] This economically balances the costs of rescue making it necessary and efficient.

4). Practical Obstacles

The biggest criticism for the rescue obligation is the practical challenge it poses ranging from identifying the rescuers to determining the degree of the duty. Law cannot hold an

[136]*Id*., 119-120.
[137]H.M. Malm, *Bad Samaritan Laws: Harm, Help, Or Hype?* 19 LAW AND PHILOSOPHY 707, 714 (2000).
[138]See David Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. LAW. REV. 653 (2006). The author provides an illuminating account of the practical reality of rescues studying data from over twenty states to conclude that rescues are common, even in hazardous situations. The statistics exhibit a divide between the theory and reality of rescue.
[139]See Eric Grush, *The Inefficiency of the No-Duty-to Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U.PA.L.REV.881 (1998).
[140] See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 99-100 (1978).

individual for charity. This can be referred as the problem of administrative enforceability as a result of such a rule. Let us begin with a hypothetical illustration of a child *A* swimming in a pond who suddenly disappears in the water without any cry for help, only later to be discovered dead. During those moments, there were many people surrounding the pond, which included *B*. *B* jumped into the pond after a reaction from the group, but it was too late. Thereafter the survivors of *A* sued for damages against *B* for failing to successfully rescue *A*.

Courts can run into many difficulties starting with who is the person to rescue in a situation when there is more than one potential rescuer to intervene. Many others besides *B* were present during that time. Is there any mechanism which makes *B* any more responsible than *C,D, or E*? It is hard to predict which person is more liable than the other. Further, there is the issue of nearness to the rescue situation. If *C,* on a distant building, sees *A* drown, it is difficult to see what role *C* is expected to play in rescuing *A*. The extent of closeness makes determining rescue duty deeply circumstantial.

Secondly, the meaning of the verb "rescue" is itself indeterminate. Consider, *A*'s drowning was not something anyone was aware of. It occurred without any call for rescue or apparent physical sign. Enforcing this duty can be blurry as it is not clear whether rescue implies responding to a call for distress, demanding limited intervention, call for assistance in a situation by persuasion, bargain between the victim and rescuer, or just any harm that might occur irrespective of the involvement of others. Thus, rescue is contextual having a problem of extensions.

The advocates of this duty insist on a duty of easy rescue. Consider another person on the spot named *G* who is hydrophobic. Now can *G* be expected to make the same effort of *B* by risking her/his fear of water to effect a rescue? It is an uneasy question; it coerces people who for reasons may want to withdraw. The contours of easy or moderate duty are not straightforward as what may be easy for one person may vary for another. It is not clear how to assess the risk to the rescuer and the consequences of her/his action. In addition, what is easy in one situation may be arduous in another. It raises the problem of decision making for the rescuer: how can the amount of aid be determined based on the harm? *G* may contend that rescue in any degree incurs risk to oneself and this is enough justification not to intervene. In this case, the rescue action demanded diving into the pond. But what if the rescuer tried other attempts, but failed to dive in the water? The adequacy of the rescuer's conduct is still under a thick cloud of doubt.

Moreover, let us ask the question, has *B* really failed to rescue in this case? It strikes at the root of what we mean by a "failure to rescue"? Does it mean a failure to attempt to rescue? Does it mean an attempt to rescue, but a failure to succeed in the rescue? Or does it mean affecting a rescue irrespective of its outcome? Thus, all this points to the contentious nature of enforcing easy rescues to determine a breach of duty to rescue.

The claim for damages opens fresh challenges. It is hard to determine the penalty for a failure to rescue as the loss is not directly attributable to the rescuer. So, there is no basis of arriving at a just amount. Imagine another rescue situation as the above hypothetical suggests, but on a different day. Now in both cases the rescuer is sued for damages. There can be no way to distinguish the amount of damages in these cases since there is little separating the two, in terms of outcome. Suppose a third situation in a road accident, where *B* failed to stop the child being run over from an approaching car. There are commonalities in all three scenarios as there was a failure to rescue (let us assume) leading to a death of the child. There is no intelligent parameter to arrive at damages in any of these three scenarios.

The foregoing arguments outline the difficulties in tort law to accommodate this duty to the full extent. The case against a duty to rescue is found in law's underlying disposition of liberalism and the spirit of people as self-determining subjects.[141] It leaves people to choose their separate ends resisting any paternalistic behavior. Given this backdrop, defining and enforcing this duty must be suited to an individual's free choice.

B) Position for a Duty of Easy Rescue

Easy rescues call for intervention when the harm to the rescuer is minimal. These tease out questions relating to legal and humanitarian obligations. Recall the analogy of *Podias* where the defendants did not use their cell phone to call an emergency service. Still further, the observation in *Union Pacific*: "*with the humane side of the question the courts are not concerned.*" A society's integration is fractured if it does not bind close ties among its people. At its core it enhances an individual's self-worth recognizing human dignity and mutual respect.

[141]See generally H.M. Malm, *Liberalism, Bad Samaritan Law, and Legal Paternalism*, 106 ETHICS 4 (1995).

Accordingly, this section outlines arguments for a duty of easy rescue in four parts: 1) responsibility thesis, 2) distinctiveness of tort law, 3) determining nearness, and 4) moral and political legitimacy. We conclude that this duty works as a way of social integration where individuals contribute to institutions in ways that promote justice and efficiency.

1) Responsibility Thesis

Saving lives of people in a civil society justifies rescue obligations in the larger cooperative scheme. A duty to rescue encourages a fraternal interaction among people. It is consistent with the assumption, that it is a right of the victim to be rescued and a corresponding duty of the rescuer to abate danger. In this article, we have seen how responsibility follows harm-creation. The previous section covered the tension between freedom and responsibility observing how freedom triumphs—limited only by a fair imposition of responsibility. So terming the duty to rescue strangers as responsible action reinterprets the earlier notion of fault-based legal responsibility. We examine the contours of the responsibility thesis to see what type of responsibility justifies a duty to rescue.

Individuals are units composed in a society, and security justifies the curbs on the freedom of individuals in a society. Joel Feinberg suggests that the responsibility arising from special relationships can be differently understood as a relation owed by virtue of being human.[142] For this reason, tort law is a social glue that engenders a sense of civic responsibility. Some others have suggested that this duty be read as a guarantee of welfare towards another.[143] It recognizes minimal-respect of one person towards another. Another view advanced is to "deputize" this State function as a caretaker to the citizens themselves.[144] The nature of this duty is positively grounded as a public duty. Such an unlimited account of duties in a simple fashion runs into problems of justification.[145]

Part II examined the decisions considering fault based on responsibility. It is hard to reconcile the responsibility for harms caused by omissions and those caused by one's direct

[142]JOEL FEINBERG, FREEDOM AND FULFILLMENT 180 (1992).
[143]See Theodore Benditt, *Liability for Failing to Rescue*, 1 LAW AND PHILOSOPHY 391 (1982).
[144]See *infra* note 146, Alison McIntyre, *Guilty By-standers? On the Legitimacy of Duty to Rescue Statutes*, 182.
[145]See A.M. Honroe, *Law Morals and Rescue* in J.M. RATCLIFFE ED. THE GOOD SAMARITAN AND THE LAW (1966) 238 as cited in Erick Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHILOSOPHY AND PUBLIC AFFAIRS 230 (1980). Honroe states the limited duty to assist strangers on the basis of a shared morality.

involvement. While the latter is conceivable, the former is going beyond the call of duty. The non-performance of an act which could save lives does not count as a cause.[146] Mack addresses the critique to this account deliberating a causal responsibility model as against a moral one. It infers that not preventing harm is akin to causing it.[147]

In what is termed as *negative causation*, the causally differentiating thesis states that omissions can be treated as causes. Mack cites the example of a swimmer and a capable rescuer; the rescuer did not owe duty towards the victim and instead watches the drowning unmoved.[148] It raises the question: why must duty effect causation? If the rescuer had contracted to save the victim at a particular time and the victim died before, the rescuer would still have been liable for inaction. The reason is that non-prevention of injury is a causal event by aggravating the harm from allowing it to persist.[149]

However, scholars (including Mack) are skeptical about the causation analysis since the failure to prevent harm is not an indispensible part of that harm.[150] The omission to aid in the above illustration does not make the victim worse off as it is only continuing a peril.[151] The drowning is a condition independent from the rescuer's failure to intervene. Mack attributes it to entering causal streams. He observes: "*The power to avert or not is not the power to cause whatever is averted*."[152]

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[146]*Id.*, Erick Mack, *Bad Samaritanism and the Causation of Harm*, 237. Another model is the *but-for* test of seeing anyone who can prevent as a cause of the harm is too broad. It makes the test of causation too broad. *See* Alison McIntyre, *Guilty By-standers? On the Legitimacy of Duty to Rescue Statutes*, 23 PHILOSOPHY AND PUBLIC AFFAIRS 157, 162 (1994). McIntyre gives the illustration of a room that became hot raising three premises: i) *you* could have prevented the room from getting hot by turning the air conditioner, ii) *your* failure to turn on the air conditioner was a necessary condition of the heated room, iii) *your* failure to act with other circumstances was the sufficient condition of the room heating up. All these conditions are similar and continue to be true if we remove the condition of your failure to act. It makes the air conditioners turned-off state a sufficient condition enough. On these lines, he argues for the non-mention of the condition of omission as a cause, as there are many non-causal counterfactual dependencies.

[147]*Id.,* 238. Mack questions if there is something odd if the relation between inaction and a subsequent event depends on the moral status (responsibility thesis) of inaction.

[148]*Id*.

[149]John Kleinig, *Good Samaritanism*, 5 PHILOSOPHY AND PUBLIC AFFAIRS, 382 (1976). See A.D. Woozely, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983).Woozely advances negative causation where the harm is aggravated allowing the victim to remain in the same condition.

[150]*Supra* note 146, Alison McIntyre, *Guilty By-standers? On the Legitimacy of Duty to Rescue Statutes,* argues for the legitimacy of bad Samaritan statutes. *See also supra* note142, Joel Feinberg grounds duty to rescue in omissions as causes of harm.

[151]*Supra* note 146, Alison McIntyre, *Guilty By-standers? On the Legitimacy of Duty to Rescue Statutes*, 164, finds it implausible that the rescuer's intervention was the necessary condition for the rescue of the victim, not the necessary condition of the victim's drowning.

[152]*Supra* note 145, Erick Mack, Bad *Samaritanism and the Causation of Harm*, 259.

The responsibility thesis leads to a problem of legitimation despite its moral worthiness. The challenge of grounding easy rescues in public duty implies at one level that tort duties are general public duties owed to society and not solely private individuals contacting with one another. At another level, to make omissions to aid as causes only complicates the inquiry on causal responsibility. It implies that even if the condition would have occurred normally, the rescuer is under the obligation to avert danger. The causation model is questionable in so far as it addresses the capacity to prevent harm in the absence of a linkage with the cause of the harm.

2). Distinctiveness of Tort Law

Tort law allocates duties for the smooth function of society. We discussed how tort law is based on private ordering of rights and rescue as a conferral of something over and above to the victim. This section briefly touches upon two fallacies: the notion of privity of rights resembling contract law, which is incorporated in the tort model and the idea of rescue as conferring benefits.

Epstein's argument against the duty to rescue was based on the liberty of the self-determining individual. If seen in light of conferring rights and obligations in a contract-like manner: rescues do not fit under tort law. The notion of liberty begs the question whether this results in substituting contract values in tort law? As a result, Wienrib grounds the duty of easy rescue in the "absence of contract values."[153] It makes the distinctive function of tort law remedying what contract law does not spell out.

Wienrib explores the indeterminate line of tort and contract basing the duty of easy rescue in common law. He explains that a potential rescuer cannot strike a bargain with a drowning person on the terms of her/his rescue; such a contract of rescue is simply unenforceable under law owing to duress. This demonstrates that contract values are inoperative in rescue situations where two parties are not on the same level to effectively define each other's duties. The cases of rejection of the no-duty to rescue rule is based on contractualism (remember what Ripstein calls "terms of interaction between parties"). There is a tendency to overlap the

[153]See *supra* note 16. Wienrib points out that the common law position of nonfeasance relies on the principle of contract law. However, *see* Melvin Eisenberg, *The Duty to Rescue in Contract Law,* 71 FORDHAM L. REV. 647 (2002). The author finds there is a duty to rescue under contract law and attempts to reconcile this with the principles of tort law.

analysis of tort and liberty of contract values, which creates a void in situations of emergencies.[154] There is nothing guiding conduct in cases where contracts do not work. So, Wienrib develops an interesting argument that tort must bridge the gap of absence in contact law.[155]

Tort law selectively redresses harms. It does not concern itself with gifts or gratuitous favors. Rescues are controversial as the harm the rescuer must rectify has not been created by her/him. The survival of the imperiled person depends on the abatement of danger and a return to the position that the person was before the situation. To refer to something as a benefit is to mean that the victim's condition has been improved to a marginally higher position making her/him profit from the intervention.[156] In this context, the threshold question is: does duty to aid signify the right to benefit?

Feinberg suggests a different perspective on the meaning of "benefit."[157] When *A* has conferred a benefit on *B*, it can imply that *B* is now in a better position than s/he was before *A* conferred the benefit. However, *B*'s position has only been restored to the original position, what Feinberg terms as "baseline of its normal condition."[158] From this perspective, the victim is not conferred a benefit, but restored to a condition of normalcy. Looked this way, the conferral of rescue is seen to restore the victim's earlier position. In what was discussed in the preceding section on causal types, this model removes the distinction between causing harm and benefitting from it.

The terminology of *benefit* that is commonly used to describe the shifting baselines to the normal condition of the victim prior to the emergency is anomalous. Feinberg gives the example of an executive order of commuting a prisoner's clemency as a classic case of benefit. It is one of benefit as the Executive did not have a duty to do so, but did it on other grounds.[159] The prisoner

[154]*Id.,* 269.Wienrib in this context differentiates beneficence and rescue. Beneficence is when the resources can be traded in a market unlike rescues where aid is not a commodity.
[155]Wienrib demonstrates the duty of easy rescue where the defendant is responsible for the creation of peril. However, such a situation has already been found to be acceptable by courts. This line of argument does not sit with the broader argument about the duty of easy rescues.
[156]*Supra* note 142, 180. Feinberg's thesis states that benefitting cannot be seen as i) conferral of benefits, ii) gratuitous favours, iii) fulfillments of the imperfect duty to charity, iv) performance of specific duty without co-relative rights, iv) acts of supererogation.
[157]*Id*.
[158]*Id*.
[159]*Id*., 181.

has profited by the act of pardon because the benefit is analyzed from the advantage that the prisoner received.

Conversely, a bystander who watches another person drown is in a position to easily rescue by throwing a rope, or calling for help. This makes the actions of a rescuer not a benefit, but a duty. It is important to revisit this view if consistent with our main conclusions in the article: grafting the duty to aid on the duty to act reasonably. In light of this, Feinberg's justification for the imposition of a duty to aid presupposes such a duty *already* exists. (*Note*: there is an assumption of the existence of such a duty even before.)Thus, describing benefit whether a gift, imperfect duty, and so on, or a duty, flows first from a resolution of the nature of the legal obligation to rescue.

However, McIntyre observes the complications in this view because it assumes the rescuer can make people better off. To borrow the author's example, two people *A* and *B* need to be rescued by *Z*. If *A* is rescued and not *B*, then *B* is not said to have been treated wrongfully by *Z*. Feinberg states that *B* did not make *Z* worse off as s/he was not wronged by *Z*. In the same vein, if we assume that *Z* did not save either *A* or *B*, then under Feinberg's assertion Z wronged both *A* and *B*. McIntyre problematizes this saying that to have made them both worse off, the rescuer would have to firstly have the ability to make them better off. Since the rescuer is seen not to have this ability to make them both better off: it raises doubts on Feinberg's view.

This section concluded two things: firstly, tort law preserves liberty of the individual by recasting their interactions in a fair and equal manner; and in doing so, fills the gaps in the law of obligations. Torts and contracts are concerned with the correlative rights and duties to each other. This receptively draws us to Wienreb's argument about the distinctive utility of tort law in the absence of contractual remedy. It is hard to imagine a world literally founded on the Hobbesian social contract where all social obligations are essentially contractual and vested in the State. Tort functions as a clearing house of contractarian values in such a vacuum. However, Wiernreb does not address counter-arguments about the weaknesses in the corresponding principles of fairness in contract law that protects equal status of parties. This could have been established if there is an inconsistency in the equality protected by tort and contract. Secondly, giving a new meaning to benefit is a way to contest the entire notion of what we take to be a part of *duty*. The negation of a commonplace understanding of benefit turns on prior duty. This returns the victim

to a status quo existing before the emergency. Since this does not resolve anything much about the nature of the justification of that prior duty, the argument has a circular reasoning.

3). Determining Nearness

A major criticism of the duty rule is the inchoate limits of its applicability. It is not clear if the rescuer must be concerned with only those who are physically near us or a larger extension. Indeed, there is no clarity on the limits of physical distance that attracts rescue. (Recall that a converse of this was discussed in the previous part.) Contrast two hypothetical illustrations: *A* is walking on the road and finds *B* lying on the ground a few feet away requiring help. Furthermore, *C* requires aid in a faraway country and her/his condition is brought to *A*'s notice. The difference in these two illustrations is that of measuring distance. In the first scenario, it is conceded that it is just to impose a duty on *A,* as s/he was physically close to the victim. Whereas in the second, *A* was far away from the victim and imposing a duty to rescue will be an unfair imposition. Evidently *B* and *C* cannot be treated equally. The problem of distance gets thicker when verifying the approximate limit of nearness that law must recognize. Take another example, if *D* requires assistance, neither in a faraway country nor immediately near, somewhere in-between. The in-betweeness is a vague territory that does not render easy solutions to fix a duty.

The extant debate on distance garnered focus when Peter Singer states that distance must not be a constraint to rescue on a conception based on sacrifice.[160] It virtually extends an unlimited scope of action making a rescuer responsible both to her/his suffering neighbor and to a starving person in another continent. Remedying this open-ended anomaly, Kamm argues that the duty to aid must be determined on nearness. The duty to rescue is stronger to those who are nearby than those far away.[161] But how is distance measurable? It is measured by the degree of

[160]See Peter Singer, *Famine, Affluence and Morality,* 1 PHILOSOPHY AND PUBLIC AFFAIRS 241 (1972) See also PETER UNGER, LIVING HIGH AND LETTING DIE (1996). See further, Charles Betiz, *Justice and International Relations*, 4 PHILOSOPHY AND PUBLIC AFFAIRS 360 (1975). Betiz argues a notion of rescue in the context of global ethics. Tom Campbell, *Humanity Before Justice*, 4 BRITISH JOURNAL OF POLITICAL SCIENCE 1 (1974). Campbell contends that there is a relation between the existence of suffering and our moral duty to minimize it.

[161]F.M. Kamm, *Does Distance Matter Morally to the Duty to Rescue?*, 19 LAW AND PHILOSOPHY 655 (2000).

nearness to the victim.[162] Thus, she concludes that nearness (manifesting a moral obligation) legitimates rescue.

Some, like Igneski, respond to Kamm stating that moral determinateness fixes duty and not nearness.[163] In a given situation there arises a duty to aid not from a particular conception of distance, but from a morally determinate duty. The general obligation to aid is an imperfect duty and nearness is a characteristic of duty not its legitimation.

Legitimacy is derived from the fact that the rescuer can do something determinate to end the situation—independent of being near. Imagine from the above hypothetical that *A* can see *C* is in a bad condition by exceptional gift of long range sight and can save *C* by deploying minimal effort of pressing an automatic button. The fallacy of nearness exposes that *A* is not near *C* (although s/he could save *C* by pressing a button) so there is no duty. It fails to explain that the moral determinacy of the situation arises from duty and not nearness. In entirety, this argument is tautological as it reverts to the duty account to fix moral determinacy. We conclude that distance is one of the auxiliary factors in this determination, not a decisive one.

4). Political and Moral Legitimacy

The normative foundation of a duty is the undercurrent of the debate so far. There is a political and moral basis underlying a duty to rescue strangers.[164] At another level, it balances individual intuition versus social participation. As we note, a call for such a duty must be based on a notion of dignity of personhood that forms the fundamental building block of domestic and international movements in public law.[165] Scholars have not stressed on the concept of dignity of the individual in tort law. In this backdrop, we examine the question (without answering it): is imposing a duty to rescue on individuals as a way of justice proper to expect?

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[162]*Id*., 662. Kamm draws an analogy to proximity stating that it is actually physical distance measured in number of steps, and time taken to get there travelling.

[163]Violetta Igneski, *Distance, Determinacy and the Duty to Aid: A Reply to Kamm*, 20 LAW AND PHILOSOPHY 605 (2001).

[164]See Michael Menlowe, *The Philosophical Foundations of a Duty to Rescue* in MICHAEL MENLOWE & ALEXANDER SMITH ed., THE DUTY TO RESCUE: JURISPRUDENCE OF AID (1993).The author finds that both the consequentialists and the non-consequentialists find that there is a moral requirement to rescue.

[165]Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights,* 41 METAPHILOSOPHY 464 (2010). Habermas gives an insightful explanation how dignity evolved as the moral hinge in the emergence of modern human rights discourse. He writes: "*The respect for the dignity of every person forbids the state to dispose of any individual merely as a means to another end, even if that end be to save the lives of many other people.*"

We briefly discuss the support for the duty from: i) utilitarian tradition, ii) deontological duty, and iii) social cooperation thesis. We find that the strongest argument is the social cooperation thesis concerning duties as part of the individuals' function in contributing to just societal institutions.

i) Utilitarian Tradition

There is an intuitive weight to concede that collective good is a satisfactory moral account. Bentham discussed the duty of beneficence more as a way of polemicizing it. He stated that the duty of beneficence flows from the duty to save another from mischief when it causes little prejudice to oneself.[166] The greatest happiness principle advances the goal of an equal society in the fulfillment common interests.

A leading proponent, Mill, found that there is a need to compel performance of positive acts for the benefit of others, which is undertaken as responsibility of an individual in society.[167] He observed that the general rule is to hold people answerable for evil. The exception, he held, is justified in grave cases. Mill's case for the duty to aid others is founded on the *harm principle*.

Rescues achieve the greatest happiness for the greatest number. Wienreb explains this in context of the utilitarian justification on emergency and convenience.[168] There can arise a problem of delimiting emergencies *vis-à-vis* personal risk. This is inconsistent with the Benthamite justification on consequences. He attempts two plausible alternatives to prove it on grounds of acting in emergency, but doubts its soundness. So in the penultimate, he proves the Benthamite justification on the grounds of reliance.

Firstly, duty to rescue can be grounded in the greatest happiness principle. This makes the duty of rescue about altruism as it protects a broad duty to rescue irrespective of emergency or convenience. However, this subordinates any individual interest to others. It altogether removes any limitation, as Wienreb remarks it is "unrealistic." Secondly, another way to justify Bentham's consequentialism is the cost benefit analysis. Rescues can be said to be unjustified when the cost to rescue outweighs the benefits. But this approach is vague to compute in real terms.

[166] *Supra* note 57, 323.
[167] *Supra* note 57, J S Mill, 15.
[168] *Supra* note 17, 280-287.

Wienreb advances the notion of reliance demonstrating that it can restrict the duty to cases where the benefit outweighs the cost. It proves the Benthamite limitation of the duty on grounds of emergency and inconvenience. This way, the benefits outweigh the cost to the rescuers making it the recipe for greater happiness.

On the overall, there are epistemological limitations regarding the utilitarian arguments. Happiness is an imprecise index to gauge utility. The over-emphasis of means to achieve ends is open to untoward moral objections.[169] It does not answer how the individual ought to act in a given situation. It lacks an important moral ingredient. This leads us to the next enquiry: examining individual moral choice in the duty to rescue.

ii) Deontological Duty

The deontological account binds the duty to rescue in morally autonomous individuals. According to Kant, the subject's freedom from coercion is accomplished by recognizing citizens as self-legislating authors of law.[170] This implies that individuals treat each other as ends in themselves and not means.[171] The aim of the Kantian analysis is the exercise of the moral point of view through practical reasoning. This notion stresses on the general obligation of beneficence to those in distress.

Kant distinguishes between perfect and imperfect obligations.[172] The duty to rescue is an imperfect duty. Perfect duties were enforceable by law and acknowledged by the theory of right. Imperfect duties are only acknowledged by the theory of justice.[173] This imperfect duty is derived from the right to one's personhood. This right is realized conferring reciprocal limits on each other's freedom. A person cannot deny another the freedom s/he enjoys.[174]

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[169]*Id*. 286-287.

[170]IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, 16 (J. Ladd trans., 1965). Freedom can be conceived as the pure concept of reason. Kant finds that the categorical imperative establishes the obligation for something to qualify as a basic universal law. See, IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (trans. Lewis, 1959) 39, Kant explains the categorical imperative as "*[a]ct only according to that maxim by which you can at the same time will that it should become a universal law*."

[171]*Id.*, 47. Kant writes: "Act so that you treat humanity, whether in your own Person or in that of another, always as an end and never as a means only."

[172]*Supra* note 170, 13.

[173]Menlowe gives a different reading to Kant to find a duty instead of imperfect duty considered as perfect obligation.

[174]*Supra* note 17, 288.

The right of dignity, Kant also called physical integrity is the central human value.[175] Without recognizing physical integrity, individuals cannot realize their ends. The duty of beneficence derives from Kant's universal personhood based on physical integrity. However, this notion relaxes the emergency and convenience rule stretching to cases even when the rescuers confront hardship.[176] It makes the duty to rescue overly general by singling out people to perform heroic act.

Wienreb resolves the intermingling of morality and legality suggesting that social institutions perform the necessary task of coordinating peoples rescue needs. This assures a duty to rescue by the State as a part of its public functions in ways that courts find hard to delineate. It leads to the next discussion: the function of social institutions to deliver justice. In this view, people in a society have a conception of justice where ideas of social cooperation govern the proper distribution of resources. Thus both Wienreb and Ripstein converge, advocating the importance of a duty of rescue from an institutional point of view.

iii) Social Cooperation Thesis

A sound argument for a duty to rescue as natural and involuntary is justice among individuals agreeing to a scheme of social coordination of institutions in a society. Rawls lays the groundwork for contemporary political and legal philosophy in his theory of justice based on principles of social cooperation. The principle of fairness is based on democracy and equality of individuals guaranteed by social institutions.[177] Rawls states there are in addition conditions for institutions to achieve the object of social coordination. There are duties which apply to individuals under a theory of justice. They are called natural duties and "the most important natural duty is that to support and to further just institutions."[178]

Individuals are direct stakeholders in the smooth running of just institutions. Rawls notes that individuals have two functions: to contribute their share in just institutions; and to assist in

[175]IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, (M. Gregor trans., 1998) 42. Kant defines dignity as the moral injunction to treat every person as an end in itself. He writes that everything "[*h*]*as either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.*"
[176]*Id*., 290.
[177]*Supra* note 2.
[178]*Id*., 334

the establishment of just arrangements when they do not exist.[179] The duty to help another in jeopardy at minimal risk to oneself and the duty of mutual aid are owed to other individuals.[180] This secures an integration of the systems of social arrangements in a structured society.

Natural duties further the political ties of citizens in a union. In this manner, the duty of easy rescue encourages a cooperative spirit among people to look out for each other's well being. There is a natural balance of liberty and security making people act when the demands are not onerous. Remember our discussion on the bilateral terms of interaction of tort law. The social cooperation thesis advances a redistributive theory framing the duty towards society as a whole based on a thin version of civic friendship.

In conclusion, the arguments show that a duty to rescue rests on sound moral intuitions of benevolence. A tort law that shrugs a duty to rescue engenders overly self-interested actors. The natural duty of individuals to do justice is an important linkage in the arrangement of social functions between institutions and citizens, thus also lessening the statist concern about the welfare of its citizens. In spite of the glaring challenges administering this duty, the rule of rescue at minimal risk to the rescuer succeeds in sharing burdens and creating a stronger societal structure. This duty symbolizes a remedial jurisprudence infusing solidarity and compassion as the valued goals of tort law.

V. NORMATIVE FOUNDATION OF RESCUE

The article has thusfar concentrated on the overlapping idea of rescue in the concept of duty. Duty draws its meaning from reasonableness. Reasonableness is an approximate determination of how we ought to act in situations. It sets the terms of interaction of parties by balancing competing factors along the way. In this manner, reasonableness of rescue acts as a hinge to ensure that tort law promotes a sense of civic responsibility and the right of an individual to self-determination. It is important to keep in mind this dualism as its correlation is explained below.

We next discussed the use of the balancing approach. This is an analytical device to spot the interests of the victim, rescuer, and defendant *vis-à-vis* the individual, society, and State. The

[179] *Id*.
[180] Rawls draws from Kant, stating that the duty of mutual respect is the highest moral duty.

duty to act reasonably ensures a fair balance of all three parties. It lends a degree of objectivity and method to reason these complex cases. However, it is activated only when the individual rescuer chooses to embark a rescue mission. The doctrine proves that the duty to rescue is latent in tort. There is very much a duty to rescue, which is self-actualizing. Its regulation can be inferred from ordinary social and public policy embodied in tort law.

Easy cases of rescue involve negligence of the defendant, professional rescuers, and special legal relationships. The cases outside of this are the difficult ones to decide. In this context, we examined arguments in favor and against the duty of such rescues. The duty to act reasonably is the only way to mitigate the extreme positions. All this said, how can acting reasonably guide interpreting a rescue situation? Does simple balancing perfect outcomes to decide reasonability? Lastly, is "reasonable" content dependent or content independent?

First, we respond to this developing a criticism of the free balancing approach showing that answers in hard cases must go beyond the balancing stage to rest on substantive principles. The dualist nature of these hard cases implies that search for principles must transcend even the boundaries of private law. The rescue conundrum has a powerful public law element as it deals with human rights and the interaction of the State with its individuals. So the duty to rescue (based on reasonableness) lies at the junction of public and private law. We explain this using the disappearance thesis of public and private law. Therefore, in the ideal theory, courts must engage in finding higher norms giving meaning to reasonableness to resolve these hard cases.

There are no absolute values in tort law. To some extent its values in conflict are inevitably balanced. Does the balancing approach tell us something we do not know? It is an argumentative framework to weigh the conduct and interests of parties. The typologies in part III were not formulaic tests, but serve as reference points to systematically begin evaluating interests. The object of the balancing is to grasp the conflicting demands in rescue situations to ensure a fair outcome for the rescuer, victim, and the defendant. This approach is a useful starting analysis to reckon the relative rights of the parties to make a proper determination of duty.

However, rescue related adjudication will necessarily need to go beyond balancing factors. The flaw in the balancing process is that there are no normative guidelines over what to identify on the scales. Courts can randomly select their own factors and call it balancing. Again, varying situations and contexts mean that balancing cannot be a linear function of picking and

choosing interests and conflicts. Such a form of balancing is a constraint on the rights of the parties. Recall the decision of the court in *Posecai* where it misbalanced the interests weighing the defendant's foreseeability of the harm by ignoring the harm of the injured plaintiff.[181] A sound rights thesis requires that it be based on values and outcomes and not factors that are pervasively adjusted on a sliding scale.

The claim of the balancing approach as being principled adjudication is debatable. There is no way to justify what is reasonable in one case from the other. It is hard to tell how courts identify interests in a case much less why it favors one over the other in the absence of substantive introspection of norms. Values are the substantive hinge that provides meaning to rights. There is otherwise no cogent way to know the extent of rights and its corresponding limitations. It protects against rights being balanced away or ignored by courts in deciding rescue cases.

The law of rescue will need to search for these values as groundwork to decide hard cases. These values are fundamentally ingrained cutting across the categories of public and private law. A good reason for this is that rescue invites debates on constitutional values of liberalism and welfare which necessarily implicates the State and the nature of its relation with its people. An active welfare State will provide a legal duty to rescue in hard cases. On the other hand, a liberal state limits its role to free individuals to determine rights and limitations. So, this brings us to the conclusion that rescue is neither exclusively public nor a private matter.

How can there be a mixed public and private law element? A State is conceptualized in relation with its citizens. Bills of rights are claims of citizens against the State constituting the domain of public law. Citizens' bilateral claims are governed contractually through the law of obligations (tort, contracts). It creates two legal rationalities: public and private. An important justification for private law is its exit options for individuals who do not otherwise enjoy such an option under the authority of a State.[182] Even if one cannot exit a State, one can exit a private association. But this distinction is called into question as it is often hard to separate the line where the private ends and public begins. For this reason, there is a higher order of values that transcend this demarcation. This is where lies buried the normative roots of rescue. At the outset,

[181] *Supra* note 102.
[182] See Frank Michelmen, *The Bill of Rights, the Common Law and the Freedom Friendly State*, 58 U. MIAMI. L. REV. 401 (2003).

we identify two (opposing) public law rights involved in rescue cases. A right not to rescue is grounded in the freedom of action and expression of an individual to make self-determining choices. On the other hand, a right to rescue is grounded in the right to life and dignity of the individual. So rescue runs into statist and contractarian tensions in public law tensions much the same way in private law.

Traditional hierarchy ranks private law subordinate to public and constitutional law. In this scenario, the application of constitutional rights among individuals is known as State action or horizontal effect of constitutional rights. But this hierarchy is called into question when there is no agreement on the fundamental distinction. Kennedy in his essay *The Stages of the Decline of the Public/Private Distinction* intriguingly marks the circularity of the public and private distinction.[183] There is a sense that everything can be private and also public at the same time as the State is implicated directly or indirectly. Rescue cases present the same impossibility. On one hand it requires that private individual perform a public function. At the same time, it must safeguard the free choice of the individual. This dichotomy is explained in relation to the death of the public-private divide.

This dichotomy can be resolved recognizing the norming of law based on the values of freedom, equality and dignity of the individual. It is a higher value of norms that transcends legal categories such as public and private. This protects a commonality of values in a legal culture avoiding contradictions. The decision of the German case of *Luth* carries this point forward.[184] The complainant tried to influence theaters and the general public to boycott a movie made by a director who had produced an anti-Semitic film. The constitutional court found that the decision of the superior court violated his basic right of free expression. The court held that the basic law is not a value neutral document and establishes a hierarchy of values of dignity of the human personality developing freely within the community impacts all spheres public or private. Since it influences all spheres of conduct, it found that private law must also be compatible with the basic law. It held that the "radiating effect" of basic rights must impact private law.[185] This

[183]Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U.PA.L.REV. 1349 (1982).
[184]*The Luth Case* (1958) 7 BVerfGe 198 (Federal Constitutional Court of Germany). See also *Shelly v. Kramer* 334 U.S. 1 (1948); *Retail Wholoesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573 (Supreme Court of Canada).
[185]See Constitution of the Republic of South Africa, 1996, http://www.info.gov.za/documents/constitution/1996/index.htm (last visited on 1st December, 2010). South Africa is a paradigmatic example of a legal system based on a common value of norms. § 8 (2) "*A provision of the Bill of*

foreshadows that there is a higher value of norms to which private law must conform. This can in-turn settle the shortcomings of the balancing approach by infusing a unifying theme for a normative foundation of rights in private law.

Since the law of rescue involves strong public and private law dimensions, courts must search for these higher norms that validate a rule of rescue. At the moment there seems to be either a purely private law interpretation of the duty to act reasonably based on the liberal contractual model, or the European welfarist alternative based on the social democratic model.[186] It shows that the identical problem of tort law has two equally persuading justifications arising from differing conceptions of the political state and the relation with its people. Therefore, it is conceded that rescue uniquely defies the public/private distinction and adjudication must derive from norms that overlap.

The last task is to take up the claim in relation to the obscurity of the public and private divide that constrains conceptualizing problems of rescues. The article posited that reasonableness mitigates this distinction, stating that adjudication of rescue must rely on norms of reasonableness. Yet greater clarity can be reached by modestly reflecting, what is "reasonableness"? What is the role of reason in reasonability? Is acting reasonably the same as acting rationally?

In philosophical discussion it is tantamount to a debate on Kantian and Humean ethics.[187] Inevitably, tort law expounds reasonableness as a subjective factor of understanding what is rational from a standpoint of aggregating peoples' views in society. Does every reasonable action have to be rational? There is no necessary synonymy between something that is unreasonable and irrational. Reasonability is judged from a common sense point of view. It implicates a sense of shared morality. By contrast, rationality is in relation to *ends* it seeks to attain to the individual or collective will. The difference is in standpoints. Rationality is a reasoned standpoint; whereas reasonability is a relative standpoint (viewed externally).

Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." § 8 (3) "*When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court … in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.*" § 39 (2) "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights*."

[186]See generally Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 ICON 79 (2003).

[187]See J.B. PRATT, REASON IN THE ART OF LIVING: PART II (1949).

In other words, when we say that *B* acted rationally, on deeper reflection we mean only that *B* reached a reasoned decision. It does not say anything about how *B* reached the decision, or whether the decision is proper or improper. There are no judgments on the nature of the decision that *B* made. In this way, it is not fitting to attach the notion of rationality to everything that is reasonable. Rationality is at best a secondary order value to reasonability. Again, future works will need to reflect on the idea of reasonability that is a critical fulcrum for disagreements and divisions.

VI. CONCLUSION

The article has come full circle. It began with a private law understanding of the rescue problem as a duty to act reasonably. And it then expanded into demolishing the myth of the purely private law understanding of reasonableness. Resolving the hard cases of rescue requires the need to look at it as symptomatic legal problem and develop a rights thesis that has common public and private foundations. This is the only way to give reasonableness content and practical meaning.

The article concludes first, that the idea of rescue is hardwired in the duty to act reasonably in tort law. Second, configurations of balances involved in rescue situations involving the victim, rescuer, and defendant are based on the duty to act reasonably. These balances serve a heuristic function showing the interplays among the three parties. Third, this article explores the arguments for and against a generalized duty to rescue to conclude that they lie at extreme positions. The rescue doctrine reconciles both sides of the debate in its existing framework. Fourth, reasonableness ought to go beyond the plain balancing approach previously discussed. It must derive content from normative principles that lend meaning to rights. Fifth, rescues represent the junction of the public law and private law distinction as it devolves from the conception of the State and relation with its people. The article concludes that normative principles must be founded on a common order of values that transcend purely public or private law reasoning.