A RIGHT/DUTY PERSPECTIVE ON THE LEGAL AND PHILOSOPHICAL FOUNDATIONS OF THE NO-DUTY-TO-RESCUE RULE

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You don't have to help anybody. That's what this country's all about.[1]

INTRODUCTION

In the American common law, a bystander generally has no duty to rescue a stranger in peril.[2] As is true with many tort doctrines today, however, there are several exceptions to this rule.[3] In addition, the absence of a duty to rescue, especially when such rescue could be accomplished with little or no risk to the rescuer (generally termed an "easy" rescue), has been criticized by the vast majority of legal scholarship on the subject.[4] Despite these limitations, and despite sweeping changes made in other tort doctrines, the no-duty-to-rescue rule survives.[5]

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1. *Seinfeld: The Finale* (NBC television broadcast May 14, 1998), *available at* http://www.seinfeldscripts.com/TheFinale.htm.

2. *See, e.g.*, Fultz v. Union-Commerce Assocs., 683 N.W.2d 587, 591 (Mich. 2004) ("[A]s a general rule, there is no duty that obligates one person to aid or protect another." (quoting Williams v. Cunningham Drug Stores, Inc., 418 N.W.2d 381, 383 (Mich. 1988))); Parra v. Tarasco, Inc., 595 N.E.2d 1186, 1187 (Ill. App. Ct. 1992) ("The common law recognizes no general duty to aid a person in peril.").

3. In *State v. Miranda*, 715 A.2d 680 (Conn. 1998), *rev'd on other grounds*, 864 A.2d 1 (Conn. 2004), the Connecticut Supreme Court identified four situations in which a legal duty to aid may be imposed: "(1) where one stands in a certain relationship to another; (2) where a statute imposes a duty to help another; (3) where one has assumed a contractual duty; and (4) where one voluntarily has assumed the care of another." *Id.* at 687.

4. *See, e.g.*, WILLIAM L. PROSSER, THE LAW OF TORTS § 56, at 341 (4th ed. 1971) ("Such decisions [affirming the no-duty rule] are revolting to any moral sense. They have been denounced with vigor by legal writers.").

5. *See* Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 316 (1997).

> In the face of continuous academic attacks, one body of tort law has survived this century, at least superficially, intact—the duty (or lack thereof) to rescue. Today, it is

Why does the no-duty-to-rescue rule still prevail? After a century of courts increasingly imposing duties upon citizens, why is there still no general duty to rescue in the common law?[6] What is it about the principles behind a duty to rescue that allows judges today to make numerous inroads upon the rule, yet keeps them wedded to legal opinions a century old?

This Note will suggest that the answer to these questions lies in the concept of rights. The fact pattern of the classic duty to rescue case is unique in that it highlights the notions of personal autonomy and the individual right of freedom of action.[7] Whatever justification a judge or justice may give in an opinion, the principle behind most decisions perpetuating the no-duty rule is the protection of individual rights. In addition, cases adopting exceptions to the general rule and questioning the propriety of the rule—by imposing a duty to rescue—can be viewed as implicitly rejecting the primacy of individual rights. To say that "rights" are the determining factor in duty to rescue doctrine means little, however, without articulating several theories behind the concept of rights and duties.

This Note makes two interrelated arguments. First, the legal rules on the duty to rescue are best explained and understood by examining the rights and duties of the victim and potential rescuer. Second, a proper conception of rights and duties justifies the lack of a general legal duty to rescue.

Part I examines the scope of the duty to rescue, from early cases defining the rule strictly through the enumeration of exceptions. The early common law used two distinctions—between moral and legal duties, and between positive acts and the failure to act—to explain the lack of a legal duty to rescue. Subsequent cases have created exceptions to this rule based on special relationships and the actions of a potential rescuer. A few state legislatures have created statutory exceptions as well. Part I concludes by recognizing the popular belief that the erosion of the no-duty-to-rescue rule will continue.

> commonly understood that there is no general, nonstatutory duty to rescue another in peril, not even a minimal duty that could be discharged by a riskless warning, absent a special relationship.

Id. (footnotes omitted).

6. Many European civil law countries, by contrast, impose a duty to rescue by statute. *See* Marc A. Franklin, Comment, *Vermont Requires Rescue*, 25 STAN. L. REV. 51, 59 & n.56 (1972) (identifying thirteen such countries).

7. For an example, see the hypothetical in the discussion of *Buch v. Amory Manufacturing Co.*, 44 A. 809 (N.H. 1898), *infra* Part I.A.

Part II shifts the focus from legal precedent to legal theory. It explores the positions of several competing theories of political/legal philosophy on the duty to rescue another in peril—theories based on morality, utilitarianism, economics, Locke's social contract, and an offshoot of social contract theory called liberal-communitarianism. This Part ultimately finds that most, if not all, of these theories support some form of a duty to rescue.

Part III presents another theory, premised on the concepts of a negative state and individual rights, which advocates a rights/duty paradigm for examining the duty to rescue. This Part draws largely upon the works of philosopher Ayn Rand and Professor Ernest Weinrib to set out a rigid conception of individual rights and the role of the negative state in protecting those rights. Based upon these principles, it expounds the rights/duty paradigm, which views persons as discrete holders of negative rights and negative duties. It concludes by explaining how this paradigm only works if one conceives of a duty as a pre-interaction obligation rather than a subjective, after-the-fact assessment of responsibility.

Part IV employs this rights/duty paradigm to critique the competing theories in Part II.[8] It concludes that four of the theories are clearly inconsistent with the previously defined notions of individual rights and the negative state, and that each of those theories' treatment of the duty to rescue suffers because of that inconsistency. It also concludes that one theory, Locke's Social Contract, may or may not be consistent with the concepts of individual rights and the negative state, depending on one's interpretation of Locke's Second Treatise on Government.

Finally, Part V returns to the legal doctrines described in Part I and assesses the implications of the rights/duty paradigm for these doctrines. It explains why the rights/duty paradigm largely, but not completely, embraces the dichotomies between law vs. morality and action vs. inaction. It also illustrates how the early common law cases implicitly adopted a discrete rights/duty model when deciding whether a duty to rescue existed. Finally, this Part determines which of the exceptions to the general rule discussed in Part I can properly exist under a rights/duty paradigm. It concludes that such a duty is

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8. This approach to analyzing the duty to rescue through abstract, even philosophical, views is novel but not unique. *See generally* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (exploring the positions of Locke, Kant, and Hegel, then propounding a "liberal-communitarian" theory of the duty to rescue).

justified when the potential rescuer upsets the balance between negative rights.

I. LEGAL DOCTRINE ON THE DUTY TO RESCUE

There is no general common law duty to rescue a stranger in peril,[9] though several exceptions exist.[10] This Part will first examine the early common law to determine the rationales behind the rule. It finds clear dichotomies between legal and moral duties, and between acts of misfeasance and acts of nonfeasance. It will then explore the exceptions to the general rule, including both common law and statutorily created duties. Finally, this Part notes that the erosion of the no-duty rule will likely continue.

A. Early Common Law: The Moral/Legal and Misfeasance/Nonfeasance Distinctions

Perhaps the most famous case on the duty to rescue in tort law is *Buch v. Amory Manufacturing Co*.[11] In *Buch*, an eight-year-old boy accompanied his thirteen-year-old brother to the defendant's mill, where the older brother worked. The overseer of the workers told the boy to leave, but the boy, not comprehending English, remained.[12] The boy's hand was subsequently caught in a gearing mechanism and injured.[13] The plaintiff charged the mill with negligence for not forcibly ejecting the boy once his presence was known.[14]

In finding for the mill, the court noted that the defendant's equipment was operating normally and that the young boy was trespassing.[15] The only duty owed to the defendant was the duty to refrain from committing "intentional or negligent acts of personal violence."[16] Indeed, since the owner left the trespasser entirely alone,

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9. *E.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) ("Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no cost to the rescuer.").

10. *See infra* Part I.B.

11. 44 A. 809 (N.H. 1898).

12. *Id.* at 809.

13. *Id.*

14. *Id.* at 810.

15. *Id.*

16. *Id.*

the trespasser could not recover for any injury suffered on the property.[17]

The ultimate holding of *Buch*, however, is not nearly as significant as the reasoning behind it. In justifying its conclusion, the court set out in detail the principle behind the no-duty-to-rescue rule:

> Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. *With purely moral obligations the law does not deal. . . .* Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.[18]

The court identifies a sharp divide between the law and morality. Legal duties are enforceable; moral duties are not.

Distinguishing between moral and legal duties, and finding the duty to rescue to be a moral duty, is pervasive in the reasoning of early 20th century cases. In *Union Pacific Railway Co. v. Cappier*,[19] the court failed to impose a duty on railroad workers to aid a man struck by a freight car.[20] In doing so, the court noted that allowing courts to enforce moral obligations would let them substitute the law with "varying ideas of morals which the changing incumbents of the bench might from time to time entertain."[21] In *Osterlind v. Hill*,[22] the Massachusetts Supreme Court held that the defendant violated no legal duty by renting a canoe to an intoxicated man who ultimately fell out and drowned.[23] While these decisions may seem cold-hearted,

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17. *Id.*

18. *Id.* (emphasis added).

19. 72 P. 281 (Kan. 1903).

20. *Id.* at 281–82. The court expounded: "With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance." *Id.* at 282.

21. *Id.* at 283.

22. 160 N.E. 301 (Mass. 1928), *overruled by* Pridgen v. Boston Hous. Auth., 308 N.E.2d 467, 477 (Mass. 1974).

23. *Id.* at 302. The facts of the case illustrate what some might consider a callous attitude toward the victim. After renting the canoe, the defendant apparently listened to the deceased's screams for help for half an hour and did nothing. In fact, the court found the deceased's ability to hang on to the canoe for that long indicated that he was not truly helpless. *Id.*

they illustrate the importance of the existence of a legal duty to recovery.[24] In approaching the facts of each case, the respective courts did not look at the relations between the parties and decide whether to impose a legal duty. Instead, they started from the position of no legal duty, and then explored the facts to determine whether they supported the prior existence of such a duty.[25]

A second and related principle behind the early common law no-duty rule is the law's distinction between misfeasance and nonfeasance.[26] Such language can be found in the early case law.[27] In addition, the principle has been widely cited in legal scholarship as the justification for the absence of a positive duty to aid.[28] Francis Bohlen articulates well both the importance and the source of this principle:

> There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the

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24. Such holdings would be unlikely today given current exemptions for business-invitee relationships and those controlling the instrumentality of harm. *See infra* Part I.C.

25. The use of moral/legal distinctions is not limited to early 20th century cases. *See, e.g.*, Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) ("The mere fact that Bigan saw [the decedent] in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue.").

26. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984) (examining the distinction between action and inaction in the determination of the existence of a duty).

27. *See, e.g.*, Buch v. Amory Mfg. Co., 44 A. 809, 811 (N.H. 1898) ("There is a wide difference . . . both in reason and in law, between causing and preventing an injury; between doing, by negligence or otherwise, a wrong to one's neighbor, and preventing him from injuring himself . . . ."). This distinction, while weakened by the special relationship exceptions to the no-duty-to-rescue rule, *see* RESTATEMENT (SECOND) OF TORTS § 314 cmt. c. (1965) (noting the confinement of actionability of nonfeasance to the field of special relationships), is still acknowledged today. *Compare* Williams v. Cunningham Drug Stores, Inc., 418 N.W.2d 381, 382–83 (Mich. 1988) ("The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff."), *with* Hart v. Ludwig, 79 N.W.2d 895, 898 (Mich. 1956) (asserting that, in certain instances of nonfeasance, the significant conclusion "relates not to the slippery distinction between action and nonaction but to the fundamental concept of 'duty . . . .'").

28. *See, e.g.*, KEETON, *supra* note 26, at 375 (characterizing the "reluctance to countenance 'nonfeasance' as a basis of liability" as the source of the no duty to aid rule).

> defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.[29]

Bohlen goes on to explain the differences between misfeasance and nonfeasance. The first difference is the nature of the conduct at issue, though some conduct may initially appear to be either or both.[30] The other difference—the nature of the result[31]—is more subtle. Bohlen explains this difference by assigning positive and negative value to an action.[32] Misfeasance makes the plaintiff "positively worse off," thereby creating a net injury.[33] While it may result in the same physical injury, however, nonfeasance is the absence of a positive benefit. The plaintiff is no better off but is likewise no worse off; no new injury has been caused.[34] It is this distinction that is at the heart of the no-duty-to-rescue rule, and it is this distinction that courts and scholars relax when creating exceptions to that rule.

B. Exceptions to the No-Duty Rule

Courts have established several exceptions to the no-duty-to-rescue rule; the number of exceptions depends upon their categorization. To the extent that these exceptions constitute nonfeasance, they involve areas "in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action."[35] One author suggests five general exceptions to the rule: special relationships; voluntarily undertaking a rescue of the victim; negligent injury caused by the defendant; innocent injury caused by the defendant; and statutorily created duties.[36] This Part will examine these exceptions in turn, in addition to one other with

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29. Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219–20 (1908).

30. *Id.* at 220.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 220–21.

35. KEETON, *supra* note 26, at 374.

36. Jennifer L. Groninger, Comment, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What is Left of the American Rule, and Will It Survive Unabated?*, 26 PEPP. L. REV. 353, 355–56 (1999). The author notes that an exception will apply to most rescue situations. *Id.* at 357. Another author would include contractual obligations to rescue in this list. *See* Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 426 (1985) (enumerating various contractual obligations to rescue, including, *inter alia*, those applying to lifeguards and nurses). Since this exception could be considered either a special relationship or a voluntary undertaking to rescue, it will not be treated separately.

interesting implications: the duty not to prevent the giving of aid by others.

Special relationships are a fairly well-established exception to the lack of a duty to rescue. Despite distinguishing between misfeasance and nonfeasance, Bohlen recognized that the common law does impose an active duty of care arising from certain relationships.[37] Courts have created exceptions and imposed a duty upon common carriers, innkeepers, and business owners to their guests and customers, upon legal custodians to their charges, and upon teachers to students.[38] A special relationship may also exist when the defendant controls the conduct of a third person. Examples include parent-child and employer-employee relationships.[39] This is certainly not an exclusive list.[40] Courts are continually recognizing special relationships that weaken the general rule.[41]

Another exception to the general rule arises from a voluntary undertaking to rescue. One who has no duty to rescue a person in peril, yet undertakes a rescue of that person, becomes bound to exercise reasonable care in the rescue attempt.[42] If would-be rescuers act negligently, they are subject to liability for the increase in harm caused by that neglect.[43] One rationale behind the rule is that a

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37. Bohlen, *supra* note 29, at 221.

38. Groninger, *supra* note 36, at 360.

39. *Id.* at 361.

40. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 314A & 314B (1965) (listing relationships where duties arise and defining those duties). The Restatement also asserts that its list is not exclusive. *Id.* § 314A cmt. b.

41. Groninger, *supra* note 36, at 362. Three cases in particular illustrate the extent of special relationship exceptions. In *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 345–46 (Cal. 1976), the court established the duty of a psychiatrist to warn one who faces reasonably foreseeable harm from a patient. In *Pridgen v. Boston Housing Authority*, 308 N.E.2d 467, 477 (Mass. 1974), the court held that a storeowner owed a duty to aid a trespasser who had climbed into an elevator shaft and was trapped. Finally, in *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976), the court recognized a special relationship between "companions on a social venture." *Id.* at 222.

42. *See, e.g.*, Zelenko v. Gimbel Bros., Inc., 287 N.Y.S. 134, 135 (N.Y. Sup. Ct. 1935) ("[I]f a defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task."); *see also* KEETON, *supra* note 26, at 378 ("If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse.").

43. *Zelenko*, 287 N.Y.S. at 135. The court justified its holding on the assumption that, had the defendant storeowner not removed the injured customer to another room, a bystander would likely have called an ambulance. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965) (imposing a duty on one who voluntarily undertakes a rescue and thereby deprives him of the normal opportunities of protection); RESTATEMENT (SECOND) OF TORTS §

potential rescuer is less likely to attempt a rescue if another is already giving aid.[44] One might argue that this rule creates a strong incentive not to rescue. Since those with no duty to aid can only be liable for the victim's injuries if they undertake a rescue, their charitable tendencies are discouraged.[45] When the only act undertaken was a gratuitous promise to render assistance, early case law did not impose an obligation.[46] However, when the plaintiff relies on the promise to his or her detriment, some courts now impose a duty based upon breach of the promise alone.[47]

A fairly uncontroversial exception to the general rule is negligent injury. If one negligently injures another or negligently places another in a dangerous situation, one is under a duty to provide reasonable assistance to prevent additional harm.[48] The imposition of liability for negligence is not novel.[49] This exception merely requires negligent actors to reasonably attempt to mitigate the harm they caused.[50]

Innocent injury presents a less obvious exception. An innocent injury occurs when the defendant's conduct, though without fault, still harms another or places another in danger.[51] For example, courts have imposed a duty on defendants where a child's hand gets caught in the defendant's escalator,[52] the defendant's truck stalls on an icy road,[53] and the defendant's vehicle strikes a cow on a road[54]. In these

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323 (1965) (advocating liability for one who undertakes to render services necessary for the protection of another, renders the services negligently, and either increases the risk of harm or causes harm through the other's reliance).

44. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

45. *See* Groninger, *supra* note 36, at 364 ("To the extent people are aware of these principles of law, the law has the effect of discouraging rescues."); KEETON, *supra* note 26, at 378 (recognizing the capability of the rule to create a deterrent to voluntary undertaking of aid).

46. KEETON, *supra* note 26, at 379.

47. *Id.* at 380.

48. *Id.*, at 377.

49. *See* Groninger, *supra* note 36, at 357 (asserting that general agreement on liability for failure to rescue victim that one has negligently injured exists).

50. Parrish v. Atl. Coast Line R.R. Co., 20 S.E.2d 299, 305 (N.C. 1942).

51. KEETON, *supra* note 26, at 377.

52. L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942) (noting that the escalator was an instrumentality under the control of the defendant).

53. Montgomery v. Nat'l Convoy & Trucking Co., 195 S.E. 247, 253 (S.C. 1938).

54. Hardy v. Brooks, 118 S.E.2d 492, 495 (Ga. Ct. App. 1961) (asserting that one who innocently creates a dangerous situation on a public highway is duty-bound to eliminate the danger or warn others of its presence).

instances, the defendant is not at fault yet has caused the danger, making it easier for courts to create an exception and impose a duty.[55]

Perhaps the most far-reaching departure from the general rule is the duty to not prevent the giving of aid. Even if one has no duty to rescue another, one must still take care not to interfere with another's rescue attempt.[56] Such a duty is justified on the grounds that the victim should have an opportunity to receive aid.[57] In *Soldano v. O'Daniels*,[58] a bystander entered the defendant's inn and requested use of its phone to inform the police that a man was being threatened with a gun at a saloon across the street.[59] The defendant's employee refused access to the phone, and the threatened man was subsequently shot and killed.[60] In imposing a duty upon the defendant to permit use of the phone, the court gave credence to the Restatement (Second) of Torts § 327, the expanding list of special relationship exceptions, and the moral right of the victim to rescue attempts.[61] While it paid lip service to the misfeasance/nonfeasance distinction and tried to limit its holding,[62] the court emphasized its "responsibility to reshape, refine and guide legal doctrine . . . ."[63]

Finally, a duty to rescue may be imposed by state legislatures. To supersede the general common law absence of a duty to rescue, a few legislatures have created a statutory duty to report crimes or rescue another in peril.[64] The statutes that impose a duty to rescue[65] only

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55. Groninger, *supra* note 36, at 359; *see also* RESTATEMENT (SECOND) OF TORTS § 322 (1965) (imposing a duty of reasonable care to prevent further harm when an actor's innocent or negligent conduct causes bodily harm to another that makes the other helpless and in danger of further harm).

56. KEETON, *supra* note 26, at 382; *see also* RESTATEMENT (SECOND) OF TORTS §§ 326–327 (1965) (supporting liability for intentionally or negligently preventing a third person from giving aid to another).

57. KEETON, *supra* note 26, at 382.

58. 190 Cal. Rptr. 310 (Cal. Ct. App. 1983).

59. *Id.* at 312.

60. *Id.* at 311.

61. *Id.* at 313 n.5 & 316 n.9.

62. *Id.* at 316–17.

63. *Id.* at 317.

64. For a thorough list of these statutes and their scope, see Heyman, *supra* note 8, at 689 n.66. Heyman cites eight states—Florida, Massachusetts, Ohio, Rhode Island, Washington, Wisconsin, Minnesota, and Vermont—that punish either failure to rescue or to report, or both, as misdemeanors; another, Colorado, declares a duty to report crimes but does not penalize violations. *Id.*

65. Note that statutes imposing a duty to aid are different from "Good Samaritan" statutes, which encourage bystanders to assist in emergencies by limiting liability for negligent conduct.

require reasonable assistance, and only in "easy" rescue situations, i.e. without danger to the actor.[66]

C. The Future of a Duty to Rescue

As noted earlier, commentators have criticized the law's failure to require bystanders to effect an easy rescue.[67] Scholars have debated whether the erosion of the no-duty-to-rescue rule will continue.[68] Prosser and Keeton believe the exceptions to the rule will increase until the rule comes to be that mere knowledge of an emergency threatening harm to another, when rescue can be had with little cost to the rescuer, will be sufficient to impose a duty.[69] Even the Restatement finds it "inevitable" that, given the "extreme cases of morally outrageous and indefensible conduct" permitted by the no-duty rule, there will be "further inroads" upon it.[70] Indeed, this appears to be the majority position among scholars.

II. THEORIES OF POLITICAL/LEGAL PHILOSOPHY ON THE DUTY TO RESCUE

Most philosophical, political, and legal scholars that address the absence of a general duty to rescue in America support the existence of a duty in some form.[71] Some view the rule as a "legal anachronism"

See Silver, *supra* note 36, at 427–28 (describing obligations imposed by "Good Samaritan" statutes).

66. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519(a) (2002) (enacted 1967). Vermont was the first state to pass such a law. The statute reads:

> (a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.. . . .(c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

Id. §§ 519(a) & 519(c).

67. *Saldano*, 190 Cal. Rptr. at 313.

68. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 248 (1980) (claiming that the increasing exceptions to the rule have made it seem "eccentric and isolated"). *But see* Lake, *supra* note 5, at 316–17 ("[R]escue doctrine remains tied to common law concepts and tough-talk rhetoric extant at the turn of the century . . . .").

69. KEETON, *supra* note 26, at 377.

70. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c. (1965).

71. *See* KEETON, *supra* note 26, at 376 (noting that decisions recognizing no duty to aid "have been denounced with vigor by legal writers"); MICHAEL A. MENLOWE & ALEXANDER MCCALL SMITH, *Introduction*, *in* THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 1 (Michael A. Menlowe & Alexander McCall Smith eds., 1993) (recognizing general philosophical consensus on a moral duty to aid).

that has worn out its usefulness;[72] others seek to make sense out of the increasing complexity of the rule and its exceptions.[73] A third group of legal thinkers, who have articulated the views that follow, attempts to set forth the principles on which a duty should or should not be founded. This Part will describe five approaches of varying abstraction to the duty to rescue. At least four of these theories, and perhaps all five, conclude that a duty to rescue should be imposed in some circumstances.

A. Morality

Probably the most advocated position supporting a duty to rescue is simply that rescuing another in peril, in certain circumstances, is a moral duty that should be embodied in the law.[74] Some scholars express intense disdain for the immorality of the rule.[75] Others state their conclusions bluntly.[76]

One distinction among these opinions is the ultimate purpose behind making a moral duty a legal duty. Some argue that, since the average person views law as a reflection of morality, the reasonable person standard must embrace the majority moral position.[77] Others want the law to not only reflect public opinion but also to actively encourage better behavior.[78]

Another source of disagreement in the morality approach is the extent to which the law should reflect morality. Though he approved

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72. J.H. Edgar, Jr., *The Bystander's Duty and the Law of Torts—An Alternative Proposal*, 8 ST. MARY'S L.J. 302, 308 (1976).

73. *See* Lake, *supra* note 5, at 332 (recognizing scholars' attempts to reconcile present case law through policy concerns, efficiency concepts, and other principles).

74. Heyman, *supra* note 8, at 741; Viola C. Brady, Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551, 551 (1980); *see also* Michael A. Menlowe, *The Philosophical Foundations of a Duty to Rescue*, *in* THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 5, 5 (Michael A. Menlowe & Alexander McCall Smith eds., 1993) (noting "wide philosophical support for . . . a moral requirement to rescue").

75. KEETON, *supra* note 26, at 375–76 (calling some opinions upholding the rule "shocking in the extreme" and "revolting to any moral sense").

76. Menlowe, *supra* note 74, at 8 (asserting that refusing to effect an easy rescue is simply wrong and worthy of punishment).

77. *See* Lake, *supra* note 5, at 351 n.272 ("An enlightened society should no longer excuse the immoral and outrageous conduct of a person who allows another to drown, simply because he doesn't wish to get his feet wet." (quoting Lombardo v. Hoag, 566 A.2d 1185, 1189 (N.J. Super. Ct. Law Div. 1989))).

78. Antony M. Honoré, *Law, Morals and Rescue*, *in* THE GOOD SAMARITAN AND THE LAW: THE MORALITY—AND THE PROBLEMS—OF AIDING THOSE IN PERIL 225, 240 (James M. Ratcliffe ed., 1966); Menlowe, *supra* note 74, at 45.

of bringing the law more in line with morality,[79] Professor James Barr Ames acknowledged that some moral duties should not be enforced in the courts.[80] In contrast, Professor Francis Bohlen argued that judges should exercise their reasoned discretion when imposing their moral beliefs:

> While courts of law should not yield to every passing current of popular thought, . . . unless they adopt as legal those popular standards which they themselves, as men, regard as just and socially practicable . . . they will more and more lose their distinctive common law character as part of the machinery whereby free men do justice among themselves.[81]

Extending Bohlen, and in stark contrast to Ames, is Professor Ernest Weinrib's claim that "the role of the common-law judge centrally involves making moral duties into legal ones."[82]

In the end, however, most scholars who advocate a morally justified legal duty to rescue tend not to detail the philosophical source of this determination. They simply assert that it is true.[83] When dealing with morally outrageous conduct leading to harm that could have easily been prevented, it just feels right to impose a legal duty.[84]

B. Utilitarian Theory

Utilitarians generally support a duty to rescue others, at least to the extent that such a duty provides maximum satisfaction to the most people.[85] In evaluating a rule, utilitarian theory examines the actions the rule influences people to take. If those actions produce the greatest net pleasure, as compared to any alternative actions, then utility is maximized.[86] "Consequences are important; how they are reached is not."[87] In practice, a utilitarian duty to rescue might merely

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79. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908).

80. *Id.* at 109.

81. Soldano v. O'Daniels, 190 Cal. Rptr. 310, 313 (Cal. Ct. App. 1983) (quoting Bohlen, *supra* note 29, at 337).

82. Weinrib, *supra* note 68, at 263.

83. *See* Honoré, *supra* note 78, at 231 (citing United States v. Knowles, 26 F. Cas. 800, 801 (N.D. Cal. 1864)) (flatly asserting the existence of a moral duty to aid others).

84. *See id.* ("[I]f [rescue] efforts should be omitted by anyone when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the censure and reproach of good men.").

85. Menlowe, *supra* note 74, at 5.

86. Weinrib, *supra* note 68, at 281.

87. *Id.*

require rescue when the benefits of a particular attempt to rescue the victim outweigh the costs to the actor.[88]

Such a straightforward rule may not result in utility maximization, however. If the freedom to act without restriction promotes general happiness, then the costs of a significant degree of obligation to act for others could outweigh the benefits of rescue.[89] Similarly, if potential victims came to rely on would-be rescuers, the victims might undertake more dangerous activities that reduce social utility by increasing costs.[90]

Advocacy of a utilitarian duty to rescue exists beyond a mere social utility calculation. Likely the most famous support in legal scholarship for utilitarianism in the duty to rescue context was given by Ames: "The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed."[91] John Stuart Mill also discusses a general duty to aid another. While Mill advocated the primacy of utility over abstract right,[92] he also stated that the only proper use of coercive power "is to prevent harm to others."[93] This principle is consistent with the power to coerce positive acts for the benefit of others, including "certain acts of individual beneficence, such as saving a fellow-creature's life."[94] Indeed, one can cause harm by omission as well as action; one should be accountable for both.[95]

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88. *See id.* at 282 (asserting that one possible interpretation of the utilitarian system supports such a duty).

89. *See id.* at 285 (noting that excessive coercion cannot influence the will and that a duty to aid when the rescuer is placed in significant danger should not exist). *But see* Silver, *supra* note 36, at 431 (positing that the benefit of lives saved from a rescue duty justifies the loss of freedom of action). One solution to this problem might be to require rescue, but have the victim or state compensate rescuers for their socially useful rescues. *Cf.* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 568–69 (1972) (proposing the insulation of harm to an individual actor by providing damage awards for socially useful activities).

90. *See* Weinrib, *supra* note 68, at 283 ("If an act of beneficence would tend to induce reliance on similar acts, it should be avoided.").

91. Ames, *supra* note 79, at 110.

92. *See* J.S. MILL, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 9 (R.B. McCallum ed., Basil Blackwell 1948) (1859) ("It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions . . . .").

93. *Id.* at 8.

94. *Id.* at 10.

95. *Id.*

C. Economic Theory

Economic theories of the duty to rescue are actually a subset of utilitarian theory because their ultimate goal—efficiency—is measured by the maximization of social utility. To achieve this end, the law should let individuals transfer resources through a bargaining process to their most valued uses.[96] The assignment by the law of any right is important only when transaction costs burden the bargaining process. In that instance, the law should assign the resource to the one who valued it more than anyone else.[97]

In the duty to aid situation, economic analysis would ignore the distinction between misfeasance and nonfeasance.[98] Instead, one would explore the social efficiency of the rule. Indeed, Professors Landes and Posner have proposed a model explaining why the no-duty rule is efficient.[99] They assume that potential victims and potential rescuers are mutually exclusive groups. If liability were imposed for failing to rescue, potential rescuers would perform less of their preferred activities and undertake other, less risky activities, thereby reducing both the utility of rescuers and the social benefit to rescue.[100] In contrast, Professor Richard Hasen argues that the no-duty rule is actually inefficient.[101] Unlike Landes & Posner, Hasen assumes that the classes of victims and rescuers overlap. Since potential rescuers gain much utility by the possibility of being rescued themselves (assuming that the value of one's life outweighs the cost of rescue), they would not substitute activities and would almost certainly favor a duty to rescue.[102] The assumption of exclusive or

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96. Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1299 (1989). In stating his positions, Professor Weinrib relies on a theory first proposed by Coase. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–13 (1960) (advancing an economic analysis of the problem of reciprocal harms and discussing the implications on the pricing system and liability rules).

97. Weinrib, *supra* note 96, at 1300.

98. *Id.* at 1299.

99. *See* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 119–24 (1978) ("In fact, as our analysis will show, liability may be less efficient than nonliability.").

100. *Id.* at 119–21. For example, if an expert swimmer has a duty to rescue a novice swimmer, the expert might avoid beaches where novices swim, making the expert less available to rescue those who would most need rescuing.

101. Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141, 144 (1995).

102. *See id.* at 142–44.

simultaneous potential rescuer/potential victim status distinguishes the respective models.[103]

D. Locke's Social Contract Theory

Locke's Social Contract theory is an expansion of the principle of natural law. The state of nature is "a State of perfect Freedom," where each autonomous individual executes the laws of nature upon the transgressors of one's rights.[104] Because one's rights in this state are "constantly exposed to . . . Invasion," individuals remove themselves from the state of nature to form a government.[105] They do so for the "mutual Preservation of their Lives, Liberties and Estates," which Locke calls their "Property."[106] By joining the society, however, all members submit their "Person and Possession[s]" to the government of the society.[107] The government's laws are meant to preserve property,[108] but they do so to further the public good.[109]

Whether Social Contract theory requires rescue is unclear. On one hand, Locke asserts that each person has a property in one's person, to which no one else has a right.[110] On the other, "when [one's] own Preservation comes not in competition," one ought to, as much as possible, "*preserve the rest of Mankind*."[111] Moreover, because each person in society surrenders much of one's natural liberty to a properly created government,[112] and because the first duty of the government is the "preservation of the Society,"[113] the government would seem to have the power to require rescue to further the public good.

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103. *See id.* at 147.

104. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269, 271–72 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

105. *Id.* at 350; *see also id.* at 276 ("Civil Government is the proper Remedy for the Inconveniences of the State of Nature . . . ." (emphasis omitted)).

106. *Id.* at 350 (emphasis omitted).

107. *Id.* at 348.

108. *Id.* at 350–51.

109. *Id.* at 353.

110. *Id.* at 287.

111. *Id.* at 271.

112. *Id.* at 353.

113. *Id.* at 355–56 (emphasis omitted).

E. Heyman's Liberal-Communitarian Theory

Professor Heyman draws material from Locke's Social Contract, as well as Kantian and Hegelian political philosophy, to craft his own position on the duty to rescue. Heyman begins with the idea, developed by Hegel, that the citizen and the state hold "reciprocal rights and duties."[114] The state must secure the rights and welfare of citizens, thereby creating a duty to rescue imperiled citizens in emergency situations.[115] As consideration for this benefit, citizens must "perform services necessary for the common good," including acting for the state when none of its officers are available.[116] Therefore, citizens owe a duty to the state to rescue other citizens.[117] When combined with the social contract duty to rescue others, a citizen owes a duty of rescue both to the state and directly to other citizens.[118] Thus, one who fails to discharge a duty to rescue can be held liable in both criminal law and tort.[119]

Heyman labels the result of this reasoning "a liberal-communitarian theory of the duty to rescue."[120] Due to the positive ethical relationship between citizens, a citizen in peril has "a quasi-property right" in the services of other citizens.[121] Unlike a utilitarian rationale, Heyman's theory does not ignore individual rights but specifically includes them as an element of the public good.[122] Unlike in morality arguments, the duty to rescue is not merely morally required; instead, it is embodied in rights and obligations of citizens and the state.[123] This notion, which Heyman calls a "concrete conception of community,"[124] creates a duty to rescue on behalf of others and at the behest of the state.[125]

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114. Heyman, *supra* note 8, at 726 (citing G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 261R (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821)).

115. *Id.* at 728–29.

116. *Id.*

117. *Id.* at 729.

118. *Id.* at 738.

119. *Id.* at 738–39.

120. *Id.* at 739.

121. *Id.* at 736.

122. *Id.* at 740–41.

123. *Id.* at 742.

124. *Id.* at 745.

125. *Id.* at 749.

III. A RIGHTS/DUTY PARADIGM OF THE DUTY TO RESCUE

After examining the treatment of the duty to rescue by several philosophical and legal theories, this Note will now suggest another: a rights/duty paradigm. This model provides a clearer conception of the workings of a duty in practice and furthers understanding of the doctrines involved. However, for this explanation to be valid, one must accept a set of conditions regarding the nature of government and human interaction—specifically, the principles of individual rights and the negative state. This Part will examine the concepts of individual rights and the negative state, based largely on the works of philosopher Ayn Rand and Professor Ernest Weinrib, to provide the necessary principles. Then, it will present the rights/duty paradigm and define its terms. Finally, it will explain the pre-interaction conception of "duty" that must be accepted for the rights/duty paradigm to accurately assess conflicts between individual interests.

A. Individual Rights and the Negative State

Individual rights are the means by which the legal code interacts with the fundamental nature of individuals.[126] The origin of rights lies in one's existence as a rational being who cannot function properly under coercion; therefore, "rights are a necessary condition of [one's] particular mode of survival."[127] The fundamental right from which all others derive is the right to one's own life.[128] Since one who has no right to the product of his effort cannot survive, the right to property is necessary for the implementation of all other rights.[129] In practice, rights are action-oriented. They demand "freedom from physical compulsion, coercion or interference by other men."[130] As such, each person's life and freedom are not owned by or owed to society.[131]

The key individual rights concept to grasp for the affirmative duty context is the maxim that rights cannot conflict; a "right" which,

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126. AYN RAND, *Man's Rights*, *in* THE VIRTUE OF SELFISHNESS 122, 122 (1964).

127. *Id.* at 126.

128. *Id.* at 124; *see also* Weinrib, *supra* note 96, at 1286, 1290 (stating Hegel's treatment of rights as the expressions of the universal free will and asserting that a person's body is the immediate embodiment of the free will).

129. RAND, *supra* note 126, at 125.

130. *Id.*

131. *Id.* at 124. Indeed, since society is merely a grouping of individuals, "society" is not an entity itself. *Id.* at 123.

to be exercised, must violate another right, is not truly a right.[132] One's rights can impose on another only the negative obligation not to violate those rights.[133] Consequently, rights to one's body and property are not contingent upon the particular interests or needs of others, and "[n]o obligation exists . . . to confer a benefit on anyone else."[134]

Given the supremacy of individual rights, the proper government has only one purpose – the protection of individual rights.[135] This principle of individual rights is exemplified by the words of the Declaration of Independence: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[136] Implicit in this statement and those that follow it is the belief that a government has the ability to identify (but not create) rights, adjudicate among its citizens disputes concerning those rights, and enforce those rights on behalf of its citizens. However, because only the State has the lawful authority to use physical force to protect rights, its power can be dangerous to citizens.[137] Therefore, the government is given no powers except those "delegated to it by the citizens for a specific purpose."[138] To protect against coercion, all laws must be "objectively justifiable" as protecting the rights of individuals against infringement.[139]

These considerations lead to the principle of the negative state: the State may act only when necessary to protect the individual rights

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132. *Id.* at 129.

133. *Id.* at 125; s*ee also* Weinrib, *supra* note 96, at 1289 (explaining the central imperative of Hegel's abstract right to respect another's freedom).

134. Weinrib, *supra* note 96, at 1291. Hegel even addresses the duty to rescue directly: "Even if I can accomplish the salvation of another with no real prejudice to myself—for example, by tossing a rope to a drowning child . . . abstract right imposes no duty on me to do so." *Id.* (discussing Hegel's theory of abstract right); *see also* RAND, *supra* note 126, at 129 ("No man can have a right to impose an unchosen obligation . . . on another man."). Hegel goes on to modify this conclusion by applying community ethics to abstract right. *See generally* Heyman, *supra* note 8, at 721–32 (discussing the aspect of community in Hegel's philosophy of right). Hegel's theory of abstract right by itself seems much nearer the true principles of right than his full theory.

135. RAND, *supra* note 126, at 124.

136. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

137. RAND, *supra* note 126, at 131.

138. AYN RAND, *The Nature of Government*, *in* THE VIRTUE OF SELFISHNESS, *supra* note 126, at 144, 149 (1964) (emphasis omitted). Indeed, as rights are defined here, the term "individual rights" is redundant, since only individuals are endowed with rights by their nature. RAND, *supra* note 126, at 134.

139. RAND, *supra* note 138, at 149.

of its citizens. It may not impose obligations upon them to benefit others. Consequently, under a negative state, an individual is free to undertake any activity as long as it does not violate the rights of others.[140]

B. The Rights/Duty Paradigm

The rights/duty paradigm proposed in this Note is straightforward: all rights and duties properly recognized by the law are originally negative in character, and every right or duty has a corresponding and exactly reciprocal duty or right. Every individual right, in the sphere of the law, is inherently negative in character. One does not have the right to speak, work, eat, or even live; one has the right not to have these freedoms infringed by others. Similarly, one does not have a duty to protect the rights of others to speak, work, eat or live; one only has the duty not to infringe upon these freedoms.[141] These duties can be characterized as one broad duty not to interfere with another's liberty, or as several distinct duties. Whatever characterization is given, each comports with a corresponding right in another person or persons that exactly equals the duty in scope. Some examples will illustrate this point. Starting with the basics, *A* does not have the right to shoot *B*, even though *A* is exercising her free will. *B* has a right not to be harmed by *A*; *A* therefore has a duty not to harm *B*. Nor can *A* take *B*'s car, even if *B* has two cars and *A* has none. *B* has a right not to have her property taken; *A* has no right to *B*'s property but a duty not to take it.

This rights/duty paradigm does allow for positive rights and duties. However, such positive rights and duties can exist only in the sense that they originate in pre-existing negative rights and duties,

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140. *See id.* at 148 ("Under a proper social system, a private individual is legally free to take any action he pleases (so long as he does not violate the rights of others) . . . ."). One might wonder how such broad principles could possibly resolve the intricacies of the duty to rescue or any other law. Rand recognized this difficulty and addressed it: "Many errors and many disagreements are possible in the field of implementation, but what is essential here is the principle to be implemented: the principle that the purpose of law and of government is the protection of individual rights." *Id.* at 152. Parts IV and V of this Note will be using this principle as a guide to analysis of the duty to rescue.

141. *See* Weinrib, *supra* note 96, at 1292 ("The imperative to respect another as a person signals a duty to avoid infringements of—rather than to confer benefits upon—the physical and proprietary embodiments of another's personality."). For purposes of positing a rights/duty paradigm, this Note will use the term "negative duty." Whether such a thing as a negative duty can exist is debatable. One could logically argue that a duty not to do something is merely the absence of a right to do that thing.

and they can always be characterized negatively. For example, suppose *A* contracts with *B* to build *B* a house for $10,000, paid up front. *B* could now be said to have a positive right to a house, while *A* has a positive duty to build that house. Yet in a sense, *B*'s future house is her property. She has a right not to have that property interfered with. Likewise, *A* has the duty not to interfere with *B*'s property, which in practice involves an obligation to build the house.

The rights/duty paradigm, while potentially applicable to the law generally, serves especially well in the duty to rescue context. The permissible changes in form but not substance of rights and duties are central to the analysis. Generally, *V* has no positive right to aid from another, and *R* has no positive duty to provide aid. Their corresponding rights and duties are negative only.[142] Suppose, however, that *R* does indeed have a duty to rescue. *V* can now be said to have a positive right to rescue, or at minimum, a legally recognizable interest in being rescued. For *R* to uphold his duty not to interfere with *V*'s right not to be deprived of a legal interest, *R* may have to undertake various kinds of activities. As will be shown in Part *V*, this reasoning might support a duty to rescue in some circumstances.

C. The Conception of Duty

It is important to recognize that the notion of "duty" in the rights/duty paradigm differs dramatically from the current understanding of duty. Modern tort opinions see legal duties as a flexible element of a tort action; if the defendant should be subject to liability, then she was indeed duty-bound.[143] A "[d]uty is a legal conclusion about relationships between individuals, made after the fact . . . . The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct

142. One might argue that a persons about to drown will soon lose all of their rights, including the fundamental right to life, and must therefore be saved. However, the characterization of rights as negative refutes this. Since the victim only has a right not to have their life interfered with, and a potential rescuer only has a duty not to jeopardize that life, no duty may be imposed. There is no positive duty to act for the well-being of another. *See* Weinrib, *supra* note 96, at 1292 n.21, 1293 ("There are no positive duties in abstract right to do anything in particular . . . .").

143. *See, e.g.*, Pridgen v. Boston Hous. Auth., 308 N.E.2d 467, 476–77 (Mass. 1974) (determining that the defendant could not be "rewarded with immunity from liability" before finding the existence of a duty).

of the individual."[144] Duties are not absolute but are ever-changing.[145] Only by considering several perspectives can a duty be imposed.[146]

The rights/duty paradigm would hold that the breach of a duty, which is premised on a fixed principle and defined prior to any factual dispute, is in fact the key to tort liability. It is the essential threshold requirement that must exist before any consideration of liability can occur. Similarly, "[t]hat the plaintiff's harm can be characterized in terms of an invaded right is a necessary condition of liability."[147] A duty to rescue context is well suited to illustrating the need for pre-existing rights and duties. For a general duty to require rescue in any form, *R* must be aware of *V*'s peril.[148] In the modern view, *V*'s right to rescue would be triggered into existence merely by *R*'s happening to see *V* drowning in a pond or hearing his cries. Not only is there no justification for recognizing a positive right to aid in *V*, but this right would be totally contingent on the "mere accidental propinquity" of *V* and *R*.[149]

IV. COMPARISON OF RIGHTS/DUTY PARADIGM TO THEORIES ON THE DUTY TO RESCUE

Each of the theories discussed in Part II presents a cogent position on the duty to rescue. However, this Part will argue that four of those theories do not accord the proper status to individual rights and state action, thereby highlighting their fundamental inconsistency with an approach to the duty to rescue based on negative rights and duties. It also submits that the other theory, Locke's Social Contract, may be read either to permit a duty to rescue or to prohibit such a duty as an infringement of individual liberty.

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144. RK Constructors, Inc. v. Fusco Corp., 650 A.2d 153, 155 (Conn. 1994) (internal quotations and citation omitted).

145. *See* Lake, *supra* note 5, at 358, 364 n.270 (discussing the difficulty of defining duty).

146. *See, e.g.*, Soldano v. O'Daniels, 190 Cal. Rptr. 310, 315–16 (Cal. Ct. App. 1983) (employing an eight-factor test to determine whether a duty is owed to third persons).

147. Weinrib, *supra* note 96, at 1301.

148. To hold otherwise would impose upon every citizen a duty to actively seek out persons needing aid.

149. Home Office v. Dorset Yacht Co., [1970] A.C. 1004, 1027 (H.L.) (appeal taken from Eng.).

A. Morality

Law should not be a reflection of popular views on morality because morality is subjective, whereas the law is meant to be objective—to apply equally and justly to all who live under it. Moral principles are subjective in the sense that all individuals do not hold one set of identical morals. The problem with "free men do[ing] justice among themselves"[150] is that they are really doing justice upon each other. Because of the State's enormous power as the only lawful user of coercive force, its citizens must restrain its capriciousness. They do so by requiring objective, impersonal enforcement of the laws.[151] To allow subjective application of the law would subject a citizen's rights to the arbitrary choice or belief of a state official, a clear inversion of the proper roles of the individual and the state.[152] A judge should ask not, "What ought I do?", but rather "What must I do to uphold individual rights?" An objective law may still accord with a "universally" accepted moral principle; on the other hand, it may not satisfy any person's moral ideals. Only by being objective, however, can it be legitimate.[153]

B. Utilitarianism

The conflict between a utilitarian and a rights-based approach to the duty to rescue is clear. "Rights are always problematic for utilitarians. . . ."[154] Without a rights framework to guide levels of liability, imposing a burden and failing to confer a benefit are judged by equal standards.[155] By rejecting the primacy of individual rights and making social utility the ultimate concern, a utilitarian duty to rescue would potentially impose a heavy burden. The marginal costs of restricting freedom decrease with increasingly demanding rules, and the potential benefits from rescue—saved lives—likely have a very high social value. The result could be the rejection of emergency and

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150. *See supra* text accompanying note 81.

151. *See* RAND, *supra* note 138, at 148 ("If a society is to be free, its government has to be controlled.").

152. *See id.* at 151 ("[A] man's rights may not be left at the mercy of the unilateral decision, the arbitrary choice, the irrationality, *the whim* of another man.").

153. Of course, if the law need not be objective, then an individual judge's views on popular morality may be just as appropriate a determinant of the law as any other method.

154. Weinrib, *supra* note 68, at 265 (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 90, 171 (1977)).

155. Weinrib, *supra* note 96, at 1298.

convenience limitations on a duty to rescue. Instead, the law might create a broad duty of beneficence to others.[156] The unwillingness of courts and legislatures to actually require rescue even in situations dangerous to the rescuer is "the most serious difficulty for a utilitarian justification of a duty to rescue."[157] The restrictions upon rights are too great.

C. Economics

Like utilitarianism, economics rejects any notion of the supremacy of rights in the relations among citizens and the government.[158] Rights are merely the tools for the allocation of resources.[159] In the economics model, rights are positive, acting as tradable commodities; in the rights/duty model, rights are negative, acting as proscriptions against interference with freedom. Clearly, making the free exercise of one's rights a commodity, the trading of which is encouraged by the State, violates the principles of individual rights.

Some have proposed alternatives to the basic Coasean scheme in attempts to alleviate the restrictions on rights. One author proposes that the law only impose a duty on those who would voluntarily choose it.[160] However, this approach views the freedom of action as just another interest, albeit a weighty one, that can be overcome with the proper incentives. This rule would present two of the problems of a moral duty to rescue: a lack of an objective standard for all actors, and a duty imposed after the fact. Another strategy to satisfy both rights and efficiency might impose a general duty to rescue but compensate rescuers for their efforts. While this reasoning may sound appealing, it still involves imposing an "unchosen obligation" on an individual.[161] Moreover, since rescuers' valuations of their time and effort would be inherently subjective and objectively unknowable

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156. Weinrib, *supra* note 68, at 281.

157. Menlowe, *supra* note 74, at 22.

158. Weinrib, *supra* note 96, at 1299 ("For the economic approach, the function of law is not to declare rights but to lubricate the mechanisms that will put the goods to their most valued uses.").

159. *See id.* ("[T]he assignment of rights. . . is without significance . . . [and] merely marks a point of departure for the bargaining. . . .").

160. Eric H. Grush, Comment, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. PA. L. REV. 881, 899 (1998).

161. *See supra* note 134 and accompanying text.

pre-rescue, it would be impossible to determine appropriate compensation for a required rescue.

D. Social Contract

Of the five politico-philosophical theories presented here, Locke's Social Contract theory comes closest to accord with the rights/duty paradigm. The theory's ultimate position depends on whether Locke is read to favor the preservation of individual liberty over the preservation of the public good. Locke recognizes the importance of liberty as a right inherent in each individual.[162] He also recognizes that liberty is subject to the legislative power of the society.[163] This power must be used to further the common good.[164] The issue then is whether the public good is furthered solely by upholding individual rights. At times, Locke suggests that the public good is distinct and superior to the rights of particular persons.[165] Were that the case, a duty to rescue that furthered the public welfare would be permissible, despite restrictions on individual liberties. However, Locke also suggests that each person has only surrendered the power to punish interference with individual rights, in order that the government can justly make laws and punish offenses.[166] The government is merely an umpire, settling disputes over the rights of its citizens.[167]

Because individuals created the State out of necessity, and because a person's most beneficial condition is freedom, the State is given the minimum level of powers necessary to address deprivations of rights. Under this reading of Locke, citizens would not owe each other any duty of charity. The supremacy of individual rights would

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162. *See* LOCKE, supra note 104, at 393–94 ("Every [person] is born with a . . . *Right of Freedom to* [*one's*] *Person*, which no other [person] has a Power over, but the free Disposal of it lies in [one]self.").

163. *See id.* at 283 ("The Liberty of [one], in Society, is to be under no . . . Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it.") (emphasis omitted); *id.* at 352–53 (noting that one's natural liberty is confined in many ways by the laws of the society).

164. *Id.* at 353.

165. *See, e.g.*, *id.* at 355–56 ("[T]he first and fundamental natural Law, which is to govern even the Legislative it self, is the preservation of the Society, and (*as far as will consist with the publick good*) of every person in it.") (emphasis added and omitted).

166. *Id.* at 323–24.

167. *Id.* at 324.

prevent one citizen from demanding the aid of another, even through majoritarian government force.[168]

E. Liberal-Communitarian

At first blush, Professor Heyman's liberal-communitarian view would also seem to come close to the individual rights perspective. Heyman notes that the continuation of the no-duty rule rests not on outdated judicial opinions but on principles.[169] He recognizes the importance of rights to the duty analysis and the need for reciprocal rights and duties.[170] He also looks to the theoretical foundations of these rights and duties to support his own theory.[171]

Heyman's liberal-communitarian view may be internally consistent, but the sources from which it draws lead to assumptions and characterizations that cannot stand up to the strictures of individual rights and the negative state. First, Heyman relies on Hegel and Locke to show that citizens and the State owe reciprocal duties to each other.[172] This principle would of course violate the primacy of individual rights and the concept of a state as existing solely for protection of those rights. In addition, the extent of the liberal-communitarian rights and duties is unknowable until circumstances occur to trigger their use.

One such duty owed to the State requires that, when the State is unable to fulfill its duty to a citizen to protect that citizen from harm, another citizen, aware of the dangerous situation, is obliged to step in and act for the State.[173] This requirement suggests practical problems that undermine Heyman's theory. First, what level of service must the citizen perform? If one takes the place of state actors, must one assume their risks and employ their techniques? There are several obvious reasons why citizens are not given the same duties and authority as police officers or emergency medical personnel. Furthermore, the citizens formed a government precisely so that the government alone would have the authority to establish laws and enforce them objectively.

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168. *See supra* Part III.A.

169. Heyman, *supra* note 8, at 675.

170. *See supra* text accompanying notes 114 & 122–23.

171. *See* Heyman, *supra* note 8, at 679 (discussing how Locke's social contract supports his theory).

172. *Id.* at 726.

173. *See supra* text accompanying notes 110–12.

The obligation to assist others, and their corresponding right to that assistance, also illustrates a marked contrast to a theory of individual rights. With true individual rights, all rights and their corresponding duties are inherently negative. Heyman's adoption of Locke's social contract and of Hegel's ethical duties to the community also presents a host of line-drawing problems. For example, why would a relationship among citizens "based on interdependence and mutual trust"[174] extend only to rescue in emergencies? Would the duty to preserve one's "community and . . . fellow citizens"[175] require giving money to a poorer member of the community? What about 10,000 poorer citizens? A theory of individual rights holds such considerations beyond the proper scope of the law.[176]

V. APPLICATION OF THE RIGHTS/DUTY PARADIGM TO DUTY TO RESCUE DOCTRINE

Part IV showed that, in contrast to the rights/duty paradigm, several theories that support a general legal duty to rescue another in peril do not employ a proper conception of individual rights and the negative state. It remains to be seen whether the rights/duty paradigm would necessarily reject any duty to rescue. This Part will explore the ways in which a rights/duty paradigm would reorder the duty to rescue doctrine. It begins by examining the misfeasance/nonfeasance dichotomy under the new model. Then, it looks at the language of duty to rescue cases and the extent to which their decisions reflect an implicit consideration of rights and duties. Finally, this Part applies the rights/duty paradigm to the exceptions set out in Part I and deduces whether they would still exist under such reasoning.

A. The Misfeasance/Nonfeasance Dichotomy

The distinction between misfeasance and nonfeasance, widely cited in legal scholarship as the deciding principle among early common law duty to rescue cases,[177] closely parallels the rights/duty paradigm. When one commits an act of misfeasance, one has likely violated the basic duty not to interfere with the freedoms of another (and thus has violated the other's corresponding right not to have his

174. Heyman, *supra* note 8, at 731.
175. *Id.* at 733.
176. *See supra* text accompanying notes 134, 138 & 140.
177. *See supra* text accompanying notes 28–29.

freedom infringed by another). The misfeasor's negative duty can now be described as an affirmative duty to protect the rights of the injured victim. By contrast, nonfeasance likely does not interfere with another's freedoms. Neither a right to rescue nor a corresponding duty to rescue is created.

The correlation between the two principles is not perfect, however. It is possible to have a positive right to commit a misfeasance[178] and a positive duty not to allow a nonfeasance.[179]

Because of this disconnect, the proper method of decision should not be made purely on action or inaction. Instead, the rights and duties of the various parties must be examined.

B. The Common Law Recognition of Rights and Duties

The discussion of early common law cases in Part I illustrated the use of language regarding duties.[180] Such language was not uncommon. What is noteworthy, however, is reasoning that implicitly incorporates the principles of the rights/duty paradigm. For example, in *Buch*, the court implicitly recognizes that a proper legal obligation must be objective and antecedent to the act complained of.[181] It also noted that a victim's need of rescue cannot allow that victim to impose upon another a legal duty.[182] In *Cappier*, the court suggested that basing a law on morality would make it contingent upon the arbitrary whim of the judge,[183] and that a legal duty to aid may only be owed to another individual, not the general public.[184] And in

178. If misfeasance is defined as making another "positively worse off," *see supra* text accompanying note 31, then an act of self-defense that injures an aggressor would be a misfeasance. Such an act would be justified, however, under a rights/duty paradigm. The aggressor, by infringing on the freedoms of the victim, has created a positive right in the victim to the removal of the infringement. (The aggressor would have a corresponding duty to remove that infringement.) Since rights cannot conflict, *see supra* text accompanying note 132, the aggressor would no longer have a right not to be harmed by the victim. Self-defense is a rare example of the lawful use of force by one citizen against another.

179. For an example, see the contracts hypothetical in Part III.B *supra*. Note, however, that in both of these instances, some actor has already altered the base state of negative reciprocal duties.

180. *See supra* text accompanying notes 16, 23–25.

181. Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1898) ("The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform.").

182. *Id.* at 811.

183. *See supra* text accompanying note 21.

184. Union Pac. Ry. Co. v. Cappier, 72 P. 281, 283 (Kan. 1903).

Osterlind, the court stated explicitly that, because "[n]o legal right of the intestate was infringed," the plaintiff could not recover.[185]

Case language supportive of the rights/duty paradigm is not limited to early cases. In *Yania v. Bigan*,[186] the court rejected the plaintiff's claim that the defendant was liable for goading the decedent into jumping into a water-filled pit. The court noted the failure of the defendant's words to "deprive[] [the decedent] of his volition and freedom of choice."[187] It also stated that one cannot impose legal responsibility on another merely for encouraging conduct by the decedent which results in the need for rescue.[188]

Based on the language and reasoning of these cases, certain courts did in fact recognize the significance of corresponding rights and duties. Judges in the early common law era generally understood the primacy of negative rights and duties, even if they just hinted at it in passing or incorporated its principles into another explanation (i.e. the distinctions between misfeasance and nonfeasance or morality and the law). As these examples show, cases that deny a broad duty to rescue generally do not cite policy considerations, morality, or utility. They implicitly acknowledge the right not to have one's freedoms infringed by the imposition of a duty through the conduct of another.

On the other hand, cases that do find a duty to rescue tend to cite all manner of reasons: public policy, morality, foreseeability, and reasonableness, among others. In *Pridgen*, the court imposed a duty of reasonable care, motivated by the public concern for the safety and well-being of others and the ephemeral nature of individual rights and duties.[189] In *Tarasoff*, the court required a psychiatrist to meet a duty of reasonable care to protect foreseeable victims of patients.[190] And in *Soldano*, the court weighed eight separate factors, including foreseeability, moral blameworthiness, and public policy, to determine the existence of a duty.[191] One can deduce from these examples that cases imposing a duty to rescue do not rely on strict

185. Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928), *overruled by* Pridgen v. Boston Hous. Auth., 308 N.E.2d 467, 477 (Mass. 1974) (criticizing the distinction between "misfeasance" and "nonfeasance").

186. 155 A.2d 343, 345 (Pa. 1959).

187. *Id*.

188. *Id.* at 346.

189. *Pridgen*, 308 N.E. 2d at 477.

190. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345–46 (Cal. 1976).

191. Soldano v. O'Daniels, 190 Cal. Rptr. 310, 315–16 (Cal. Ct. App. 1983).

notions of rights and duties, but rather on a combination of factors, each of which is unique to a particular set of facts. Such reasoning is antithetical to the principles of a rights/duty paradigm.

C. Exceptions

Despite the correlation in the previous cases between recognition of the importance of rights and duties and the conclusion that no duty to rescue existed, such a result is not preordained. It has been shown that, when one views the interaction between two individuals after one of those individuals has already acted, positive rights and duties may exist.[192] This sort of view is especially prevalent in the fact patterns of exceptions to the no-duty-to-rescue rule. The following discussion will explore whether and under what circumstances a duty to rescue could exist under a rights/duty paradigm.

The mere existence of a special relationship, without more, would not likely trigger a duty under a rights/duty paradigm. A relationship between *R* and *V* would entail a duty to rescue only if the potential rescuer, *R*, committed some act that created in the victim, *V*, a positive interest in being rescued. Absent a contractual agreement to undertake rescue as part of the relationship, a duty could almost never be imposed, even in relationships traditionally held to involve such a duty.[193]

Under the paradigm, a voluntary undertaking would create a duty to rescue if it included interfering with *V*'s right to be left alone. However, a court could only impose significant damages if *R*'s conduct harmed *V* in some way. This would include further injury to *V* or removing *V* to a place where better help could not be procured. One might also argue that a mere promise, or a rescue attempt just begun, induces reliance in the victim, so as to trigger a positive right in *V* to aid and a positive duty in *R* to provide that aid. The proper result in such a circumstance depends on whether one recognizes reliance as a proper method of altering the negative rights balance.

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192. *See supra* notes 178–79 and accompanying text.

193. *See supra* text accompanying note 38. Duties could not be imposed in these situations because of the inherently negative character of rights and duties. Even though a guest may effectively be under the control of an innkeeper, merely agreeing to rent a room does not infringe upon any of the guest's freedoms. The parent-child relationship may be an exception to this principle, however. In one sense, a parent brings about the existence of a child. Yet for several years, children are incapable of understanding their inherent rights and duties and exercising many of the freedoms adults possess. Since the parent created the child, knowing it would not have the capacity to reason, the parent has the positive duty to care for the child.

The problem with reliance in this context is that it comes dangerously close to allowing *V* to impose a positive duty upon *R* without *R* having objectively harmed any of *V*'s interests. If the law enumerated certain conduct that would essentially "allow" reliance, a duty could justly be imposed in such instances.[194]

Causing negligent injury is a clear-cut case for the paradigm. The negligent injury of *V* by *R* would always involve a duty to rescue, because negligence that puts *V* in need of rescue presupposes that *R* interfered with a negative right of *V*.

The innocent injury case presents an interesting study for the rights/duty paradigm. Suppose a case where *R*'s truck stalled on a bend in an icy road with no fault on his part.[195] Does *R* have a duty to *V*, another traveler on the road? If so, what is the extent of that duty?

Initially, *V* has a negative right not to be harmed. Whether negligently or innocently, *R* placed the truck in the middle of the road, thereby jeopardizing *V*'s right.[196] Consequently, *V* now has a positive right in the sense that *R* has a positive duty to prevent harm to *V*. However, *R*'s duty exists only to the extent that her action has infringed upon *V*'s negative rights. If *V* crashes, but the crash is due to another cause, then *R* has no duty to rescue. In addition, once the danger represented by *R*'s truck is removed, *R*'s positive duty to act for *V* ends.

Whether a third person is under a duty not to prevent rescue is a very close question under the rights/duty paradigm. The central issue is whether *V*'s right not to be harmed entails the right to have potential rescuers act unmolested. In a case like *Soldano*,[197] where a rescuer desires to use an instrumentality owned by the third party, there would be no duty. To hold otherwise would allow someone in

194. This rule would be similar to RESTATEMENT (SECOND) OF TORTS § 323 (1965), *supra* note 43.

195. The fact pattern here draws on Montgomery v. Nat'l Convoy & Trucking Co., 195 S.E. 247 (S.C. 1938).

196. Note that the threat of force infringes one's rights. Putting a gun to another's head to influence that person's behavior limits his lawful freedom of action as surely as if he were physically bound.

197. Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Cal. Ct. App. 1983). For a brief discussion of this case, see *supra* notes 58–63 and accompanying text.

need to impose upon another the positive duty to provide the use of property without consent.[198]

However, a person certainly has the freedom to ask others to act for her benefit. *V* does not violate the rights of *R* or anyone else by asking for a favor (absent coercion). Of course, *V* does not have a positive right to *R*'s help. Meanwhile, the third party has a duty not to interfere with the freedoms of others. The issue is whether the third party's duty not to interfere with *R* can be transferred to *V*. There would be no doubt of the third party's liability if *R* had been contracted by *V* to, say, purchase her antidote to snake venom. Since *V* could be said to have a positive right in the performance of the contract, and *R* a positive duty to act to meet that right, interference by a third party would frustrate this right. Of course, a mere promise by *R* to render aid is likely not enough of an act to create a positive right in *V*. However, if one recognizes reliance as a proper means to alter negative rights, and *V* relied on *R*'s promise to forego seeking help elsewhere, then the third party's duty to *R* would be transferable to *V*.

Finally, the rights/duty paradigm would forbid duties to rescue imposed by statute. Even though duty-to-rescue statutes tend to limit their scope to reasonable action undertaken without peril to the actor,[199] they still impose positive duties on rescuers, without their consent, to act on behalf of another.

CONCLUSION

Perhaps the most remarkable thing about the no-duty-to-rescue rule is that it is still a rule at all. Most scholars embrace the many exceptions to the rule, then ask the courts to continue the trend by applying various subjective factors in their duty "calculations." Should this trend continue, the no-duty rule will lose any character as a principle for decisions; it will merely be the starting point of a judge's reasoning, quickly lost in the discussion of exceptions, interesting facts, and the judge's own feelings about the moral conduct of each actor. The ultimate decision may or may not cite precedent, but it would be filled with independent reasoning regardless. After all, "[t]he question is not whether the law may

198. Imposing a duty here would violate both the maxim that rights cannot conflict and the requirement that laws be applied consistently according to objective principles, rather than varying according to the exigencies of the moment.

199. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519(a) (2002) (enacted 1967).

compromise our independence because it does that all the time. The question is when can it."[200]

By setting out the structure of duty-to-rescue doctrine and the principles on which it was founded, this Note attacks the underlying premise of the preceding quotation. Through an exploration of individual rights and the negative state, an examination of five theories of political/legal philosophy, and the application of a rights/duty paradigm, this Note exposes the shortcomings of prevailing theories of duty-to-rescue doctrine. Ultimately, based upon a proper conception of individual rights and the concept of a negative state, the law should not compromise the independence of individuals by enforcing a legal duty to rescue.

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200. Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957, 963 (2000).