

# Against Samaritan Laws: The Good, the Bad, and the Ugly

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Third Fisherman: Faith, master, I am thinking of the poor  
men that were cast away before us even now.

Master: Alas, poor souls, it grieved my heart to hear  
what pitiful cries they made to help them when,  
well-a-day, we could scarce help ourselves.

William Shakespeare, *Pericles, Prince of Tyre*

## § 1. *Benevolence and Justice in the Classical Liberal Tradition*

“In economic matters,” said Jacob Viner, “benevolence plays but a minor rôle.<sup>1</sup>” This is indeed one key lesson from classical economics, which one may, for example, trace back to the famous butcher comment Adam Smith once made. “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner,” argued Smith, “but from their regard to their own interest.<sup>2</sup>” Self-interest is a fundamental method of analysis in economics, while, on the other hand, as Alfred Marshall noted, feelings of duty are not easily captured by the machinery of economics<sup>3</sup>. Such a way of looking at behaviour, where altruism takes a back seat, was notably defended in the Chicago School of economics by, say, Gary Becker<sup>4</sup>. Though he recognized that people may be moved by altruistic motives, not solely being concerned with their own interests, he nonetheless assumed away such motives. In fact, he explained altruism in terms of economic

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<sup>1</sup> J. Viner, “Adam Smith and Laissez Faire”, *Journal of Political Economy*, Vol. 35, No. 2, 1927, p. 206.

<sup>2</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, I.ii.2, G.ed. p. 27.

<sup>3</sup> Alfred Marshall, *Principles of Economics*, 8th edition, London, Macmillan, 1930, p. 24.

<sup>4</sup> Gary S. Becker, “Altruism in the Family and Selfishness in the Market Place”, *Economica*, New Series, Vol. 48, No. 189, 1981, pp. 1-15.

rationality<sup>5</sup>. Such a way of thinking, moreover, regularly takes an additional step, a normative one, saying that we should not force people to be altruistic. “I find it impossible”, said Frank Knight, “to accept or give meaning to an ethical obligation on the part of the individual to improve society.”<sup>6</sup> Many scholars are uncomfortable with this approach, and understandably so, given that we are fundamentally asked to cast off beneficence. Most common law jurisdictions, however, have rejected duties to perform beneficent actions. For example, bystanders have no duty to rescue others<sup>7</sup>. Nor must you be altruistic in any significant way. There is a notable consensus on this point in the classical liberal tradition that this chapter defends by arguing against Bad Samaritan laws.

Let us start with a simple distinction. Bad Samaritan laws “oblige persons, on pain of criminal punishment, to provide easy rescues and other acts of aid for persons in grave peril.”<sup>8</sup> Good Samaritan laws, conversely, protect against liability people who do indeed rescue others. Today, the law is clear – one is not responsible for what one fails to do. That is, there are no Bad Samaritan laws in most common law jurisdictions<sup>9</sup>. People cannot be held liable for not coming to the rescue of others. There are some exceptions, as Joshua Dressler noted, say when a mother fails to fulfill her special obligations to her child, or when you fail to pay your federal taxes<sup>10</sup>. But overall the law will not punish you for what you fail to do, however morally repugnant your inaction may be. You may, for instance, walk away from a crime in progress, even when intervening would not expose you to grave physical harm. The contrast between common and civil law jurisdictions on that point is striking, and perhaps troubling. Why should there be no duty

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<sup>5</sup> Gary S. Becker, “Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology”, *Journal of Economic Literature*, Vol. 14, No. 3, 1976, p. 818. Likewise, Michael C. Jensen, “Self-Interest, Altruism, Incentives, and Agency Theory”, *Journal of Applied Corporate Finance*, Vol. 7, No. 2, 1994, pp. 40-45.

<sup>6</sup> F. Knight, “Intellectual Confusion on Morals and Economics”, *Int. J. Ethics*, Vol. 45, No. 2, 1935, p. 218.

<sup>7</sup> *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959), *Artiglio v. Corning, Inc.*, 18 Cal.4th 604, 613 (1998), *Williams v. State of California*, 34 Cal.3d 18, 23 (1983).

<sup>8</sup> H. Malm, “Liberalism, Bad Samaritan Law, and Legal Paternalism”, *Ethics*, Vol. 106, No. 1, 1995, p. 4.

<sup>9</sup> One can find, however, some toothless exceptions in Vermont or Minnesota – Vt. Stat. Ann. tit. 12, § 519 (1973), and Minn. Stat. Ann. § 604.05 (West Supp. 1983). In Vermont, for instance, the maximum penalty is a \$100 fine, when, conversely, in civil law jurisdictions, failure to help can lead to a jail sentence.

<sup>10</sup> Most exceptions are linked to special relationships, say, between husband and wife, shipmaster and crew, or employer and employee. Ernest J. Weinrib, “The Case for a Duty to Rescue”, *Yale Law J.*, Vol. 90, No. 2, 1980, pp. 247f. n.7, William L. Prosser, *Law of Torts*, 4th ed., Hornbook Series, 1971, pp. 340-4, and Joshua Dressler, “Some Brief Thoughts (Mostly Negative) About ‘Bad Samaritan’ Laws”, *Santa Clara Law Review*, Vol. 40, No. 4, 2000, pp. 975f.

to rescue endangered persons? In France, Norway, Germany, Poland, Russia, and Italy, for example, we can indeed find statutory requirements to render aid, subject to some conditions. The law does not go as far as saying, “though shalt love thy neighbour as thyself.<sup>11</sup>” But you do have responsibilities in the management of others’ affairs, following the Roman law doctrine of *negotiorum gestio*<sup>12</sup>. The refusal of many neoclassical economists and legal scholars to embrace the forgone conclusion of such a tradition, according to which there is a duty of beneficence, has been widely criticized. This chapter, conversely, explains why there should be no affirmative duty to rescue. Of particular interest to us will be the application of economic theory to the analysis of law.

That the individualism embraced by many classical liberals conflicts with Bad Samaritan laws, we could think, may be a major failing of that liberal tradition. For example, even Knight condemned “excessive individualism”, which he characterized as “the real threat to liberalism<sup>13</sup>”. Why then should we not accept a duty to save drowning kids? Is that not, we could ask, excessive individualism? No, it is not. Should you save drowning kids? Obviously. But it does not follow that there should be a duty to rescue, this chapter will argue. Classical liberalism has established a stark distinction between beneficence and justice. Adam Smith, for instance, said of beneficence that, “It is the ornament which embellishes, not the foundation which supports, the building and which it was, therefore, sufficient to recommend, but by no means necessary to impose. Justice, on the contrary, is the main pillar that upholds the whole edifice.<sup>14</sup>” Such a distinction may seem idiosyncratic, as it is not clear how failing to save a drowning kid is not a matter of justice. I will attempt to explain such a counterintuitive distinction, as well as the role it plays in economic ethics, so that we may better understand this position that is often condemned as egoistic or morally revolting by philosophers and business ethicists alike<sup>15</sup>.

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<sup>11</sup> Mark 12:31.

<sup>12</sup> John P. Dawson, “*Negotiorum Gestio*: The Altruistic Intermeddler I”, *Harvard Law Review*, Vol. 74, No. 5, 1961, pp. 817-65. John P. Dawson, “*Negotiorum Gestio*: The Altruistic Intermeddler II”, *Harvard Law Review*, Vol. 74, No. 6, 1961, pp. 1073-1129. A. D. Woozley, “A Duty to Rescue: Some Thoughts on Criminal Liability”, *Virginia L. Review*, Vol. 69, No. 7, 1983, p. 1274.

<sup>13</sup> Frank H. Knight, “Pragmatism and Social Action”, *Intern. J. of Ethics*, Vol. 46, No. 2, 1936, p. 233.

<sup>14</sup> Adam Smith, *The Theory of Moral Sentiments*, II.iii, London, Henry G. Bohn, 1853, p. 125.

<sup>15</sup> M. Sandel, *What Money Can't Buy*, New York, Farrar, Straus and Giroux, 2013, 244 pp., E. Anderson, *Value in Ethics and Economics*, Cambridge, Harvard University Press, 1993, p. 145, and M. Brennan, “Incentives, Rationality, and Society”, *J. of Applied Corporate Finance*, Vol. 7, No. 2, 1994, pp. 31-9.

We should not enact Bad Samaritan laws, I will argue, but only Good Samaritan laws to protect against liability people who do rescue others. Good Samaritan laws shield those who carry a rescue from being sued if the rescue miscarries, except in cases of gross negligence or recklessness<sup>16</sup>. The objective is to reduce any hesitation bystanders may have about giving assistance to those who need it, following the parable in the Gospel of Luke<sup>17</sup>. Such laws pose no genuine problem, unlike Bad Samaritan laws, which, as affirmative duties, are much more problematic than might be thought. If the objective is one of effective altruism, finding an effective way in which others can be helped, then it might be desirable to enact criminal sanctions for failures to rescue. The goal, however, should not be efficacy, as it should rather be efficiency. That is, we have to consider the consequences of enacting any such duty, which will be the object of this chapter. I first (§2) explain how the just compensation principle can justify Good Samaritan laws. After, (§3) I go over the economic argument against Bad Samaritan laws. This will then permit us to (§4) examine some other arguments against such laws, and to see why Bad Samaritan laws create an unequal system of rescues where some people can buy their way out. In the end, (§5) I defend Smith's distinction between justice and beneficence. I should add that Bad Samaritan laws are normally not enforced in Europe, and therefore the question is not so much whether we should indeed have such rules in common law jurisdictions, but rather to understand the role benevolence plays in the liberal tradition.

## ***§ 2. Good Samaritan Laws – Why Polite People Should Be Protected***

Let us begin with the easier case to justify in the liberal tradition, namely Good Samaritan laws<sup>18</sup>. As Viner explains, many medieval theologians argued that the merit of charity was in its being voluntary, a matter of private conscience, and therefore there used to be

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<sup>16</sup> *Valazquez v. Jiminez*, 798 A.2 51, 63 (N.J. 2002).

<sup>17</sup> Luke 10:30-37.

<sup>18</sup> Some laws concerning reports of crimes to law officials are also known as Good Samaritan laws, mistakenly, like Massachusetts Gen. Laws Ann. ch. 268, § 40, ch. 269, § 18. Conversely, more than 30 states in the United States have passed real Good Samaritan laws providing some degree of immunity to those who call 911 to help someone who is overdosing.

considerable opposition to mandatory tithes within the Church<sup>19</sup>. Subsequently, we can find an enduring tradition of condemning provisions of poor relief under state direction. Such a tradition, of course, has been championed by numerous classical liberals. Social justice, we can hear, should mostly or largely be a matter of private charity. Similarly, altruism and selflessness should voluntarily be assumed by the people. There is, however, a problem of incentives, which, for example, bothered Milton Friedman and ultimately made him endorse some state redistribution in the form of a negative income tax<sup>20</sup>. Many factors can impede private charity, such that the worst-off will not be able to count on the generosity of the best-off. In large communities, for example, individuals can become “anonymous”. Hence, we may all assume that other people will help, while, in fact, no one will – in which case charity fails. This problem has been understood for a long time.

“Often there is more than one reason”, Cicero explained, “for the failure to defend a person in fulfilment of an obligation. People are reluctant to incur enmity or trouble or expense; and again, indifference, laziness, passivity, or concentration on some personal pursuits or activities is a hindrance, so that they allow persons whom they should protect to go without their support.”<sup>21</sup>”

The reluctance to incur legal trouble is one factor that Good Samaritan laws address<sup>22</sup>. One should not be punished for one’s beneficence, at least as far as the law is concerned. Without such a guarantee, if people were liable for their kind-heartedness, one can easily imagine how it could be costly for individuals to engage in everyday acts of benevolence.

Consider a case that happened in Nanjing, China<sup>23</sup>. In 2006, Shoulan Xu, an old woman waiting for a bus, was knocked down and seriously wounded. A young man, Yu Peng, helped her to get to the nearby hospital. Once there, Xu falsely claimed it was Peng who was responsible for her injury. In 2007, a local court ruled that Peng should pay 40 per

<sup>19</sup> Jacob Viner, “The Intellectual History of Laissez Faire”, *J. of Law and Economics*, Vol. 3, 1960, p. 52.

<sup>20</sup> Milton Friedman, *Capitalism and Freedom*, Chicago, University of Chicago Press, 2002, pp. 181, 191.

<sup>21</sup> Cicero, *De Officiis (On Obligations)*, I.28.

<sup>22</sup> For instance, Kan. Stat. Ann. §§65-2891(a) & (d), or N.J.S.A. 2A:62A1, as well as, *Swenson v. Waseca Mutual Insurance Co.*, 653 N.W.2d 794, 798 (Minn. App. 2002).

<sup>23</sup> Fengsen Li, “How to Solve the Moral Dilemma of Helping a Fallen Old Man: An Economic Point of View”, *Business, Management and Education*, Vol. 11, No. 2, 2013, pp. 209f.

cent of the medical charges, though it recognized that neither Xu nor Peng were at fault, and that neither could prove their side of the story. Common sense, the court claimed, was that if Peng was not responsible for Xu's troubles, he should not have offered his help. Therefore, because Peng helped Xu, one could infer that Peng was the person who had injured Xu. The argument, of course, is ludicrous and disregards the burden of proof. However, it shows how good people can expose themselves simply by being considerate.

One can find a similar logic in most jurisdictions of Canada with "apology acts". For the purpose of these statutes<sup>24</sup>, an apology is an expression of sympathy and regret for someone's woes, a statement that one is sorry, or any other actions indicating contrition or commiseration. Being particularly polite, Canadians are prone to offer such apologies, which, some lawyers maintained, could be taken as admissions of fault or liability, for instance when a doctor offers an apology after a failed operation. To counter this practice, apology legislations provide that an apology does not constitute an admission of fault or liability, and that it must not be taken into consideration, nor is it admissible as evidence of fault or liability. Hence, they protect those who only want to offer heartfelt apologies.

If one had to choose between the Chinese and the Canadian rules, it is to be expected that the latter would be preferred. In the Nanjing case, Peng was punished for being a decent human being. Notice an additional point – the court understood his altruism as part of an implicit exchange. Altruism, in that case, becomes a simple way of repaying what one owes to someone else – I help you, because I am responsible for your woes. This is not altruism however. It is about paying one's debts or being liable for one's actions. For an action to be altruistic, it must be a matter of private conscience. The action can be protected, but it cannot be mandatory. Some people may welcome the time of the year when they must pay their taxes, because their money can help some other people, but that is not altruism. In the Canadian case, conversely, the law protected those who are trying to be considerate, which should not lead them to being liable for their kind-heartedness.

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<sup>24</sup> For example, *Apology Act*, S.O. 2009 c. 3, or *Apology Act*, S.B.C. 2006 c. 19.

From a classical liberal standpoint, a Good Samaritan law can be justified by appealing to the just compensation principle<sup>25</sup>. The argument is that we are all better-off if other people can come to our rescue without fear of reprisal, other things being equal. The efficiency of such Good Samaritan laws seems evident enough – they reduce the bargaining costs of rescues, as they remove liability from the equation in most situations.

William Landes and Richard Posner nonetheless wrote that such “statutes are puzzling from an economic standpoint.”<sup>26</sup> For example, a bad Samaritan physician rendering assistance in an emergency will still be entitled to his ordinary fee, which includes his malpractice insurance premium, though the statute will excuse him from liability, except in cases of gross negligence. “Perhaps these statutes are to be explained”, Landes and Posner therefore concluded, “by the political power of the beneficiaries rather than by the community’s interest in promoting efficiency.” That may be so, but the analysis above also suggests that Good Samaritan laws may have a positive activity-level effect on rescues. There will always be strong altruists who will rescue others no matter the costs of the rescues, or give little thought to those costs, but most people are probably mild or weak altruists and may refrain from attempting a rescue if it is too costly to themselves.

Good Samaritan laws increases the supply of altruism in society, and therefore not only are such statutes likely efficient, but they may be morally commendable. It is reasonable to argue that people should not be punished for their beneficence. Does it follow, though, that people should be punished for not being beneficent? As Thomas Scanlon argued, “if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone’s dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so.”<sup>27</sup> It may be morally wrong, but should we punish those who fail to live up to such a standard? Could we use the just compensation principle to say that each of us would be better-off *ex ante* with Bad Samaritan law

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<sup>25</sup> Richard Epstein, *Skepticism and Freedom*, Chicago, University of Chicago Press, 2003, p. 100.

<sup>26</sup> William M. Landes and Richard A. Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism”, *Journal of Legal Studies*, Vol. 7, No. 1, 1978, p. 127.

<sup>27</sup> Thomas Scanlon, *What We Owe to Each Other*, Cambridge, Belknap Press, 1999, p. 224. Similarly, Peter Singer argued that, “If it is in your power to prevent something bad from happening, without sacrificing anything nearly as important, it is wrong not to do so.” Peter Singer, *The Life You Can Save*, New York, Random House, 2010, p. 15.

compelling people to save others when the costs to themselves are minimal? No, I will argue, because we have to consider the consequences of enacting any such duty to rescue.

### **§ 3. *Bad Samaritan Laws – The Economic Case Against a Duty to Rescue***

We now turn to a more difficult question. Bad Samaritan laws impose a duty to rescue, and a failure to comply constitutes a failure-to-act offense, as Dressler noted<sup>28</sup>. They are affirmative duties, such that you may be liable for not coming to the aid of others<sup>29</sup>. These laws involve a special statutory-duty to act in a certain way, much like there is a federal statute requiring people to pay their taxes by a specified date<sup>30</sup>. In some cases, people are indeed responsible for what they fail to do, as is clear, for instance, in English law. One can find an example in *Rex v. Pittwood* where a railroad gatekeeper was found guilty of manslaughter after failing in his duty to put back down the gate after a cart had passed at a level crossing<sup>31</sup>. He went off to lunch, and meanwhile a train collided with another cart, killing the train driver. The gatekeeper was contractually obligated to close the gate, and, therefore, in this case, he was liable for his omission. But had anyone else been on the scene, facing a version of the famous trolley problem in which one could see that someone would die unless the gate was closed, one could have walked away without any criminal liability<sup>32</sup>. This section explains how we calculate negligence in tort law, which, in turn, will permit us to contrast effective altruism, embracing a duty to rescue, with the opposite conclusion defended by law-and-economics practitioners like Posner.

Consider a troubling case – the murder of Catherine Genovese, a 28 years old New York native. In 1964, in Queens, Kitty, as she called herself, was attacked and murdered while about thirty-eight persons witnessed the attack behind the blinds of their houses without

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<sup>28</sup> Joshua Dressler, “Some Brief Thoughts (Mostly Negative) About ‘Bad Samaritan’ Laws”, *Santa Clara Law Review*, Vol. 40, No. 4, 2000, p. 976.

<sup>29</sup> R. Epstein, *Cases and Materials on Torts*, 9th edition, New York, Wolters Kluwer, 2008, pp. 563-644.

<sup>30</sup> 26 U.S.C. § 7203 (1999) – Willful Failure to File Return, Supply Information, or Pay Tax.

<sup>31</sup> *Rex v. Pittwood*, 19 TLR 37 (1902).

<sup>32</sup> *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, 1027 (H.L.). “And when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person’s assistance. There may be a moral duty to do so, but it is not practical to make it a legal duty.”

offering any help or calling the police. The whole incident lasted for more than half an hour. This is an obvious example of failed altruism. Surrounded by so many people, we could think, no one should be abandoned like this, and for that reason it might be fitting to impose criminal sanctions on those who are guilty of such “wrongful not-doing” deeds.

There are many reasons why we might want to reject a duty to rescue, but for now let us only examine how such a duty can be defeated in economic terms. My claim is that there is a conflict between effectiveness and efficiency. Since Bad Samaritan laws are inefficient, and that efficiency should be preferred to effectiveness, we should not support such laws, which, what is more, may not even be effective as some people have assumed.

We may begin by summarizing the case for Bad Samaritan laws being effective. For example, effective altruism is defined as “the project of using evidence and reason to figure out how to benefit others as much as possible, and taking action on that basis.”<sup>33</sup> Much like the economic analysis of torts championed by Posner, this approach commonly associated with Peter Singer is rooted in the utilitarian tradition. Unlike many law-and-economics practitioners who oppose Bad Samaritan laws, however, effective altruism defends a duty to help others. Why do these theories arrive at different conclusions when they both wish to maximize the welfare of everyone? One might recall that Jeremy Bentham did endorse a duty of easy rescue<sup>34</sup>, and so did William Godwin, one of the first exponents of anarchism, as he argued for a “system of disinterested benevolence”, in which everyone would be required “to seek the good of the whole” in order to maximize the utility of all<sup>35</sup>. Indeed, many supporters of Bad Samaritan laws have emphasized its effectiveness – the desired end will be attained. If criminal liability is attached to one’s failure to rescue strangers in danger, when the rescue is not too risky, then we might expect that more rescues will take place, and therefore lives will be saved.

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<sup>33</sup> William MacAskill, “Effective Altruism: Introduction”, *Essays in Philosophy*, Vol. 18, No. 1, 2017, p. 2.

<sup>34</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Oxford, Clarendon Press, 1907, xvii.l.xix, p. 323, “why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?”

<sup>35</sup> William Godwin, *Enquiry Concerning Political Justice and Its Influence on Morals and Happiness*, Vol. 1, London, J. Watson, 1842, pp. 200-208.

Intuitively, we could think that the resulting distribution of costs is positive for Bad Samaritan laws. Recall that such laws impose a duty of easy rescue. The law in Vermont, for example, reads, “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.” The law does not ask to put yourself in danger. You only have to intervene when you deem it safe.

In the *Genovese* case, for instance, simply calling the police, or stepping outside with a baseball bat might have been sufficient to stop the attack. In such cases, therefore, it might be beneficial to impose a duty to rescue. The argument is tempting. However, it is not clear that this is the right approach economically. To understand why, we should examine the economics of liability for negligence, beginning with these three variables:

(*B*) Burden – i.e. the costs of the precautions taken to prevent the accident.

(*P*) Probability – i.e. the probability of an accident happening.

(*L*) Loss – i.e. the magnitude of the accident if it happens.

Judge Learned Hand of the Court of Appeals for the Second Circuit offered what is now known as the Hand Formula to establish whether a potential injurer is negligent –  $B < PL$ . That is, in determining the level of appropriate care, courts should consider not only the cost of the accident, but its probability as well<sup>36</sup>. For there to be no negligence the product of  $PL$  must be inferior to  $B$ <sup>37</sup>. Let us pause for a moment and think about how this formula could justify Bad Samaritan laws. If one can prevent a serious harm to fall on someone else, assuming that the cost of the rescue is trivial while the cost of the accident is high, is it not odd that common law jurisdictions do not make people liable for walking away? It would certainly seem so. The case proponents of effective altruism

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<sup>36</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>37</sup> As Richard Posner explains, the Hand Formula should be understood in marginal terms, such that “expected accident costs and accident prevention costs must be compared at the margin, by measuring the costs and benefits of small increments in safety and stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety.” Richard A. Posner, *Economic Analysis of Law*, 8th edition, New York, Wolters Kluwer, 2011, pp. 214f. See also, Thomas M. Scanlon, *What We Owe to Each Other*, Cambridge, Harvard University Press, 1998, p. 208, who rejects the probability condition.

make for a duty to rescue enforceable by tort damages and criminal sanctions therefore seems sound. This is an illusion, I will demonstrate, as Bad Samaritan laws are likely inefficient compared to our nonliability alternatives and perhaps even regrettable morally.

Let us turn to the well-known trolley problem, as recounted by Judith Jarvis Thomson<sup>38</sup>. You drive a trolley, when suddenly the brakes fail. You must decide whether to continue straight and kill five persons or turn and kill one. The correct result, Thomson argues, would be to save four lives by turning, and we certainly agree. To better understand the dilemma, however, it is useful to think not only about morality, but also about tort liability. There are three notable options, whether you, the driver of the trolley, are liable for the impending loss of lives, which, following Epstein<sup>39</sup>, we may illustrate as follows.

**Table 1. Results of Alternative Liability Rules for the Trolley Problem**

	<i>Not liable</i>	<i>Liable if you deviate</i>	<i>Liable either way</i>
<i>B</i> – Burden	Decreases	Increases	Increases
<i>P</i> – Probability	Increases	Decreases	Decreases
<i>L</i> – Loss	Increases	Increases	Decreases
Explanation	This option does not incentivise you to maintain your trolley or to deviate from your original course.	This option creates a wedge between private and social costs, as it is better for you to kill five.	This option gives you both the incentive to turn as well as to maintain your trolley.

In this case, then, liability either way gets us the right outcome. Why is it not so with Bad Samaritan laws? To make one liable in order to overcome one's reluctance to save others would seem to increase value<sup>40</sup>. The main problem, as I will explain, is that we cannot use our intuitions about negative duties and transpose them to a theory of positive duties. These two sorts of duties require different kinds of analyses – especially as we examine the burden and the probability involved in rescues. The trolley problem is about

<sup>38</sup> Judith Jarvis Thomson, "Killing, Letting Die, and the Trolley Problem", *The Monist*, Vol. 59, No. 2, 1976, pp. 204-17.

<sup>39</sup> Richard Epstein, *Skepticism and Freedom*, Chicago, University of Chicago Press, 2003, p. 102.

<sup>40</sup> Richard A. Posner, *Economic Analysis of Law*, 8th edition, New York, Wolters Kluwer, 2011, p. 242.

misfeasance. It is about your responsibility in actively killing some individuals. You command the trolley that is about to harm other people. A duty to rescue, on the other hand, is about nonfeasance. You have to decide whether you will help others. There is no denying that inaction may be morally repugnant in some instances. It is not evident, however, that imposing extensive affirmative duties is justified by our moral disapproval, especially since the overall distribution of costs for Bad Samaritan laws may be negative.

The next section will offer moral arguments against a duty to rescue, but we may already introduce the economic arguments. Let us imagine that Bad Samaritan laws are indeed effective, as they may well be at least to a certain extent<sup>41</sup>. The problem with efficacy is that it does not consider the consequences of realizing a specific objective. If someone drowns near a crowded beach with one hundred potential rescuers<sup>42</sup>, then we can expect that the costs of prosecuting all these persons will be high. We would have to take into account the costs of investigating, which might also be high given that the criminal responsibility would have to be proven beyond reasonable doubt<sup>43</sup>. All the resources that would be spent on investigating and prosecuting bad Samaritans could be employed in a much more efficient way to prevent some of the accidents to ever happen. Rather than to prosecute bystanders at the beach, for example, we could hire a lifeguard. Rather than to prosecute the thirty-eight witnesses to the Genovese murder, we could hire a police officer who would walk around the neighbourhood, or even install streetlamps to make it safer to walk at night. This would not only save lives, but also give jobs to a few people, say lifeguards and paramedics, without having to put anyone in jail. The point is that the resources necessary to incite altruism might be better employed in a different way if our primary objective is to save lives. Consequently, our first argument would go as follows.

- (1) Inefficiency – given the costs of a liability rule, we would be better-off to invest in other ways to save lives that would not have people being sent to jail.

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<sup>41</sup> R. Hansen, “The Efficient Duty to Rescue”, *Intern. R. of Law & Econ.*, Vol. 15, No. 2, 1995, pp. 141-50.

<sup>42</sup> *Stockberger v. United States*, 332 F.3d 479, at 481 (7th Cir. 2003).

<sup>43</sup> Joshua Dressler, “Some Brief Thoughts (Mostly Negative) About ‘Bad Samaritan’ Laws”, *Santa Clara Law Review*, Vol. 40, No. 4, 2000, p. 985. A. D. Wozzley, “A Duty to Rescue: Some Thoughts on Criminal Liability”, *Virginia Law Review*, Vol. 69, No. 7, 1983, p. 1277.

I should add that the question of efficiency should be understood in Marshallian and not in Paretian terms, nor in the more elaborate Kaldor-Hicks understanding of efficiency. That is, the question is not whether some individual people will be made better-off by Bad Samaritan laws. Any policy will benefit at least some people. As Epstein noted, “if one considers the low costs of prevention to *B* of rescuing *A*, and the serious, if not deadly, harm that *A* will suffer if *B* chooses not to rescue him, there is no reason why the *Carroll Towing* formula”, namely the Hand formula, “or the general rules of negligence should not require, under pain of liability, the defendant to come to the aid of the plaintiff.<sup>44</sup>” In other words, Bad Samaritan laws may be Kaldor-Hicks efficient in some cases, especially if we only consider the rescuer and the rescuee. Without transaction costs, the two parties would indeed have made the exchange themselves. Bad Samaritan laws would then overcome the inability of the parties to form a mutually beneficial contract under conditions of emergency – where the transaction costs would be too high.

One can understand, however, that the costs of Bad Samaritan laws should not solely be assessed between the two parties. We should rather consider whether the law will be an overall economic improvement, and how it will fare compared to some alternative policy. The total gains must be larger than the total costs, including the costs of imprisoning all cowards and schmucks unfortunate enough to get caught and not rich enough to get off.

It could be retorted that there might be diminishing marginal returns for instance to hiring professional rescuers. If our choice is between hiring a lifeguard and imposing legal penalties on bad Samaritans at the same cost, then the former may be preferable. But once we already have several lifeguards, it might be that adding another does not offer greater lifeguard coverage, while using Bad Samaritan laws to incentivize fellow swimmers to help others out of difficulties does offer a meaningful reduction in drowning risk<sup>45</sup>. That may be so, and yet we may notice that this argument implies imposing a burden on the general population that may exceed the benefits in terms of the lives saved.

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<sup>44</sup> Richard Epstein, “A Theory of Strict Liability”, *Journal of Legal Studies*, Vol. 2, No. 1, 1973, p. 190.

<sup>45</sup> I am grateful to Gideon Elford for this argument – 76th Annual Midwest Political Science Association (MPSA) Conference, Session ‘Charity and Justice’, April 8, 2018, Chicago.

A second problem, then, is that as soon as we assume that people's lives are to be saved by altruistic bystanders, it is in the interest of those running the public security system to make more and more people altruistic, up to a point where we institutionalize altruism, making it mandatory – and, one could add, unidentifiable since altruism must be a matter of private conscience. This may lead us to what David Friedman has called the “efficiency of inefficient punishment”, that is, a system in which large amounts are spent either “trying to appropriate other people's human capital” or “trying to keep their human capital from being appropriated—rent seeking with large stakes and large costs.<sup>46</sup>” In other words, rather than investing in preventive measures that would save lives, we would use liability rules to make people act as, say, lifeguards or paramedics, while some people will rather spend a lot of money so as not to have to be good Samaritans, for example by hiring good lawyers or buying a private beach. Such a system of tort liability would be inefficient – it would force everyone to be the unwilling insurers for the risky behaviour or others, as Malm noted<sup>47</sup>, leading to a socialized scheme of risk management.

(2) Rent seeking – a regime of liability for failure to rescue may have to spend large amounts in order to actually appropriate the capital of ordinary people.

Consider prospective duties of beneficence. Recently, Chiara Cordelli argued that agents have “prospective duties” to “progressively acquire capacities those agents have never possessed that would enable them to perform beneficent actions in the future<sup>48</sup>”. For example, people may have to take swimming lessons to be able to save drowning kids. In this case, one would not be off the hook if one were to fail to save a drowning kid because one lacks the capacity to swim. One has a duty to acquire the capacity to enable one to fulfill one's moral duty to save others. Such a proposal, though, would require everyone to become, say, lifeguards, which, again, would be inefficient. Bad Samaritan laws currently do not go that far. But it seems that for them to be effective they must

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<sup>46</sup> David Friedman, *Hidden Order*, New York, HarperBusiness, 1996, p. 311.

<sup>47</sup> H. Malm, “Liberalism, Bad Samaritan Law, and Legal Paternalism”, *Ethics*, Vol. 106, No. 1, 1995, p. 5. Also, A. D'Amato, “The ‘Bad Samaritan’ Paradigm”, *Northwestern U. Law Rev.*, Vol. 70, 1976, pp. 798-812, and T. Benditt, “Liability for Failing to Rescue”, *Law and Philosophy*, Vol. 1, 1982, pp. 391-418.

<sup>48</sup> C. Cordelli, “Prospective Duties and the Demands of Beneficence”, *Ethics*, Vol. 128, No. 2, 2018, p. 375.

reduce the probability of a loss resulting from an accident, and therefore there is indeed an incentive for these laws to make people spend more on their capacity to rescue others.

Third, it is not clear in how many cases Bad Samaritan laws will even be efficient, following the work of Landes and Posner on the negative activity-level effect of such laws<sup>49</sup>. One problem, as Posner explains, is that these laws “would also make it more costly to be in a situation where one might be called upon to attempt a rescue, and the added cost would presumably reduce the number of potential rescuers – the strong swimmer would avoid the crowded beach.<sup>50</sup>” A problem with failure-to-act offenses is that they can make some potential rescuers flee from the scene so as not to be held liable. It is true that genuinely altruistic individuals would be unaffected. Yet if Bad Samaritan laws make it costlier to be in a situation where one may need to rescue others, or to be seen in such a situation, then such laws may be ineffective given their advocated purpose.

(3) Negative activity-level effect – a liability rule will drive away some potential rescuers from dangerous areas, which, in turn, will make it less likely that victims will be found and then rescued<sup>51</sup>.

It would be a mistake for our understanding of Bad Samaritan laws to take the number of potential rescuees as constant. Whereas Good Samaritan laws probably have a positive activity-level effect on rescues, increasing the number of altruists, Bad Samaritan laws may well have the opposite effect. Following Robert Lucas, we know that “any change in policy will systematically alter the structure of econometric models.<sup>52</sup>” There is indeed a fundamental distinction between the situation prior to a policy change and the estimated as well as the true situation that will prevail after that change. We must consider the number of potential rescuers when evaluating Bad Samaritan laws. One could retort that there is little evidence to suggest that such laws would result in fewer potential

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<sup>49</sup> William M. Landes and Richard A. Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism”, *Journal of Legal Studies*, Vol. 7, No. 1, 1978, pp. 119-124.

<sup>50</sup> Richard A. Posner, *Economic Analysis of Law*, 8th edition, New York, Wolters Kluwer, 2011, p. 242.

<sup>51</sup> William M. Landes and Richard A. Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism”, *Journal of Legal Studies*, Vol. 7, No. 1, 1978, pp. 119-124.

<sup>52</sup> Robert E. Lucas, Jr., “Econometric Policy Evaluation: A Critique”, *Carnegie-Rochester Conference Series on Public Policy*, Vol. 1, 1976, p. 41.

Samaritans. Insofar as these laws are supposed to apply to easy rescue cases, where the burdens of saving others are not great, it is not obvious that it would be a prudent strategy to go out of one's way to avoid those costs if doing so itself involved considerable costs.

We may briefly add another point. There are two classes of people that Bad Samaritan laws may deter from rescuing others, namely weak altruists and professional rescuers. First, a regime of liability for failure to rescue, Landes and Posner argued, would make it impossible for rescuers to prove that their motivation was altruistic, and thus it would negate a possible reward of rescues, that is, public recognition. Second, and more importantly, "Professional rescue firms whose entire income depended on compensation for rescue services would be diverted to other activities since there would be no way for them to charge for their rescue."<sup>53</sup> This would not be true, though, if the most common form of samaritanism consists in calling on the aid of professional services, say by calling the police or for medical aid. Yet if it is true, as Landes and Posner suspect, say for crises demanding immediate action, this could create additional problems. We may indeed expect that professional rescuers are generally better at rescuing people than amateurs. Therefore, it may also be appropriate to examine the quality of the rescues in a liability regime – for example, are there more broken ribs under a system of Bad Samaritan laws?

(4) Quality of rescues – professional rescuers may be driven out of their business by a liability rule, which may, in turn, lower the quality of rescues that would then be provided by amateurs.

This is certainly not the strongest argument against Bad Samaritan laws, although it has been a rather controversial question, for example in *Van Horn v. Watson*<sup>54</sup>. In any case,

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<sup>53</sup> William M. Landes and Richard A. Posner, "Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism", *Journal of Legal Studies*, Vol. 7, No. 1, 1978, p. 122.

<sup>54</sup> *Van Horn v. Watson*, 45 Cal. 4th 322, 197 P.3d 164, 86 Cal. Rptr. 3d 350 (2008). "In this case, defendant Lisa Torti removed plaintiff Alexandra Van Horn from a vehicle involved in an accident and, by so doing, allegedly caused Van Horn to become paralyzed. In the resultant suit for negligence, Torti argued that she had provided 'emergency care at the scene of an emergency' and was immune under section 1799.102." In California, the Health and Safety Code, section 1799.102 states that, "No person who in good faith, and not for compensation, renders emergency care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission." In a controversial decision, the California Supreme Court understood section 1799.102 "to immunize from liability for civil damages any person who renders

the negative activity-level effect would presumably only hold true for a strong Bad Samaritan law, for example one with a jailtime penalty. The above economic arguments against a regime of liability for failure to rescue, then, could be summarized as follows, assuming that ( $B'$ ) is the costs for bystanders to be involved in rescues, ( $P'$ ) is the probability of a rescue happening, and ( $L'$ ) is the magnitude of the accident if it happens.

**Table 2. Results of Alternative Rules for Rescue Problems**

	<i>Weak Bad Samaritan Law – say a \$100 fine like in Vermont</i>	<i>Strong Bad Samaritan Law – say a criminal sanction with jailtime</i>	<i>Preventive Measures of Rescue – say hiring lifeguards</i>
$B'$ – Burden	Slightly increases	Increases	Decreases
$P'$ – Probability	Negligible effect	Possibly decreases	Increases
$L'$ – Loss	Negligible effect	Possibly increases	Negligible effect
Explanation	This option can have a negligible effect on rescues at best, given the limited penalty attached to failures to rescue.	This option may have the paradoxical effect of causing some people to flee the scene of easy rescues, while others may put themselves in danger.	This option shifts the cost of rescues from the bystanders to some professionals, which increases the probability of a rescue happening.

The economic argument is that a weak Bad Samaritan law will mostly be symbolic, while a strong law will potentially be ineffective, if there it produces a negative activity-level effect on rescues, or inefficient, if it incites some people to put themselves in danger in order to avoid the jailtime penalty for failures to rescue. In such a case, we might provisionally conclude, preventive rescue policies may be more attractive economically. We should also understand that our objective should not be to maximize rescues, but to save lives. These objectives are not the same. It might be beneficial to invest in measures that will limit the number of cases where people will have to be saved in the first place – for example, by installing streetlights in a dangerous park, dedicated bicycle lanes for

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emergency medical care”, and then restricted the meaning of “emergency medical care” to exclude many acts of rescue, including the act the defendant performed. The California legislation reversed this ruling.

some streets, or shark nets around some beaches. Such an approach would likely be more cost-effective than prosecuting all bad Samaritans, and potentially jailing some of them.

#### **§ 4. Ugly Samaritan Laws – The Moral Case Against a Duty to Rescue**

Consider *Buch v. Armory Manufacturing Co.*<sup>55</sup>, a case of affirmative duty. The plaintiff, an eight years old kid, trespassed in the defendant's mill when weaving machinery was in operation. An overseer told the kid to leave the premises, which he did not do, and subsequently his hand was crushed in a machine. The court ruled that since the kid was a trespasser, the defendant owed him no other duty than to do no wrong. There was no legal duty to protect against a wrong, and, in fact, it was the kid who was liable for any damage he may have caused to the machinery by having his hand crushed. This happened at the end of the nineteenth century, but nothing much has changed on that front. One may think this is an unfortunate remnant of a less civilized age, though we may want to resist such an intuition. What would happen if we were to enact a Bad Samaritan law? Let me go over a few points, which will explain why the ethical individualism endorsed by many scholars is not as farfetched as one could think, legally and morally. This section highlights five objections to Bad Samaritan and what I call Ugly Samaritan laws.

First, we may notice how Bad Samaritan laws could buttress inequality in rescues, such that the costs of these laws would mostly fall on the worst-off. Indeed, the more fortunate can simply make sure not to be in any position where they may have to save other people.

(5) Inequality – Bad Samaritan laws may create a two-tier system of rescues where more fortunate people can buy their way out of the system, say by hiring a good lawyer *ex post*, so as not to be found guilty, or by buying a private beach *ex ante*, so as not to even be in a position where they may have to save others.

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<sup>55</sup> *Buch v. Armory Manufacturing Co.*, 44 A. 809 (N.H. 1897).

Bad Samaritan laws might especially be problematic in terms of inequality if we use them as an argument to move away from preventive measures that more specifically benefit the worst-off. Classical liberals may also point out that such laws would permit the state to commandeer the destiny of individuals, making them the unwilling rescuers of anyone.

(6) Autonomy – Bad Samaritan laws will interfere with the private sphere of individuals, that is, with the domain over which they should be sovereign<sup>56</sup>.

Loren Lomasky, conversely, endorsed a “Minimally Decent Samaritan” law, as he noted that, “Individuals acting in their private capacity can rightfully be required to make provision to others when one’s own project pursuit is not thereby substantially impaired but where that which is provided is crucial to the welfare of the beneficiary.<sup>57</sup>” From a classical liberal point of view, we may expect that many will disagree. That something is “crucial to the welfare of the beneficiary” is much too permissive for a criminal or a liability rule. We may agree with John Stuart Mill’s second principle of conduct – “each person’s bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation.<sup>58</sup>” Yet such a principle should not necessarily make us endorse a system of liability for failure to rescue, as rather a public system of police and law enforcement. In any case, public investment in preventive measures would be more acceptable from a liberal point of view in terms of liberty and equality than a system of Bad Samaritan law.

At this point, a cynical observer might suggest that the real function of Bad Samaritan laws is not to save lives, but to impose a net cost on selfish and coward people who would not attempt easy rescues, and who are not fortunate enough to bypass these laws. They are retributive in nature. This may be a fair conclusion if, as David Friedman argued, “Legal rules are to be judged by the structure of incentives they establish and the

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<sup>56</sup> F. Knight, “Ethics and Economic Reform. I”, *Economica*, New Series, Vol. 6, No. 21, 1939, p. 5 – “*all relations between men ought ideally to rest on mutual free consent, and not on coercion, either on the part of other individuals or on the part of ‘society’ as politically organized in the state.*”

<sup>57</sup> Loren Lomasky, *Persons, Rights, and the Moral Community*, Oxford, Oxford U. Press, 1987, p. 128.

<sup>58</sup> John Stuart Mill, *On Liberty*, Oxford, Oxford University Press, 2008, p. 83.

consequences of people altering their behavior in response to those incentives.<sup>59</sup> Indeed, if the objective is to save lives, we should rather adopt a preventive mindset. It would be more efficient. But the objective of Bad Samaritan laws may not be to help those who need help, as rather to express our moral disapproval of selfish and coward people. That is, the objective may be to punish those who act in a morally culpable manner<sup>60</sup>. This is not a strong moral argument for enacting a duty to rescue. It is just a way to signal blameworthiness, which, from a liberal point of view, should better be left to public condemnation. Our seventh and perhaps the strongest argument therefore goes as follows:

(7) Retributive nature – Bad Samaritan laws are retributive in nature, as their main function is to impose a cost on those who do not attempt easy rescues.

The ugly side of Bad Samaritan laws, paradoxically, is that they are not incentives for altruism. They rather promote vindictiveness, such that if you are not already a good Samaritan, then you are potentially to be jailed, or at least fined – provided you are caught and found guilty of nonfeasance. We may therefore disagree with Hanoch Dagan that these laws promote altruism<sup>61</sup> – the rationale for the law may be altruistic, but its effect on society would be completely different. We would be unable to identify the altruism the law proposes to uphold, and, in fact, imposing altruism coercively is as much self-defeating as trying to buy friendship<sup>62</sup>. It cannot be done. As Becker noted, given that a person (*h*) is effectively altruistic toward another (*w*), “‘Altruistic’ means that *h*’s utility function depends positively on the wellbeing of *w*, and ‘effectively’ means that *h*’s behaviour is changed by his altruism.<sup>63</sup>” A Bad Samaritan law would make the effective condition of altruism unobservable, as *h*’s behaviour may rather be changed by, say, the criminal sanctions, or the fine, he could incur were he to walk away from an easy rescue.

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<sup>59</sup> David Friedman, *Law’s Order*, Princeton, Princeton University Press, 2000, p. 11.

<sup>60</sup> Joshua Dressler, “Some Brief Thoughts (Mostly Negative) About ‘Bad Samaritan’ Laws”, *Santa Clara Law Review*, Vol. 40, No. 4, 2000, p. 980.

<sup>61</sup> Hanoch Dagan, “In Defense of the Good Samaritan”, *Michigan Law R.*, Vol. 97, No. 5, 1999, pp. 1167ff.

<sup>62</sup> Michael J. Sandel, *What Money Can’t Buy*, New York, Farrar, Straus and Giroux, 2013, pp. 93-6.

<sup>63</sup> Gary S. Becker, “Altruism in the Family and Selfishness in the Market Place”, *Economica*, New Series, Vol. 48, No. 189, 1981, p. 1.

Bad Samaritan laws accordingly make altruism indistinguishable. As Landes and Posner noted, “imposition of liability would reduce the supply of a moral value, altruism.”<sup>64</sup> For an action to be altruistic, it must be a matter of private conscience, which would no longer be possible to identify under a Bad Samaritan regime. As Dagan explained, a duty to rescue is a “form of institutionalized limited altruism”<sup>65</sup>, but this is an oxymoron. Medieval theologians who argued for the merit of charity over mandatory tithes made a similar claim – one cannot institutionalize charity, as it would be self-contradictory. More recently, Epstein argued that, “It is the intention (or motive) that determines the worth of the act”, and therefore, he added, “the expansion of the scope of positive law could only reduce the moral worth of human action.”<sup>66</sup> By imposing an affirmative duty to rescue, we use the law to signal our disapprobation of those who would flee the scenes of easy rescues. We do not stand for a society in which altruism is esteemed, but rather we use the law to root out bad Samaritans, which is self-defeating because we also extinguish altruism in the process – or, more precisely, we make altruism unidentifiable for rescues.

Another reason would go as follows – one of the main assumptions of neoclassical economics is that people know their own interest better than any government officials may do, at least in the vast majority of cases<sup>67</sup>. Such an assumption, moreover, is a cornerstone of common law. “There is no safer rule”, said the Supreme Court of Maine in 1871, “than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital.”<sup>68</sup> Now, that people generally know better than the state what is good for themselves is not necessarily something we should welcome. If not getting involved in a rescue costs nothing, as Anthony Woosley noted, “then not getting involved is the most prudent line to take.”<sup>69</sup> Hence, it seems that it is in no one’s interest to rescue others, absent a Bad

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<sup>64</sup> William M. Landes and Richard A. Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism”, *Journal of Legal Studies*, Vol. 7, No. 1, 1978, p. 122.

<sup>65</sup> Hanoch Dagan, “In Defense of the Good Samaritan”, *Michigan Law R.*, Vol. 97, No. 5, 1999, p. 1168.

<sup>66</sup> Richard Epstein, “A Theory of Strict Liability”, *J. of Legal Studies*, Vol. 2, No. 1, 1973, p. 200.

<sup>67</sup> Paul A. Samuelson, “Consumption Theory in Terms of Revealed Preference”, *Economica*, New Series, Vol. 15, No. 60, 1948, pp. 243-53.

<sup>68</sup> *Opinion of the Justices*, 59 Me. 598 (1871).

<sup>69</sup> A. D. Woosley, “A Duty to Rescue: Some Thoughts on Criminal Liability”, *Virginia Law Review*, Vol. 69, No. 7, 1983, p. 1277. See also the interesting case discussed by H. M. Malm, “Bad Samaritan Laws: Harm, Help, or Hype?”, *Law and Philosophy*, Vol. 19, No. 6, 2000, pp. 732f.

Samaritan law, or absent a special statutory-duty. But that conclusion is manifestly wrong, since people, after all, do rescue others. As Epstein said, “right now the balance looks about right: forest fires, floods, children down wells—all evoke tremendous outpourings of organized assistance even when the chances of success are tiny relative to the costs involved.<sup>70</sup>” It would be a mistake, then, to transpose the imagined attributes of the economic man, a narrowly self-interested agent, to real people, most of whom are actually decent Samaritans. The fact is that, except for some completely distasteful or incompetent persons, most people will save drowning children. There is no evidence that we need Bad Samaritan laws in common law countries, compared to civil law countries.

(8) Altruism – absent a regime of liability for failure to rescue, most people will attempt to rescue and help others, that is, “since the cost is small and the benefit great,” Landes and Posner explained, “altruism should be sufficient to motivate rescue without legal intervention.<sup>71</sup>”

The critics of liberalism may have criticized its atomistic individualism, which “tends to dissolve traditional human ties and to impoverish social and cultural relationships”, as Alasdair MacIntyre argued<sup>72</sup>. But that critique has probably been overstated<sup>73</sup>. Help for disaster victims is one heartening feature of our modern liberal societies. Again, we go back to what is perhaps the core argument for Bad Samaritan laws – they punish bad people, or, at least, people we would condemn as blameworthy, since they refuse to help. Bad Samaritan laws are legal attempts to correct what is fundamentally a moral problem, namely the self-centeredness, wickedness, or foolishness of a few people. It is, however, a clumsy way to correct that problem, and, one might add, a dangerous trend if criminal sanctions are attached to any immoral or otherwise offensive but not harmful demeanour.

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<sup>70</sup> Richard Epstein, *Skepticism and Freedom*, Chicago, University of Chicago Press, 2003, p. 101.

<sup>71</sup> William M. Landes and Richard A. Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism”, *Journal of Legal Studies*, Vol. 7, No. 1, 1978, p. 127.

<sup>72</sup> Alasdair MacIntyre, “Nietzsche or Aristotle?”, in Giovanna Borradori (ed.), *The American Philosopher*, Chicago, University of Chicago Press, 1994, p. 143.

<sup>73</sup> Herbert A. Simon, *Administrative Behavior*, 4th edition, New York, Free Press, 1997, p. 302.

Finally, we must consider the question of causation. The distinction between misfeasance and nonfeasance is central in common law<sup>74</sup>. Such a distinction, though, is questioned by Bad Samaritan laws as they are moved by a certain theory of negligence. As Epstein noted, theories of negligence “share the common premise that once conduct is described as reasonable no legal sanction ought to attach to it.”<sup>75</sup> If one’s conduct is unreasonable, however, notwithstanding one’s responsibility, then we may attach sanctions to one’s conduct. Once again, a cynical observer might suggest, and at this point the suggestion seems fair, that the real function of Bad Samaritan laws is to impose a net cost on selfish people, namely people who do not behave reasonably from a good Samaritan viewpoint.

On the other hand, following a theory of strict liability, Epstein argued that causation is the only basis of liability in tort. If we were to accept the premises of such a theory, it would strike a decisive blow to Bad Samaritan laws that may impose tort sanctions on passersby not willing to save others. These passersby were not responsible for the initial accident, and for that reason we must be careful how we attach any sanction on their failure to rescue other people. Nonfeasance cannot be understood as the cause of harm, lest one be under a special duty to aid, like a babysitter would be if a child under her care was drowning. Failure to help someone cannot be equated with causing the harm itself.

(9) Causation – a regime of liability for failure to rescue would bypass the role causation now plays in the law of tort to rather impose a certain “reasonable Samaritan” standard, dictating when people should rescue others.

Perhaps the clearest rejection of the causation argument was given by Woolley who claimed that Bad Samaritan laws are in fact negative duties, that is, “the duty not to do something, whether by act or by omission, by doing which one allows things to get worse for the victim.”<sup>76</sup> Not so, should we retort<sup>77</sup>. A “duty not to do something by omission” is

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<sup>74</sup> Ernest J. Weinrib, “The Case for a Duty to Rescue”, *Yale Law Journal*, Vol. 90, No. 2, 1980, pp. 247-93.

<sup>75</sup> Richard Epstein, “A Theory of Strict Liability”, *J. of Legal Studies*, Vol. 2, No. 1, 1973, p. 157.

<sup>76</sup> A. D. Woolley, “A Duty to Rescue: Some Thoughts on Criminal Liability”, *Virginia Law Review*, Vol. 69, No. 7, 1983, p. 1296.

<sup>77</sup> See H. M. Malm, “Between the Horns of the Negative-Positive Duty Debate”, *Philosophical Studies*, Vol. 61, No. 3, 1991, pp. 187-210.

quite a mouthful, and Bad Samaritan laws cannot reasonably be understood as negative duties. They are clearly positive duties imposing an obligation to rescue other individuals.

Let us say, however, that we are not convinced by the above critique, like Peter Singer<sup>78</sup> or Richard Posner were<sup>79</sup>. For example, Ronald Coase rejected the established causal model of tort law, as he observed that liability problems are rather reciprocal in nature. “Should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.<sup>80</sup>” In cases of rescue, the question would be whether A should allow harm to fall on B, or B be allowed by his invocation of a Bad Samaritan law to harm A. We should prefer the former option, I have argued, using moral, legal, and economic arguments. Yet one may wonder whether I underestimate the expressive value of such a law<sup>81</sup>. Bad Samaritan laws may be ways of publicly expressing the importance of positive duties toward others and publicly expressing a commitment to reciprocity in rescues. From a liberal standpoint, however, such an objective is likely inadmissible. The law is not to promote any specific view about altruism and jail anyone who would fail it.

The moral argument against Bad Samaritan laws could be reformulated as follows. They are attempts to “purify thoughts and perfect character<sup>82</sup>” but only for the few people who are not already decent enough to rescue others when they can without danger or peril to themselves. This is an objective the law should never pursue, as Joshua Dressler noted<sup>83</sup>. But it is also a pyrrhic victory – the cost of potentially reforming the character of a few people is to effectively extinguish altruism in society, or, to be more precise, to make altruism impalpable, and therefore to reduce the moral worth of altruistic rescues. This is why we may want to call such laws Ugly Samaritan laws – forcing people to altruistically rescue others is a victory won at such great cost that it is tantamount to a crushing defeat.

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<sup>78</sup> Peter Singer, *The Life You Can Save*, New York, Random House, 2010, pp. 29ff.

<sup>79</sup> Richard A. Posner, *Economic Analysis of Law*, 8th edition, New York, Wolters Kluwer, 2011, p. 242.

<sup>80</sup> Ronald H. Coase, *The Firm, the Market, and the Law*, Chicago, University of Chicago Press, 1990, p. 96.

<sup>81</sup> Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection*, New Haven, Yale University Press, 2016, p. 91: “We have beneficence because we want it and are willing to pay for it. Thus, altruism and beneficence can readily be viewed as ends in themselves; they can be seen as things we have in our utility functions.”

<sup>82</sup> *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994).

<sup>83</sup> Joshua Dressler, “Some Brief Thoughts (Mostly Negative) About ‘Bad Samaritan’ Laws”, *Santa Clara Law Review*, Vol. 40, No. 4, 2000, p. 987.

### § 5. *I Am Not My Brother's Keeper – The Individualist Tilt of Liberalism*

“Students of ethics or social science”, said Frank Knight, “hardly need to be reminded that one of the leading modern schools of ethical thought has been dominated by economists.<sup>84</sup>” He was speaking, of course, about utilitarianism. Whether Bad Samaritan laws are efficient has been the object of much debate. On that point, I side with Landes and Posner, that is, a regime of positive duties to rescue is probably inefficient. But, we could ask, is there not something profoundly callous with embracing or rejecting a duty to rescue on economic grounds? Could we not say that “the decision is not to be made just by adding up numbers and going for the greater<sup>85</sup>”? We might worry that our rejection of Bad Samaritan laws rests on an acceptance of “efficient offenses”, such that, say, we would let those who need to be rescued go without our aid, because aiding them would cost too much compared to the benefits of the rescues. This would be a heartless way of considering the problem. Why then do classical liberals continue to separate justice and benevolence, following Smith, especially when it seems that a failure to be benevolent is unjust in several cases? Let me offer some final thoughts on that question.

For Smith, self-interest dominates all other motives. “We are not ready to suspect any person of being defective in selfishness”, he wrote<sup>86</sup>. Should we then worry that the radical individualist foundation of classical liberalism is its Achilles’ heel? Is it not counterproductive and potentially unjust to place such emphasis on selfishness, especially when it concerns the rescue of drowning kids? No, and here is why – the distinction Adam Smith championed between beneficence and justice is not one which requires us to cast off beneficence. Quite the contrary, the distinction establishes a simple division of labour, one that is quite relevant for our understanding of Good and Bad Samaritan laws.

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<sup>84</sup> Frank H. Knight, “Freedom as Fact and Criterion”, *Intern. J. of Ethics*, Vol. 39, No. 2, 1929, p. 129.

<sup>85</sup> A. D. Woozley, “A Duty to Rescue: Some Thoughts on Criminal Liability”, *Virginia Law Review*, Vol. 69, No. 7, 1983, p. 1284.

<sup>86</sup> Adam Smith, *The Theory of Moral Sentiments*, VII.2.iii, London, Henry G. Bohn, 1853, p. 446.

In the *Wealth of Nations*, we may remember, Smith defined “justice” as “the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it<sup>87</sup>”. He also said that, “Nobody but a beggar chuses to depend chiefly upon the benevolence of his fellow-citizens.<sup>88</sup>” In a market society, you do not have to rely on the benevolence of your fellows, as there are professional rescuers who will save your life for a fee. This is especially beneficial in fields where many people need to be saved, which is why we rely daily on the services of professional paramedics, physicians, and firefighters. If we accept the above definition of justice, we should have social institutions that will be designed to protect people’s lives.

Relying on beneficence will fall short in that regard, a point which many have already made. For example, “altruism is more common”, explained Becker, “within firms partly because is more efficient in small organizations<sup>89</sup>”, and Coase also noted that, “Adam Smith’s view of benevolence seems to be that it is strongest within the family and that as we go beyond the family, to friends, neighbours, and colleagues, and then to others who are none of these, the force of benevolence becomes weaker the more remote and the more casual the connection.<sup>90</sup>” That is, we may rely on beneficence when the cost of the rescue is small and the benefit great, but too often the costs will be high – for example, the costs of training to be a paramedic, having the right equipment, and the search costs.

This leads us to one interesting conclusion. If we accept Smith’s definition of justice as well as the shortcomings of beneficence for many cases of rescue, both of which were accepted by Friedman, Becker, and Hayek, then, from a classical liberal standpoint, we may conclude that services that save people’s lives, say healthcare or firefighters, should be public. No one should have to beg to be saved – this would be a case of oppression. An extensive exposition of this conclusion goes beyond the scope of this chapter. But, at the very least, we can say that some key services, including healthcare, may fall within

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<sup>87</sup> A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, IV.ix.51, G.ed. p. 687.

<sup>88</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, I.ii.2, G.ed. p. 27.

<sup>89</sup> Gary S. Becker, “Altruism in the Family and Selfishness in the Market Place”, *Economica*, New Series, Vol. 48, No. 189, 1981, p. 12. Also, “The pervasiveness of selfish behaviour has been greatly exaggerated by the identification of economic activity with market transactions.”

<sup>90</sup> Ronald H. Coase, *Essays on Economics and Economists*, Chicago, U. of Chicago Press, 1994, p. 102.

the scope of justice as defined by Smith, and that these services cannot be rendered properly by solely relying on altruism or private charity. We should only rely on the generosity of bystanders when the costs are low, in which case a Bad Samaritan law will be superfluous. The logic of Bad Samaritan laws can leave one to think that the costs of rescues are often low, like in the Genovese case. Yet such an impression is probably incorrect, since the costs will be distributed among many people, who must then develop their human capital to become rescuers would the need ever arise. Moreover, in many cases, the costs are simply exorbitant, which may leave some vulnerable to oppression<sup>91</sup>.

One may notice an additional point on the role of altruism in our market societies, and the way in which it has been understood in the classical liberal tradition following Adam Smith. Normally, any extension we give to the domain of market capitalism will shrink the domain of altruism so as to reinforce a certain understanding of economic selfishness.

“Adam Smith’s main point,” as Coase noted, “is not that benevolence or love is *not* the basis of economic life in a modern society, but that it *cannot be*. We have to rely on the market, with its motive force, self-interest. If man were so constituted that he only responded to feelings of benevolence, we would still be living in caves with lives ‘nasty, bruteish and short.’<sup>92</sup>”

That is, a gift economy is not recommendable. It would make most people worse-off. However, in cases of rescue, even after we account for professional rescuers, altruism has still a vital role to play. In fact, absent legal compulsion, we can expect that professional rescuers will limit their rescues to areas where that activity is profitable for them, while leaving the supply of altruism intact for nonprofitable cases of rescue. Therefore, it is not clear that altruism has “negative survival value under competition and would tend to be

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<sup>91</sup> Åsbjørn Melkevik, “No Malibu Surfer Left Behind: Three Tales About Market Coercion”, *Business Ethics Quarterly*, Vol. 27, No. 3, 2017, pp. 335-351. Åsbjørn Melkevik, “Four Concepts of Rules: A Theory of Rule Egalitarianism”, *European Journal of Political Theory*, 2016, online first.

<sup>92</sup> Ronald H. Coase, *Essays on Economics and Economists*, Chicago, U. of Chicago Press, 1994, p. 82.

weeded out of competitive markets”, as Landes and Posner wrote, nor that it would be “crowded out by selfishness<sup>93</sup>”. Most people are decent Samaritans, as Smith explained.

“How selfish soever man may be supposed, there are evidently some principles in his nature that interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.<sup>94</sup>”

Therefore, there is indeed a distinction between justice and beneficence – it would be unjust to rely on beneficence to save people’s lives, because that objective would better be served by self-interest in most cases, that is, hiring people to save others. We may notice that Smith’s theory of justice is institutional. The question is not whether individuals act in an unjust manner when refusing to save others. That would be a question of morality, not one of government. The question is rather how institutions should protect individuals in the most efficient way. One could still retort that we should not think economically when lives are hanging in the balance. But if our objective is to save lives, then the objection fails. As David Friedman noted, “An economic argument that logically derives a conclusion that feels wrong forces us to think more carefully about both the argument and the intuition it contradicts.<sup>95</sup>” The argument of this chapter may feel wrong – you should not be forced to save others, and we should rather enact Good Samaritan laws. Such an approach would save more lives than Bad Samaritan laws.

However, this chapter has also shown that Bad Samaritan laws can be defeated not only economically, but ethically as well. The economic individualism associated with Smith encourages a system that permits good people to do good, especially when the costs are low – say when you just happen to be on the scene and when you can save another without putting your life in jeopardy. A Bad Samaritan regime, conversely, does no such thing. It may reduce the supply of altruism in our societies, discouraging many weak

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<sup>93</sup> William M. Landes and Richard A. Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism”, *Journal of Legal Studies*, Vol. 7, No. 1, 1978, p. 98.

<sup>94</sup> Adam Smith, *The Theory of Moral Sentiments*, I.i, London, Henry G. Bohn, 1853, p. 3.

<sup>95</sup> David Friedman, *Law’s Order*, Princeton, Princeton University Press, 2000, p. 194.

altruists. Moreover, as we saw, Bad Samaritan laws would directly contravene Smith's definition of justice, since it would permit some to acquire other people's human capital.

In conclusion, Bad Samaritan laws have gained considerable momentum in both state legislatures and state courts, as Teresita Rodriguez noted three decades ago<sup>96</sup>. The enthusiasm of many scholars for such laws has not been curbed. A duty to rescue, it is often said, would reflect the shared morality of the American people<sup>97</sup>. Not so – we can agree that people should not be punished for their beneficence, and therefore we may indeed enact Good Samaritan laws. However, this chapter has shown that the ethics, the jurisprudence, and the economics of rescues all point in the same direction – we should avoid Bad Samaritan laws, which benefits are uncertain, but which deficiencies are not.

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<sup>96</sup> Teresita Rodriguez, "I Am My Brother's Keeper: A Trend Towards Imposing a General Duty Upon a Bystander to Assist a Person in Danger", *Boston College Law Review*, Vol. 26, No. 2, 1985, pp. 497-527.

<sup>97</sup> Ernest J. Weinrib, "The Case for a Duty to Rescue", *Yale Law Journal*, Vol. 90, No. 2, 1980, p. 261.