REASONABLENESS, JUSTICE AND THE NO-DUTY-TO-RESCUE RULE OF TORTS

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INTRODUCTION

The no-duty-to-rescue rule says that people are not required to rescue others in distress.¹ Thus, someone who fails to offer aid cannot be held civilly liable if the victim later succumbs to the danger. This liability exemption applies no matter how grave the risk facing the victim, and no matter how simple, easy and safe the rescue opportunity for the bystander.²

To most people, the no-duty-to-rescue rule seems clearly at odds with the concept of moral fault.³ Instinctively, it feels wrong to stand idly by as another human being suffers harm. This instinct could be rooted in a number of possible sources. Many societies embrace values of benevolence and altruism.⁴ Most religions preach good samaritanism and denounce selfishness.⁵ Whatever their source, our sensibilities tell us

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2. The Restatement (Second) of Torts illustrates the point: A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from doing so by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B. Restatement (Second) of Torts § 314 illus. 1 (1965).
5. See George W. Dent, Jr., Secularism and the Supreme Court, 1999 BYU L. Rev. 1, 37 (1999) (noting that idea of helping others "is integral to most religions,"
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that one who fails to rescue others is morally deficient.

Because of its apparent immorality, the no-duty-to-rescue rule also seems unreasonable. However, as I will attempt to show in this brief essay, such a conclusion is by no means inescapable. In fact, I shall argue that reasonableness fully supports the rule as currently formulated. My thesis will unfold in two parts. First, I shall demonstrate that the no-duty-to-rescue rule is actually a reasonable exception to a broader principle of cooperation, which forces people to make sacrifices for parties who take affirmative measures to defend their interests in emergencies. Second, I show how the rule satisfies the reasonable requirements of distributive and corrective justice, deftly balancing the interests of the parties and the state, while maintaining the integrity of the liberal value system of which it is a part.

I. THE RULE IS THE EXCEPTION

Although tort law does not impose a duty to rescue, it has long recognized a duty to cooperate. This duty is not active, but passive. It allows distressed parties to take property from, or inflict injury upon, unwitting or unwilling bystanders. In turn, it requires bystanders to succumb to such incursions. The obligations here are of acquiescence and sacrifice, not affirmative assistance. Yet the effect is essentially the same. Withholding cooperation is tortious unless excused. Under this perspective, liability is the rule, no-liability the exception.

The duty to cooperate is evident throughout intentional tort law. In cases of self-defense, the imperiled party is entitled to use whatever force

is necessary to stop an aggressor in her tracks.\textsuperscript{6} However, her entitlement does not stop there. She also may commandeer the interests of innocent bystanders. For example, a party claiming self-defense may endanger or even injure a passerby. The only limit is that she act reasonably under the circumstances.\textsuperscript{7} In this situation, the passerby cannot recover damages for her harm. Instead, she must sacrifice her interests for those of the privilege-holder.

The privileges of public and private necessity are even more demanding. Private necessity allows a party in imminent danger of losing her own property to appropriate, use or destroy the property of someone else, even if the owner contests the taking.\textsuperscript{8} The public necessity privilege gives similar powers to private citizens who seek to avoid or end public catastrophes.\textsuperscript{9} In each case, the persons subject to these privileges cannot resist the intrusion. They are obligated to surrender their goods to alleviate the exigency. Should they fail to do so, their obstinacy may itself be punished as a tort.

The 1908 case of \textit{Ploof v. Putnam}\textsuperscript{10} provides an apt illustration of this ancient principle. In \textit{Ploof}, bad weather forced a ship owner to moor...
his boat to the defendant’s dock without the latter’s permission.\(^{11}\) Unmoved by the ship owner’s plight, the defendant untied the boat and allowed it to drift into the storm.\(^{12}\) Ultimately, the boat ran aground, causing it to sustain damage.\(^{13}\) In the ship owner’s action against the defendant-dock owner, the court upheld the ship owner’s right to moor his vessel to the dock, even in the absence of the dock owner’s consent.\(^{14}\) In doing so, however, the court also recognized the dock owner’s duty of cooperation.\(^{15}\) Because of the emergency, the defendant could not resist the encroachment to his dock.\(^{16}\) Instead, he was obligated to step aside and accede to the ship owner’s wishes.\(^{17}\) Whether he liked it or not, the dock owner became a cooperative assistant to the ship owner’s plan to save his boat.\(^{18}\) Although the dock owner did not have to secure the boat himself, he was obliged nevertheless to aid the ship owner by adopting a position of passive noninterference.\(^{19}\)

The duty to cooperate also shows up in negligence law. Its most notable hide-out is the emergency doctrine. Under this doctrine, a person caught in an emergency has great powers. She may take all reasonable measures to secure her safety, including any which may have the unintended effect of harming innocent bystanders. These bystanders, by contrast, have little choice but to submit to the invasion, and no recourse afterwards.

This principle is best illustrated by the casebook classic, *Cordas v. Peerless Transportation Co.*\(^ {20}\) In *Cordas*, a cab driver was accosted by an armed robber. To save his life, the cabby jumped from his taxi while

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11. Id. at 188-89.
12. Id.
13. Id.
15. Id.
16. Id.
17. Id.
19. Id.
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it continued in motion.\textsuperscript{21} The abandoned vehicle eventually rolled onto a crowded sidewalk, where it struck a mother and her two infant children.\textsuperscript{22} The mother brought a negligence action against the cab company, but the case was summarily dismissed.\textsuperscript{23} The court based its decision on the cabby’s reduced standard of care.\textsuperscript{24} Noted the court: “[t]he law in this state does not hold one in an emergency to the exercise of that mature judgment required of him under circumstances where he has an opportunity for deliberate action.”\textsuperscript{25}

However, behind the court’s words lay an unstated, correlative principle: Emergencies do not just lower the imperiled party’s responsibilities, they also heighten the duties of those around them. For the \textit{Cordas} plaintiffs, this burden did not require disabling the armed criminal in the cab. But it did require that they sacrifice some of their freedom. Specifically, it forced them to relinquish their security, and even their bodily integrity, for the good of a citizen in distress.

II. THE REASONABLENESS OF THE RULE

As this discussion demonstrates, the idea of a tort-based duty to cooperate is not that controversial. The real controversy is over how that duty is triggered. In the scenarios noted above, the imperiled party triggers the duty through her own defensive action. Under a “good samaritan” rule, that duty would be triggered by danger. Although the danger must be serious and imminent, it may come from any source. It might be created by the victim herself, by some third party, by \textit{force majeure} or by any combination of these factors. However, it need not, and in most cases will not, be tied to the proposed rescuer. The question

\begin{itemize}
\item \textsuperscript{21} \textit{Id}.
\item \textsuperscript{22} \textit{Id}.
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} \textit{Cordas}, 27 N.Y.S.2d at 201-02.
\item \textsuperscript{25} \textit{Id} at 201 (quoting Kolanko v. Erie R.R. Co., 212 N.Y.S.2d 714, 717 (N.Y. App. Div. 1925)).
\end{itemize}
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is whether such an undifferentiated danger, by itself, provides a sufficient basis for assessing legal liability.

Like most of the law’s foundational issues, the answer to this question lies in the concept of reasonableness. Since reasonableness is value-driven, the duty to rescue could not be justified on instinct alone. Rather, it would have to be validated by concepts of distributive and corrective justice. To date, no one has succeeded in marshaling this support. And for good reason. Instead of promoting the morality of tort law, a duty to rescue actually undermines its sustaining principles.

A. Distributive Justice Concerns

Distributive justice has four requirements. First, there must be an authorized giver. Second, there must be an authorized receiver. Third, there must be something to distribute. And fourth there must be a legitimate reason, like need or merit, for the receiver to receive the distributed item.

In many distributive scenarios, the state is the giver and some group of citizens is the receiver. Welfare programs fit this description. Because of its representative authority, the state possesses an inherent power to distribute. As long as the recipient group qualifies for special

26. Distributive justice controls the state’s relationship to the public. Specifically, it determines how the state may regulate the freedoms of its citizens. Corrective justice, by contrast, applies only to private relationships. In particular, it provides standards for determining when one private party may interfere with the freedom of another. When a tort is committed, these concepts overlap. The state uses tort law to regulate the harmful behavior, but delegates to the victim the power to enforce its regulatory agenda. To prevent overreaching, both distributive and corrective justice place restraints on this power.


28. There is little doubt that the state itself has the authority to force people to act on behalf of others, even complete strangers. Under the social contract theory, citizens expressly or impliedly agree to duties of altruism enacted by their elected representatives. Alternatively, the principle of unjust enrichment suggests that since citizens enjoy the benefits of political association they cannot selectively disavow its burdens, including the occasional burden of social sacrifice. Even the liberal harm principle may favor duties of altruism if the harm to liberty created by those duties is considered less severe than the overall moral, political and personal harm resulting
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treatment, the resulting distribution enjoys the stamp of legitimacy.

In a tort case, however, both the giver and the receiver are private parties. Although the state creates the rules, the plaintiff dispenses the burden of liability. And although others may violate the rules, the defendant alone must bear its weight. Here, the status of the parties raises special concerns. Because private parties have no inherent regulatory authority, they may not invade the interests of others without a special license to do so. By the same token, people typically are not required to donate money or service to their neighbors. Thus, they need not make such sacrifices unless there are good distributive reasons for requiring their beneficence.

In a typical emergency scenario, the imperiled party is in danger of losing her property, her bodily integrity or her life. Thus, she clearly qualifies for special treatment under the law. Because she is in need of protection, distributive justice permits her to take defensive action. To activate this license, the state grants her regulatory authority. In doing so, it turns a private party into a sort of deputy sheriff. Equipped with privileges of self-defense or necessity, this state-sanctioned private regulator has the power to force her peers to sacrifice their interests for her own.

In this situation, the imperiled party determines who will receive the burden of sacrifice. Indeed, by exercising her privilege, she hand-selects her assistants. However, the imperiled party makes this selection at her own risk. Since people lack any inherent coercive authority, the decision to harm is presumptively wrongful. To overcome this presumption, the imperiled party must prove that her conduct was reasonable under the circumstances. Both the privilege of self-defense and the emergency doctrine excuse harmful conduct that is reasonably calculated to end an imminent threat of serious bodily harm. Here, the risk to the privilege-holder’s interests overrides the competing interests of the bystander. Where the privilege-holder’s stakes are lower, reasonableness adjusts accordingly. In cases of private necessity, the privilege-holder is permitted to take a bystander’s property in order to protect her own. However, this privilege is not absolute. To avoid an unjust enrichment, reasonableness requires that the privilege-holder pay for her power of
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neither the time nor the opportunity to react. Thus, there will be no predetermined cooperators. If someone is to bear the burden of sacrifice, the state must designate the appropriate receiver.

To make the right selection, the state must find some reason for picking certain bystanders over others. Since the rescue duty is obligatory, the selection criteria must be fair, allocating the burden of rescue on grounds that seem reasonable. Here the state has two choices: agency or status. Either the selected party did something that deserves regulation, or she enjoys an advantaged position that gives her a better ability to bear the burden of regulation.

The current no-duty rule is based on agency. In a tort case, agency is conduct that poses a threat to, or has an untoward effect upon, another person or thing. In either situation, agency has normative dimensions. First, it is distinctive. Although everyone acts, each act is a unique combination of motive, movement and circumstance. And while every act has a consequence, no two consequences are ever exactly the same.

Second, agency is relational. Since every act has an effect, agency establishes an unmistakable link between the two. Thus, when an act is directed against another human being, it forges a special bond between the actor and the person acted upon.

Finally, in light of its relational character, agency is both moral and political. Because action is a manifestation and projection of the agent’s will, any harmful act is susceptible to praise or condemnation. And since agency is a power to impose one’s will on another, the agent stands out as a perennial threat to the equality and freedom of her fellow citizens, and to the stability and order of the social system.

usurpation.

30. Generally speaking, agency is an active force which has an impact on the world. See WEBSTER’S NEW WORLD COLLEGE DICTIONARY 25 (4th ed. 2001) (defining agency as “1 active force; action; power 2 that by which something is done; means, instrumentality”).
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In an emergency situation, a bystander does not have to create the original danger to be responsible for the victim’s injuries. It suffices if her conduct has some influence over the victim’s fate. There are basically two ways that this might happen. First, she might enter into a protective relationship with the victim before the emergency develops. Here, she is not a bystander at all; rather, she is part of the problem. By assuming a guardian status, she lulls the victim into a false sense of security. In some cases, as in landlord-tenant relationships, she places the victim in a risk environment that she alone controls. In most cases, the landlord induces the tenant to forgo other opportunities for protection. In every case, she becomes the tenant’s caretaker. If the landlord lets down her guard, the building becomes vulnerable to intruders. If the tenant is attacked, the assailant is not the only culprit. The landlord who fails to assist also shares in the blame. Indeed, as the gatekeeper to the tenant’s safety, the landlord is a co-agent in her loss.

The other way a bystander may incur responsibility is by intervening after an emergency arises. As a bystander, she is an observer. But once she gets involved, she becomes an active agent in the outcome. This may occur directly – say, by moving the victim’s body and aggravating her injuries. Or, it may occur indirectly – perhaps by inducing the victim to give up other rescue options or discouraging other rescuers from offering help. Either way, the bystander turned agent leaves her unmistakable imprint on the tragedy.

Not coincidentally, these agency-based circumstances already trigger duties to aid. These duties constitute the only two exceptions to the general rule. One exception is for undertakings. When someone undertakes to aid another, she incurs an obligation not to make the

31. See Dobbs, supra note 1, § 316.
32. See id. §§ 319, 320, 321.
situation worse. If she breaches this duty, the law holds her responsible for mucking things up.\textsuperscript{33} The other exception is for special relationships.\textsuperscript{34} When a special relationship is formed, the caretaker assumes responsibility for the safety of her charge. If she shirks this responsibility, the law makes her pay for the effects of her dereliction.

The common denominator in these cases is the distributive criterion of risk. Agency deserves regulation because it imposes on others risks that limit their freedom without warning or consent. The risk criterion not only fails to support a duty to rescue, it actively opposes such an obligation.

This first part of this conclusion is beyond debate: bystanders do not create risk; risk already exists. Nor do bystanders thrust risk upon others. Someone or something else does that. Unless the bystander stands in a special relationship with the victim, she does not even influence the victim’s risk environment. In this situation, the risk criterion has nothing to regulate. As long as the bystander remains uninvolved, her inactivity is not a threat to freedom. Rather, it is an appropriate exercise of her own freedoms of self-determination and self-protection.\textsuperscript{35}

Risk does not just create duties, it also activates rights. Absent a preexisting relationship, people generally have no right to inject themselves into the lives of their neighbors. Freedom, at its core, implies a right of privacy. This right includes the power to keep intruders out. Risk breaks down these barriers. When one party places another in

\begin{itemize}
\item A party who undertakes to help may breach her duty to rescue in three ways. She may increase the danger facing the prospective victim. See id. at 861-62. She may cause the victim to justifiably rely on the undertaking to her detriment. See id. at 862-64. Or, she may discourage assistance by other potential rescuers. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 381 (5th ed. 1984).
\item See DOBBS, supra note 1, § 317.
\item This “freedom” can also be a duty. A person who causes, aggravates or fails to mitigate her damages may be held responsible for all or part of her loss. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 3, 8 (2000). In this sense, the law imposes a duty to protect one’s interests from unreasonable, unnecessary or voluntary risks, or at least a duty to refrain from shifting the resulting losses onto others.
\end{itemize}
danger, their lives become intertwined. Here, risk establishes an *ad hoc* relation.

By creating risk, the actor ties a jeopardy hook to a responsibility line and latches it onto her potential victim. Once hooked, the victim may seize that line to regulate the actor’s behavior. Because bystanders create no risk, they cast no line of responsibility. Thus, an imperiled party has nothing to grasp. Except for her fortuitous presence at a particular place for a brief moment in time, the bystander is just like any other stranger to the victim’s world. Indeed, the *only* thing the two have in common is their humanity.

This connection, however, is innate, not transactional. Since humanity is a characteristic held by all, the duty to rescue would extend to the public at large. Such a duty would be social, not personal. As such, it could not support a tort action. Unless the parties are linked by risk or relationship, the victim has no right to impair the bystander’s freedom, and the state has no authority to give the victim that power.

If the rule was otherwise, and bystanders were obligated to intervene, the risk criterion would condemn it as unjust and unreasonable. As mentioned above, the risk criterion aims to eliminate excessive risk from social transactions. In so doing, it must balance several interests, including the security interest of each party to the transaction and the state’s interest in maintaining peace and order. Conceivably, a tort-based duty to rescue could compromise all three of these interests.

First of all, by forcing heroic efforts, the rule subjects rescuers to risks that they do not choose and would not otherwise confront. A rescuer might be entrapped by a criminal feigning distress. If she lends physical assistance, she might sustain physical injuries during the emergency. Or, by immersing herself into a traumatic event, she may suffer a lifetime of psychological trauma. Even if she merely phones
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911, or shouts for help, she may become the immediate object of attack. Or, she might become the victim of a later act of retaliation. In any event, she exposes herself to enormous legal jeopardy. Since both emotions and stakes run high in emergencies, the good samaritan may eventually find herself in court, even if she does the best that she can under the circumstances.

At the same time, the rule may actually increase, rather than alleviate, the risks confronting imperiled parties. In cases of direct assistance, an unskilled, frantic or overzealous rescuer may aggravate the victim’s injuries or cause her to sustain an entirely new harm. Where there is an ongoing altercation, the rescuer’s intervention might enrage or provoke the attacker. As a result, an otherwise controlled aggressor may turn to violence, or an already aggressive attacker may increase her use of force. In any case, the rescuer may simply make a mistake, injecting herself into the lives of those who do not need or want her assistance.

Finally, such a rule jeopardizes the interests of the state. By requiring intervention, the rule increases the number of people who must interact. It also turns up the heat in the pressure cooker in which they are thrown together. In short, a duty to aid does not just change the dynamics of private crises. It threatens to turn simple skirmishes into full-blown breaches of the peace, and minor crises into major catastrophes.

So agency and risk clearly cannot justify an affirmative duty to rescue. But what about status? When the state allocates benefits to the public, need often serves as an appropriate distributive criterion. One who, through no act or fault of her own, happens to fall on hard times deserves state largesse. However, when the state distributes burdens to fund such a scheme, it must find other criteria to identify potential contributors. Often, it chooses status-based criteria like wealth or advantage. Although all but the destitute are required to contribute to a
distributive system, the richest or most advantaged citizens usually are asked to donate more than others.

Applied to a rescue scenario, one might argue that immediate bystanders are specially situated to provide aid in an emergency – a status that makes them particularly susceptible to regulation. However, this argument is critically flawed. A bystander to an emergency may have a better opportunity than others to help, but she certainly is no better equipped, merely because of her presence, to bear the burden of sacrifice. Some bystanders will have little to lose, others much. Some will exercise sound judgment, others will become rash or irrational. Some will calmly handle the pressure, others will fall apart. Because the duty to aid arises from the happenstance of location, and fails to account for differences of choice or ability, it proves to be an inadequate basis for fairly allocating the burdens of assistance.

Indeed, without proof of agency, the duty to rescue quickly devolves into a game of chance. Liability would depend not on causal responsibility or fault, but on proximity and fortuity. Those close to an emergency would have to help. However, those farther away could mind their own business. People carrying cell phones might be expected to get involved. However, those unequipped could remain incommunicado. While hearty adults might be drafted into service, the weak, infirm and youthful would be free to walk away. In each case, the assignment of responsibility would be based on circumstances not of her own making or choosing. Misfortune would trigger the need for action, but luck would determine the duty to act.

Of course, luck sometimes figures into distributive justice. Rich folks may attain their status by good fortune or sheer chance. But luck is never the reason why they are designated to pay more than others. Rather, they are selected because they have a greater ability to bear the burden of giving, and their sacrifice limits their freedom less than those
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with fewer assets.

Luck appears to play an even greater role in the fate of the conscripted bystanders discussed in Part I. They must endure the harmful but defensive reactions of others simply because they happen to be in the wrong place at the wrong time. But even here, things are not as simple as they seem. The passive duty to cooperate is far different from an affirmative duty to rescue. Unlike the duty to rescue, which imposes a continuous burden of care, the duty to cooperate is episodic only. It does not follow the bystander wherever she goes. Rather, it arises only when some desperate party forces her to get involved. Moreover, unlike the rescue duty, which is imposed by the state in the abstract, the duty to cooperate is imposed by private persons responding to real risks and a primal instinct for survival. Finally, unlike the rescue duty, which is nonnegotiable, the duty to cooperate affords the bystander at least a limited right of refusal. Thus, if the propriety of the intrusion is in doubt, the bystander herself may use reasonable force to deflect the impending encroachment. As a result, the sacrifice here is less fortuitous and more voluntary than the burden of affirmative rescue.

B. Corrective Justice Concerns

The duty to rescue fares no better under the concept of corrective justice. Corrective justice is a mechanism for undoing private wrongs. It empowers one who has suffered a wrongful loss to take action to redress it. However, it also places limits on this power. It allows recovery only against the person who caused the loss, and only if that party has reaped a wrongful gain from their encounter.

Unfortunately for people in peril, innocent bystanders do not meet either of these criteria. As noted above, proximity is not agency. A witness to an event is no more a cause of that event than those unaware of its occurrence. Unless the witness has precipitated or exacerbated the
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event, or has inhibited its safe culmination, she is not a player in the victim’s saga. Rather, she is merely part of the stage on which it unfolds.

Given her detachment, the bystander receives no benefit from the victim’s loss. Indeed, for many bystanders, the event will be psychologically damaging. For others, it might be a matter of complete indifference. But it certainly is no advantage. Because the bystander does not act, she takes nothing from the victim. Moreover, because the bystander and victim are unrelated, the bystander owes her no personal debt of service. Thus, her inaction is not a gain in the sense that it is a withheld benefit.

Absent the existence of a wrongful loss and gain, and a causal nexus between the two, corrective justice provides no support for the victim’s call for assistance. In fact, because of the bystander’s neutrality, any attempt to coerce her help might itself amount to a wrongful infringement of her autonomy.

C. Systemic Concerns

The no-duty-to-rescue rule is just one part of a larger, liberal-justice liability scheme that promotes the values of freedom and equality. Imperiled parties are free to defend their interests, even to the point of injuring bystanders. Bystanders are free to protect their interests, even to the point of ignoring imperiled parties. If an imperiled party chooses to defend herself, she is bound to exercise reasonable care. If a bystander chooses to protect others, she is held to the same level of caution.36 Should the imperiled party sustain injury, she may sue the person who

36. Once a bystander endeavors to help, she must do so reasonably. If she fails to meet this standard, she may held liable for injuries caused by her negligent assistance. See Malloy v. Fong, 232 P.2d 241, 247 (Cal. 1951); see also United States v. DeVane, 306 F.2d 182, 182 (5th Cir. 1962) (holding that the decision to undertake or abandon rescue is discretionary, "[b]ut having undertaken the rescue and engendering reliance thereon, the obligation arose to use reasonable care in carrying out the rescue.")
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created the emergency. Should a rescuer succumb to the danger, she may bring a similar action of her own.\textsuperscript{37} Together, these rules ensure proportionality and balance. Each party enjoys a right of self-protection, yet neither party holds an unfair power of coercion.

Some scholars say that adding a duty of easy rescue would not disturb this scheme, but would enhance or complete it.\textsuperscript{38} This view misunderstands tort law’s essential nature. Tort law is founded on a competitive framework.\textsuperscript{39} Under that framework, people are entitled to pursue their own ideals of happiness. To achieve that goal, each person must enjoy a freedom of action. However, as people exercise their freedoms, their paths will often cross, and their interests clash. For example, the freedom of the speeder competes with the freedoms of other motorists who wish to travel in comfort and safety. To level the competition, the law must accord each person the freedom to protect or

\textsuperscript{37} This protection is provided by the rescue doctrine. “The basic precept of the ‘rescue doctrine’ is that the person who has created a situation of peril for another will be held in law to have caused peril not only to the victim, but also to his rescuer, and thereby to have caused any injury suffered by the rescuer in the rescue attempt.” New Hampshire Ins. Co. v. Oliver, 730 So. 2d 700, 702 (Fla. Dist. Ct. App. 1999).

\textsuperscript{38} See John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 Wis. L. REV. 867, 914-16.

\textsuperscript{39} This claim may at first sound questionable. One might conceive of a good life as the acquisition of knowledge. Since knowledge is not depleted by acquisition, one person’s pursuit of knowledge does not necessarily compete against another’s. But this example seems unpersuasive for two reasons. First, many people do not define happiness in such abstract terms, but rather in terms more materialistic. A good life is finding the perfect mate, buying the perfect house and/or attaining the perfect job. These intermediate goals are part of a zero-sum game. If I marry person X, you cannot. If I purchase house Y, you must buy something else. If I accept job Z, you must find other work. Second, even when a life-plan is more abstract, the attainment of that abstract end depends on one’s ability to satisfy the sorts of intermediate ends mentioned above. Take the acquisition of knowledge. In our society, knowledge usually depends on higher education, and higher education depends on time, money and opportunity. Kids compete for places in elite private schools. Teenagers compete for seats in the best colleges. College graduates compete for spots in leading graduate programs, and so on. People who have the right connections, receive the best objective test scores, possess the greatest ambition, work the hardest and have the necessary financial resources are likely not only to climb this ladder of achievement, but to crowd its rungs so fully as to exclude others with similar aspirations. In this sense, even the pursuit of knowledge is a competitive enterprise.
defend her own interests.

In such a system, duty proceeds from action. The actor who creates risks or forms relationships is bound to exercise care. These acts, in turn, forge personal connections between the actor and other freedom-holders. When an actor behaves negligently, she breaks these bonds, and assumes an unfair advantage in the competition. When her negligence causes loss to others, it imposes upon them unfair disadvantages in their pursuit of happiness, and so activates their rights to redress. Tort law restores the integrity of the competition by annulling these unfair advantages and disadvantages and returning the parties to their original places in the race.

The duty to rescue does not fit within this competitive framework. A brief analogy makes this clear. Both football and baseball are competitive sports. Each team goes on the offensive to accomplish an objective. Each team has a chance to defend against its opponent. Both must obey rules designed to keep the match fair. If one changed the rules – say, by adding an extra down or a fourth strike – each game would remain substantially the same. The manner of playing would vary but both sports would continue to be competitive.

However, if one changed the objectives – for example, by requiring better teams to affirmatively assist their opponents – each sport would be radically transformed. Rather than being competitive contests, they would become mere exhibitions of altruism. As a result, they could no longer be considered sports.

The change to tort law evoked by the duty to rescue is on this same order of magnitude. If such a rule were adopted, duty would be based not on private relations, but on public citizenship. Responsibility would be based not on choice and action, but on passivity and proximity. Fault would be based not on unfair overreaching, but on inexcusable underloving. In the end, liability would be based not on patterned
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principle, but on sheer chance. To accommodate these changes, we would have to do more than simply rearrange some liability principles. We would have to shift from a paradigm of not-harming to a paradigm of helping.

CONCLUSION

Such a switch certainly would be momentous, but would it be unjustified? Not necessarily, at least not in the abstract. If Americans lived by an ethic of altruism, the duty to rescue would fit right in. Mutual assistance would be both a legal right and a moral obligation. However, unless and until our values change, balancing freedoms remains the law’s main objective. In some situations, as in cases of emergency, this may make the law seem immoral. Since the law imposes no duty to rescue, it permits bystanders to make bad choices. Yet by extending such deference, tort law does not necessarily sacrifice its morality. Rather, it prioritizes its moral principles, placing the core principle of freedom above all others. Seen in this way, the no-duty-to-rescue rule is not an abhorrent aberration, but rather a model of corrective and distributive justice – and nothing could be more moral, or more reasonable, than that.