

# THE LEGITIMACY AND LIMITS OF PUNISHING “BAD SAMARITANS”

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## Abstract

There are often public calls to codify moral sentiments after failures to help others, and two recent tragedies have renewed interest in one’s legal duty to aid another. This Article examines the moral underpinnings and legitimacy of so-called “Bad Samaritan” laws—laws that criminalize failures to aid others in emergency situations. Part I examines the theoretical backdrop of duties imposed by Bad Samaritan laws, including their relationship with various moral duties to aid. This leads to the analysis in Part II, which examines two related questions that are raised when moving from moral to legal duties: First, on what ground does the state have the authority to dictate that one’s needs should be met in the way specified by a particular legal duty? Second, does a special relationship exist that legitimizes the establishment of such legal duties?

INTRODUCTION .....	355
I. RESCUE AND BENEFICENCE .....	358
A. <i>Rescue</i> .....	359
B. <i>Beneficence</i> .....	362
II. FROM MORAL DUTIES TO LEGAL DUTIES .....	367
CONCLUSION.....	373

## INTRODUCTION

Consider two recent tragedies. On July 21, 2017, French philosopher Anne Dufourmantelle was sunbathing at Pampelonne Beach, near St. Tropez, when she noticed two children struggling in the water.<sup>1</sup> An orange flag on the beach had just been changed to red—indicating dangerous conditions—yet Dufourmantelle immediately entered the water to try to save the children.<sup>2</sup> Although she drowned after being carried away in a strong current, a lifeguard eventually saved the two

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1. *French philosopher Dufourmantelle drowns rescuing children*, BBC NEWS (July 24, 2017), <http://www.bbc.com/news/world-europe-40703606> [<https://perma.cc/9KK5-2UKF>] (describing Dufourmantelle as having written “numerous essays on the importance of taking risks and the need to accept that exposure to any number of possible threats is a part of everyday life.”).

2. *Id.*

children.<sup>3</sup> Most people would describe Dufourmantelle's actions as heroic and deserving of the utmost moral praise. Yet many would also describe her act as *supererogatory*—in other words, one that is not morally required because it is beyond the call of duty. After all, most people do not always have the fortitude to rush into danger and face death—even when another's life is hanging in the balance. But perhaps there is a middle ground—a less heroic action that one ought to take in these situations. Maybe dialing 9-1-1 would satisfy one's duty, or ensuring that a lifeguard (if one is on hand) is aware of the emergency. Now consider a situation similar to the one that Dufourmantelle faced—but that played out much differently.

On July 9, 2017, five teenage boys watched Jamel Dunn drown in a pond in Florida.<sup>4</sup> Rather than simply dial 9-1-1, the teens filmed Dunn's drawn-out struggle in a two-minute long video on a cell phone.<sup>5</sup> On the video, the teens laugh and taunt Dunn as he repeatedly screams for help and struggles to stay afloat.<sup>6</sup> They did not report Dunn's death to authorities—though they posted the video of his death on the internet—and Dunn's body was not pulled from the water for five days.<sup>7</sup> The teens were not charged with failing to aid Dunn because—the state attorney's office explained—there is no Florida law “that compels an individual to render, request or seek aid for a person in distress.”<sup>8</sup> If there was no legal duty or obligation to aid Dunn, should there have been? Although many would consider it unreasonable for the law to require the level of heroism displayed by Dufourmantelle, should the teens have been required to at least aid Dunn by calling 9-1-1? But even if it is left at that minimal requirement, what is the moral basis and limit of such laws?<sup>9</sup> One might attempt to answer these questions by examining the enactment of so-

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3. *Id.*

4. Ralph Ellis, Nick Valencia & Devon Sayers, *Chief to Recommend Charges Against Florida Teens Who Recorded Drowning*, CNN (July 22, 2017), [http://www.cnn.com/2017/07/21/us/florida-teens-drowning-man/?iid=ob\\_lockedrail\\_topeditorial](http://www.cnn.com/2017/07/21/us/florida-teens-drowning-man/?iid=ob_lockedrail_topeditorial) [<https://perma.cc/9MHM-UFSE>].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* However, the police chief indicated “that he will recommend that the state attorney prosecute the teens under a statute that requires a person with knowledge of a death to notify a medical examiner” (which would be a misdemeanor under that statute). *Id.*

9. A second, related question is the extent to which the omissions of the relevant parties caused Dunn's death. I note only two general difficulties with this issue. First, if failures of action are to count as causes of events, then there seems to be no non-arbitrary way to restrict the scope of failures of action that are to be considered causes of events—in this case Dunn's death. Second, the simple fact that the teens may have *prevented* Dunn's death by calling 9-1-1 does not demonstrate that the many other events and circumstances involved in Dunn's death were *insufficient* to cause his death. See Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 253–59 (1980), for a fuller account of these arguments.

called “Bad Samaritan” laws. Unlike “Good Samaritan” laws (which offer legal protection to one who provides reasonable assistance to another in need), Bad Samaritan laws make it a crime to fail to aid others in emergency situations when providing aid would be easy.<sup>10</sup>

There are often public calls to codify our moral sentiments after tragic failures to help others.<sup>11</sup> For example, during the aftermath of Hurricane Sandy, it was revealed that a young woman was refused aid from neighbors after rising water separated her from her two young children; her children were later found dead nearby.<sup>12</sup> The event prompted one commentator in the *New York Times* to suggest that it would be appropriate to enact the following law: “Any person who knows that another is in imminent danger, or has sustained serious physical harm, and who fails to render reasonable assistance, shall be fined up to \$5,000.00, imprisoned up to three months, or both.”<sup>13</sup> More recently, legal scholars have argued that “certain witnesses who are not physically present at the scene of a crime [“Digital Age Samaritans”] should be held criminally accountable for failing to report specified violent offenses of which they are aware.”<sup>14</sup> This Article examines the moral underpinnings and legitimacy of such laws.

Ironically, I say little about the details of Bad Samaritan laws themselves because that is well-covered ground.<sup>15</sup> Instead, Part I

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10. A handful of states have Bad Samaritan laws. See JOEL FEINBERG, *HARM TO OTHERS*, chapter 4 (1984) (discussed in this section), for more on legal duties to rescue. Although this paper focuses upon Bad Samaritan (duty-to-rescue) laws, many states have passed duty-to-report statutes. Some of these statutes are narrowly tailored (e.g., restricting the duty to report to violent crimes against children), while others are broader (e.g., the duty to report criminal activity generally). Many of these laws are based upon special relationships. Somewhat related, there is also “misprision of felony” (concealing one’s knowledge of another’s criminal activity to the authorities), which often requires active concealment. Of course, more broadly, it should be noted that the criminal law does not come close to complying with, say, Mill’s Harm Principle, e.g., harmless crimes might include inchoate crimes (attempt, conspiracy, solicitation), possession crimes, status crimes (public intoxication), and so on—though, there is, of course, debate about what qualifies as “harm.”

11. Faith Karimi, *Teens who laughed and recorded a drowning man in his final moments won’t face charges*, CNN (June 26, 2018), <https://www.cnn.com/2018/06/26/us/florida-teens-no-charges-drowning-man/index.html> [<https://perma.cc/ZE8Y-VC95>]. A friend of Dunn’s sister started a petition to change Florida law. *Id.*

12. Jay Sterling Silver, *Can the Law Make Us Be Decent*, N.Y. TIMES (Nov. 7, 2012), <https://www.nytimes.com/2012/11/07/opinion/can-the-law-make-bad-samaritans-be-decent.html> [<https://perma.cc/Q4MF-ZWNS>].

13. *Id.*

14. Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1119 (2021).

15. For example, A.D. Woosley addressed the potential problems with Bad Samaritan laws in a well-known article thirty-five years ago. See A.D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); see also Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157 (1994) (discussed in this section).

examines the broader, theoretical backdrop of duties imposed by Bad Samaritan laws, including their relationship with various moral duties to aid.<sup>16</sup> This leads to the analysis in Part II, which examines two related questions that are raised when moving from moral to legal duties: First, on what ground does the state have the authority to dictate that one's needs should be met in the way specified by a particular legal duty?<sup>17</sup> Second, does a special relationship exist that justifies the establishment of such legal duties?<sup>18</sup> The answers to these questions are of interest inasmuch as they shed light on the relationships among our actions, our laws, and the well-being of others.

### I. RESCUE AND BENEFICENCE

The list of positive moral duties owed by individual persons may include rescue, beneficence, and justice.<sup>19</sup> This Article focuses on the relationship between the first two of these potential duties and how they are related to legal duties to aid: *rescue*, the duty to aid others in emergency situations, and *beneficence*, the duty to promote the well-being of others.<sup>20</sup> To be clear, then, I am interested in the state's authority to compel one in one's *individual* capacity to help another, not the state's authority to address broader principles of *justice* that affect general welfare on an institutional level. Accordingly, this paper would not apply to, say, state mandates requiring the populace to wear masks or get vaccinations to protect the general welfare during a public health emergency such as a pandemic—mandates that strike me as justified and legitimate given institutional demands of *justice*.

The above tripartite conception of positive moral duties implies that rescue and beneficence are distinct. But as almost every undergraduate philosophy student knows, Peter Singer's classic paper on the topic suggests that there are questions about whether duties of rescue and beneficence may be distinguished in nonarbitrary ways. These sorts of questions led Singer to the well-known conclusion that our positive moral duties are conceivably without limit. Whatever one might think of

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16. See *infra* Part I.

17. See *infra* Part II.

18. *Id.*

19. See Luke William Hunt, *The Global Ethics of Helping and Harming*, 36.4 HUM. RTS. Q. 798 (2014), for an account of duties of rescue and beneficence in the international context. Positive moral duties typically mean that one is obliged to take some sort of step or action, rather than merely refrain from taking some sort of step or action (i.e., a negative duty).

20. The third potential positive duty, justice, is typically considered an institutional principle, such that an individual's primary duty is to support just institutions. See JOHN RAWLS, *A THEORY OF JUSTICE* 47 (Harvard Univ. Press, 2003). However, others have argued that if individuals have a duty to support just institutions, then they also have a duty to support the just ends those institutions strive to bring about. See, e.g., Liam Murphy, *Institutions and the Demands of Justice*, 27.4 PHIL. & PUB. AFF. 251, 283 (1998).

Singer’s argument, the underlying questions are relevant with respect to any positive legal duties the state may impose to aid others in one’s *individual* capacity—though, as discussed in Part II, they are relevant in surprising ways.

One of the core questions is whether there is a nonarbitrary way to draw the line between rescue and beneficence. If not, one would seem to be left with some untenable options, including: (1) drawing a line that reflects an arbitrary limit to our positive duties; (2) accepting that we have essentially unlimited positive duties; or (3) accepting that our positive duties are quite limited. There are several prominent theories—including one by Liam Murphy and one by Garrett Cullity—that have attempted to overcome the obstacle presented by the first option, namely locating a nonarbitrary limit to our duty of beneficence.<sup>21</sup> To help motivate the problem, first consider the difficulties that arise when analyzing duties to rescue.

### A. Rescue

There is no shortage of literature on the question of rescue. The field is rife with colorful moral dilemmas, and a random sampling will likely include runaway trolley cars, drowning babies, and, in some variations, pools full of drowning babies, that are supposed to explain one’s moral duties.<sup>22</sup> While these scenarios are instructive in making narrow points—and while it is presumably not impossible that one will find oneself in a pool of drowning babies—there is a reasonable concern that philosophical analysis of these hypothetical situations does not accurately reflect the process by which one actually analyzes moral questions. One worry is that pondering only whether one has the duty to make a split second decision to switch a trolley car from a track with three people tied on it to a track with two people leads to the conclusion that our duties should be based simply on their ability to produce good consequences in even the most unlikely of situations.<sup>23</sup> But as Dunn’s case illustrates, rescue is an important practical moral question even if most of us experience such situations rarely.

Joel Feinberg’s comprehensive analysis of rescue in *Harm to Others*, which generally argues that there should be a *legal* duty to rescue, is an

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21. Hunt, *supra* note 19, at 800 (considering these three options in the international context regarding the potential duties that affluent states owe to the distant needy).

22. See, e.g., Molly Crockett, *The Trolley Problem: Would You Kill One Person to Save Many Others?*, GUARDIAN (Dec. 12, 2016, 11:49 AM), <https://www.theguardian.com/science/head-quarters/2016/dec/12/the-trolley-problem-would-you-kill-one-person-to-save-many-others> [<https://perma.cc/33J7-XSA3>]; Marko Milanovic, *The Drowning Child*, EJIL: TALK! (Sept. 3, 2015), <https://www.ejiltalk.org/the-drowning-child/> [<https://perma.cc/8WGS-ZMY6>].

23. See TALBOT BREWER, THE RETRIEVAL OF ETHICS 69–70 (2009), for an analysis of the potential problems with this way of approaching practical problems.

appropriate starting point.<sup>24</sup> It is representative of a general problem in the project of distinguishing legal and moral duties of rescue from beneficence: drawing a line at the point at which one's duty to rescue ends seems like an arbitrary affair. Feinberg's argument is centered on the distinction between perfect and imperfect duties and determinate and indeterminate persons, and their respective rights (imperfect duties lack determinate recipients with correlative rights, while perfect duties involve determinate recipients with correlative rights).<sup>25</sup> The perfect duty to rescue a determinate person entails that the determinate person has a right to be rescued from harm.<sup>26</sup>

Conversely, the imperfect duty to rescue indeterminate persons does not entail a right of indeterminate persons to be saved.<sup>27</sup> So the teens mentioned earlier would presumably have a perfect duty to attempt to rescue (say, by calling 9-1-1) Dunn, a determinate recipient, who would presumably have a right to be rescued by the teens. But what if one encounters two determinate persons—two persons drowning in a pool, say—and is only capable of saving one? Feinberg seems to blur the perfect and the imperfect, and the determinate and the indeterminate, by arguing that one has an imperfect duty to rescue as many persons as possible.<sup>28</sup> Moreover, each person has a right that the rescuer rescue as many as possible.<sup>29</sup>

But if Feinberg relies on the perfect/imperfect duty dichotomy, a problem arises with the last point about imperfect duties and the rights of multiple determinate persons. In the case involving two determinate drowning persons—only one of whom may be saved—Feinberg seems to say that each drowning person does have a right: a right that the rescuer save one of them if it is only possible to save one. The problem is that this does not seem fundamentally unlike Feinberg's claim that indeterminate persons do *not* have a right to be rescued; this is because the second, determinate drowning person (who cannot be saved) is analogous to one of the many indeterminate, distant needy (who cannot be saved), yet one has a right to be rescued and the other does not.<sup>30</sup>

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24. FEINBERG, *supra* note 10, at 185–86.

25. *Id.* at 134.

26. *Id.* at 134.

27. *Id.*

28. *Id.* at 147.

29. *Id.*

30. See MICHAEL A. MENLOWE, *THE PHILOSOPHICAL FOUNDATIONS OF A DUTY TO RESCUE, THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID* 19–21 (1993), for a discussion of these problems in Feinberg's argument. In any event, if Feinberg's goal is to morally distinguish determinate sets (e.g., of babies) from non-determinate sets (e.g., the distant needy), then it would perhaps be more plausible to argue that one has a *perfect* duty to *use one's discretion* to choose who to save in a determinate set, while saving as many as possible. Each baby would thus have a right against a rescuer that the rescuer select and maximize, not a right to be saved. I will suggest

Why is this so? Here, one may ask to what extent there are factual differences between the duty to rescue as many drowning persons as possible and the duty (or lack thereof) to rescue as many of the distant needy as possible. Of course, there are many factual differences between the two cases, including: (A) physical distance, (B) experiential impact, (C) multiple potential rescuers, and (D) causal nature of aid.<sup>31</sup> However, the important question is the extent to which these factual differences are different in a relevant way.

Through a great many colorful examples, Peter Unger has argued that these and other factual differences are not morally relevant to our duty to rescue the distant needy.<sup>32</sup> They can be summed up in a more general way by treating differences such as (A) and (B) similarly and differences such as (C) and (D) similarly. Regarding (A) and (B), sending \$100.00 in the mail to help a dying child over 8,000 miles away obviously has a different experiential impact from pulling a drowning baby from a pool. What is less obvious is how this is relevant. The dying child 8,000 miles away is no less real, and, presumably, one could take a flight to a distant land, make one's way to an Oxfam station (or some other effective organization), contribute \$100.00 in person, and experience first-hand the rescue of a dying child. It just so happens that it would be much more efficient, and equally effective, to send the \$100.00 in the mail.

The factual differences represented by (C) and (D) have to do with, respectively, the impersonal nature of aiding the distant needy because there are a great many rescuers (all the affluent people in the world) and there are a great many needy persons (all the many distant needy dying around world). However, consider how Dunn's case illustrates (C): You and four friends are relaxing by a pond and notice a man drowning. Assume each of your friends is able to rescue the man easily (by calling 9-1-1, for example), but they do not do so for various reasons. It is difficult to see how your duty to rescue the man is affected by the fact that many others are able to do so.

This seems to be roughly analogous to our situation with respect to the distant needy. The fact that there are many others who could send money to the distant needy does not seem to affect my duty to do so. Conversely, the circumstances represented by (D) illustrate how the sheer volume of those in need make it difficult to see how one's meager \$100.00 has any real causal impact. For instance, it is impossible to say that one's \$100.00 donation to Oxfam makes a difference to some particular, identifiable child in a distant country. It is certainly true that

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that such moves do not address whether determinate sets are morally different from indeterminate sets.

31. See PETER UNGER, *LIVING HIGH & LETTING DIE* 33–49 (1996), for a description of these and other factual differences between cases of rescue and distant aid.

32. *Id.*

one's \$100.00 donation is a mere drop in the bucket of the millions of other donations, which permit lives to be saved collectively. However, as Unger puts it, it is difficult to see how there is any moral relevance "to the precise character of the causal relations between the well-off and those whom, whether collectively or not, they might help save."<sup>33</sup> In a sense, then, need and necessity are the ends of the stories in cases of both rescue and beneficence.<sup>34</sup>

In spite of Feinberg's complex analysis of duties and rights, we seem to be left where we started, namely, questioning the extent to which there is a moral duty to rescue and whether there is any nonarbitrary way to distinguish such a duty from the duty to help the distant needy (or a duty of beneficence). To be sure, Feinberg's argument seems to suggest that we have a duty to rescue as many people as we are able—at least if they are drowning in a swimming pool in front of us—because those people have a right to be rescued. But if we have a duty to rescue as many people—whether in a swimming pool or otherwise—as we are able, and there is no relevant difference between those in the pool and those in distant lands, we need a more expansive theory regarding duties of beneficence.

### B. *Beneficence*

Dunn's case illustrates the move to beneficence. Assuming that a simple call to 9-1-1 could have saved Dunn (seeing as he struggled in the pond for minutes), and assuming that the teens had a moral duty to rescue Dunn in this way, do the teens have the same moral duty to save a dying child in a distant land by simply mailing a \$100.00 check to Oxfam?<sup>35</sup> And there is certainly more than one starving child, which raises the question of whether the teens should send a second \$100.00 check, and third, and so on, especially if it only means that they will have less disposable income to purchase "weed" (which the teens admitted to smoking around the time Dunn drowned).<sup>36</sup>

One might argue that the Dunn case is not an appropriate example because it would have been difficult for the teens to know with certainty that Dunn—an adult—would die as a result of them not calling 9-1-1

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33. *Id.* at 49.

34. Feinberg and others would still want to say that *determinateness* adds something morally significant to rescue situations. There is clearly something factually different in cases when there is a determinate rescuer and rescuee, but, following Unger, it remains unclear what the moral difference is exactly. Perhaps there is a special relationship between determinate rescuers and rescuees—similar to familial or contractual relationships—that precludes the distant needy from possessing rights. I would submit that the nature of rescue relationships seems inherently different than the sorts of special relationships that will be discussed in Part II.

35. Karimi, *supra* note 11.

36. *Id.*

(notwithstanding the fact that they taunted him in the video, saying that he was going to die).<sup>37</sup> That said, the teens would have known at least two facts: (1) Dunn's interests were in jeopardy such that he was in need of assistance, and (2) it was necessary to take easy steps in order to attempt to meet Dunn's need. Similarly, in the case of beneficence, one knows there are persons in distant countries with vital needs. The identities of these persons and precise nature of their needs are not known, but one is quite sure that there are options that may meet the needs of these persons, including sending \$100.00 to Oxfam. One does not know exactly how this contribution will help and so—as in Dunn's case—one is only left with certain basic facts: someone is in need, and one can either act or not act upon the various options at one's disposal in an attempt to address those needs.

But there are many people in need. And if the distinction between cases of rescue and cases of beneficence are artificial, then our duties are very extreme indeed. Based in part on the following two principles, this is of course the point that Singer made over forty years ago: (1) "Suffering and death from lack of food, shelter, and medical care are bad," and (2) "[i]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it."<sup>38</sup> Accordingly, if one sees a child drowning in a shallow pond, one ought to pull the child out even if doing so means one's clothes will get muddy, which is insignificant when compared to the death of the child. And for reasons similar to the ones that have been noted (geographic distance, multiple potential rescuers, etc.), Singer argues that his two principles apply to helping the distant needy in the same way they apply to rescuing the child in the pond: We are morally required to give a great deal of our time, money, and resources to things such as famine relief, rather than spending it on "trivia."<sup>39</sup> It would be an understatement to say Singer's paper generated a great deal of disagreement regarding one's duty to help the distant needy.<sup>40</sup> The disagreement may be distilled to the following concern: Although there might be some duty to help the distant needy, there should be some practical way to limit that duty such that one is not reduced to a state of near poverty.<sup>41</sup>

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37. *Id.*

38. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972) (providing an alternative, weaker version of the argument by removing "comparable" from the second premise).

39. *Id.* at 241.

40. See generally John Arthur, *Rights and the Duty to Bring Aid*, in WORLD HUNGER AND MORAL OBLIGATION 37 (William Aiken & Hugh LaFollette eds., 1977) (responding to Singer's position).

41. See Hunt, *supra* note 19, at 807 (making these points about Singer's paper as they relate to duties owed by affluent states to peoples in other states).

Liam Murphy addressed this concern with a comprehensive theory he calls the “collective principle of beneficence,” which attempts to make sense of the extreme demands required by the utilitarianism represented in Singer’s argument.<sup>42</sup> From the outset, Murphy suggests that the demands of utilitarianism are extreme only because we view them in terms of the partial compliance of others.<sup>43</sup> In other words, our duty to help others seems so extreme because most people do not comply with *their* duty to help others.<sup>44</sup> If everyone did their fair share in aiding the needy, then the demands on each one of us would be reduced drastically.<sup>45</sup> This failure of others to comply with their duty is the basis of Murphy’s theory, which accounts for the failure with a “compliance condition.”<sup>46</sup> The compliance condition states that one’s duty of beneficence should not exceed one’s duty under conditions in which everyone else complied fully with *their* duty of beneficence.<sup>47</sup>

The condition implies that the real problem with utilitarianism is not that it is overly demanding, but rather that it does not treat all persons as rational agents who are capable of performing their duty.<sup>48</sup> Although utilitarianism typically disregards those who do not comply with their duty (almost as if they do not exist), the compliance condition affirms that non-compliers are agents who are assigned a certain portion of the work of beneficence.<sup>49</sup> Moreover, one does not have to pick up their slack, so to speak, by performing the portion of work they are failing to perform. The final formulation of Murphy’s theory is lengthy and complex, but I take the key points to be as follows:

- (1) Everyone has a duty to take actions that will optimize aggregate well-being.
- (2) However, in circumstances in which everyone does not comply with (1), one is not required to sacrifice more than one would have to sacrifice under circumstances in which everyone did comply with (1).
- (3) Therefore, in circumstances in which everyone does not comply with (1), one has a duty to take actions—

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42. LIAM B. MURPHY, MORAL DEMANDS IN NONIDEAL THEORY 5–6 (2000). *See also* Hunt, *supra* note 19, at 810 (summarizing Murphy’s work using a similar analysis to address the extent to which affluent states owe duties of rescue and beneficence to the needs of those in other states).

43. MURPHY, *supra* note 42, at 117.

44. Hunt, *supra* note 19, at 810.

45. *Id.*

46. MURPHY, *supra* note 42, at 97–101. *See also* Hunt, *supra* note 19, at 810.

47. Hunt, *supra* note 19, at 810.

48. MURPHY, *supra* note 42, at 9–13.

49. *Id.*

within the parameters of (2)—that will optimize aggregate well-being.<sup>50</sup>

This is a compelling theory, but there are two potential problems with the collective principle of beneficence. First, Murphy's theory does not seem adequate unless one adds several rules and prohibitions. For example, if one's individual duty is limited by (2) above, and one complies with (3) above, then what happens if one subsequently encounters a person drowning in a pool—or sees someone in need of a simple call to 9-1-1, such as Dunn? If one has already completed one's duty in (3), then one is under no obligation to take additional actions to help others—regardless of whether those others are 8,000 miles away or face-to-face. Conversely, people who are very bad off would seem to be completely off the hook when it comes to rescuing others. Because the very poor are already the worst off in society, their status may preclude them from being factored into the collective calculus of sacrifice allotments. It is unclear exactly how the collective principle of beneficence would cultivate a duty to rescue in such cases. Murphy acknowledges that we may have to think of rescue as simply a good rule of thumb. Unfortunately, this leads one back to Singer's position that there is no sensible reason to react differently to cases of rescue and beneficence, ultimately leaving the collective principle of beneficence as a somewhat arbitrary limitation of the duty of beneficence.<sup>51</sup>

Garrett Cullity attempted to address some of these problems in *The Moral Demands of Affluence*. Indeed, his theory is said to provide the basis for a nonarbitrary limitation to the duty of beneficence. Rather than base the limitation on the notion of one's fair share of a collective duty, Cullity proposes an "aggregate approach." Cullity suggests that one is excused from the duty of beneficence when the aggregate cost of one's successive contributions of beneficence reaches a certain point.<sup>52</sup> By rejecting the extreme demands of beneficence and embracing an aggregate approach, Cullity gives us the following account of beneficence: one has a duty to give aggregately until going further would worsen one's life by a "requirement-grounding amount" (the sort of

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50. *Id.* at 117.

51. Despite its limitations, the collective principle of beneficence is of course an impressive theory for dealing with the extreme demands of utilitarianism because it shifts the burden of beneficence to a collective unit. It seems reasonable to ground institutional and collective principles in our ethical intuitions, but when those principles are reduced to individual experiences it is unclear how exactly they apply to each *one* of us. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 102–03 (1985), for an analysis of how institutional theories ultimately lead "back to the original, Kantian, universalistic concerns of such a theory."

52. GARRETT CULLITY, *THE MORAL DEMANDS OF AFFLUENCE* 82 (2004). In taking this approach, Cullity rejects both the "severe demand" and the "extreme demand" of beneficence (the former is the general view that our duty of beneficence is very demanding, as represented by Singer). *Id.* at 70–82.

goods in which one is justified in having an interest because they would not preclude one from helping a person simply because that person has an interest in such goods)<sup>53</sup> with the caveats that one may (1) live a “non-altruistically directed life” (one that does not comply with the extreme demands of a life-altering duty of beneficence) and (2) seek “commitment goods” (e.g., personal relationships, worthwhile personal projects)<sup>54</sup> within that life.<sup>55</sup>

How is one justified in living a life that rejects the extreme demands of beneficence to which Singer and others have alerted us? Cullity argues that one’s right to live a non-altruistic life is based upon the fact that *other* people’s interests in the fulfillment of a non-altruistic life provide us with morally compelling reasons to help *them*.<sup>56</sup> In other words, almost no one complies with the extreme demand of beneficence, and the morally compelling reason to help other people does not disappear just because they do not live altruistically focused lives in the way the extreme demand would require. For Cullity, then, it follows that it must be morally permissible for each one of us to likewise pursue such a life, and the outer limit of the duty of beneficence is thus the point at which one can no longer live such a life.<sup>57</sup>

Cullity acknowledges that there is no general way to apply his theory to everyone because the interests of each person vary, as do the things one considers life-enhancing.<sup>58</sup> One person may have requirement-grounding goods (friendships, aptitudes, and so on) that are more expensive than another person’s requirement-grounding goods, thus justifying a more expensive lifestyle.<sup>59</sup> Although it seems right to say that the goods that are important to people, as well as the costs of those goods, vary a great deal, it is difficult to say exactly how this should affect one’s duty of beneficence. Cullity attempts to address the subjectivity of this question by providing some practical examples regarding how one should generally spend one’s money (for instance, some expensive purchases should be considered morally indefensible, such as a car or books for a private library, though expensive tertiary education might be morally defensible because it is life-enhancing).<sup>60</sup>

The problem is not that the implications of Cullity’s theory appear puritanical (many seem perfectly reasonable), but rather that the sorts of intuitions underlying the theory can seem to approach the status quo.

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53. *Id.* at 150–51.

54. *Id.* at 162–63.

55. *Id.* at 203.

56. *Id.* at 133–36.

57. CULLITY, *supra* note 52, at 146.

58. *Id.* at 180.

59. *Id.* at 181.

60. *Id.* at 180–83.

There is an underlying concern that the approach permits affluent people to more or less continue living as they currently do, while being more conservative in their spending on certain (superficial) items. Moreover, one reaches an impasse if there are disagreements regarding another’s fundamental conception of what is “life enhancing,” or which goods are morally indefensible. To put it another way, the aggregate approach seems to obscure what it means to say one has a *duty* to do or not do something. In some sense, then, the aggregate approach—like the collective principle of beneficence—can seem to permit one to continue acting the way one is accustomed to acting based upon one’s intuitions.<sup>61</sup>

## II. FROM MORAL DUTIES TO LEGAL DUTIES

Given the limits of Murphy’s and Cullity’s (otherwise compelling) theories to constrain duties of beneficence, this part of the Article considers a variation of the third option presented at the outset: the idea that we have limited moral duties that legitimize positive legal duties. In other words, if the distinction between a duty of rescue and a duty of beneficence is in some sense arbitrary, and if the noted theories fail to limit a duty of beneficence in a nonarbitrary way, then the state is constrained in imposing legal duties to aid others in one’s individual capacity (e.g., via Bad Samaritan Laws) without some principled, independent basis of authority to do so.<sup>62</sup> Of course, this does not mean that we have few positive moral duties (this Article takes no position on the extent and basis of one’s positive moral duties, aside from suggesting that the above theories do not establish clear limits on a duty of beneficence), but rather that we have somewhat limited positive moral duties *that legitimize positive legal duties in one’s individual capacity*.

This position is in some sense similar to the argument in political philosophy that one does not have a moral duty to obey the law simply because a need or necessity exists. Rather, a moral duty to obey the law must be based upon the state’s legitimacy with respect to the law—even though one may have an independent moral duty to meet a need with

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61. It should again be noted that neither Murphy’s nor Cullity’s theories explicitly account for the problem of rescue. While Murphy relies on “agents’ motives and character” in rescue cases, Cullity states the following regarding encountering a rescue situation in which one’s aggregate duty had already been met: “I could save the person’s life and then, if it costs me anything, take that into account as part of my overall budget for contributing to saving the lives of strangers; or I could let the person die, and spend the whole of that budget on donations to aid agencies.” Cullity suggests that the former option would be morally right because failures of rescue are more blameworthy in that they are more “vividly inescapable.” MURPHY, *supra* note 42, at 132; CULLITY, *supra* note 52, at 200. Both Murphy and Cullity’s solutions seem to be cloaked ways of saying simply that we have good reasons to rescue people.

62. I take the second option—the view that we have essentially unlimited positive duties—to be some form of unrestrained utilitarianism. That option will not be addressed.

which a law is concerned.<sup>63</sup> The position here is that contingent claims of need in cases of rescue and beneficence do not necessarily give rise to legitimate *legal* duties to meet those claims of need (though they might). Rather, the idea is that any legitimate legal requirement to aid others must be based upon the state's claim of authority to impose such requirements. Evaluating the legitimacy of Bad Samaritan Laws can thus be addressed in part by answering the following related questions: (1) On what ground does a state have the authority to dictate that one's needs should be met in the way specified by a particular legal duty? (2) Does a special relationship exist that authorizes the establishment of such legal duties?

The first question has to do with the state's authority to enact duties to aid others. Even if everyone agrees that such laws are *justified*, intrinsically and instrumentally superior to alternative arrangements, that does not necessarily answer the question about the state's authority to impose them. One way to answer the first question is to say that the state must have authority in virtue of its *legitimacy*—the moral right to command (and have its command obeyed) that one's needs should be met in the way specified by a legal duty.<sup>64</sup> There are multiple accounts regarding why a state might have this sort of authority.

Roughly, one might categorize accounts of legitimacy and their correlative duties to obey the law as transactional, natural, or associative.<sup>65</sup> Transactional accounts are based upon our interactions with others and include theories based upon special obligations that arise from consent and general duties that arise from fairness (e.g., one has a general duty to the state in light of the benefits one receives from the state).<sup>66</sup> Natural duty theorists argue that *just* states are legitimate, and one has a moral duty to support just and good states *because* they are just and good.<sup>67</sup> Finally, associative theories claim that states may subject persons

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63. This issue was debated in CHRISTOPHER HEATH WELLMAN & A. JOHN SIMMONS, *IS THERE A DUTY TO OBEY THE LAW?* (2005) (Wellman argues that we have a duty to obey based upon "samaritanism," which, roughly, includes two descriptive premises and one moral premise (the third premise): "(1) states secure vital benefits that (2) could not be secured by any other, non-coercive means...[and (3)] one's normally decisive position of moral dominion can be overridden by particularly urgent, and therefore morally preemptory, concerns." *Id.* at 23. In part II of the book, Simmons argues that samaritanism does not give rise to a moral duty to obey the law, and, here, I invoke Simmons's view to show how positive moral duties to aid others legitimate limited legal duties to aid).

64. See A. JOHN SIMMONS, *Justification and Legitimacy*, in *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 130 (2001), for an account of the distinction between a state's justification and its legitimacy.

65. See A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS*, ch. 3 (1979) and WELLMAN & SIMMONS, *supra* note 63, at part II, for an account of the weaknesses of each of these theories.

66. SIMMONS, *supra* note 65, at 63–64.

67. See PLATO, *Crito*, in *PLATO: COMPLETE WORKS* (John M. Cooper ed., 1997), for an early account of a natural duty theory (in which Socrates suggests that it would be wrong to disobey

to legitimate authority because states are the kinds of associations that generate obligations; this is analogous to a duty one might owe to one’s parent or sibling by virtue simply of occupying the duty-laden role of “son” or “brother.”<sup>68</sup>

Each of these theories has significant—though not necessarily conclusive—shortcomings. To be sure, these brief remarks do not scratch the surface of the voluminous work on legitimacy and authority.<sup>69</sup> Defending and justifying one theory or another is not this Article’s goal, but it is plausible to think that many liberal states in some sense embrace transactional theories based upon reciprocation and fairness: In the context of liberal societies, persons are often viewed as reciprocators who have a fair share of the collective labor. This means that persons are viewed as having a general duty to the collective because it would be wrong to reap the benefits of the collective as a free rider who takes advantage of others’ good faith compliance. The point is that reciprocation is presumed to be central to the ideal of the liberal state: Liberal states are just political societies based upon a collective enterprise in which persons do their part to keep it running.<sup>70</sup> This is notwithstanding theoretical problems with the idea, including that some benefits provided by the collective may not have been accepted voluntarily or explicitly by all members of the collective (though perhaps many benefits are accepted tacitly).<sup>71</sup> But this and other complaints about reciprocation do not undermine the fundamental role that reciprocation seems to play in liberal states. This is not a particularly controversial or dogmatic claim because the idea of reciprocation—in one form or another—is significant in the work of many liberal theorists who embrace pluralism.<sup>72</sup>

This brief sketch of legitimacy does raise an important point about the extent to which states in the liberal tradition may dictate that one’s needs

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the law and flee Athens because he has a duty not to harm the state and the moral value of its Law).

68. See RONALD DWORKIN, *LAW’S EMPIRE*, ch. 2 (1986), for an account of associative theories.

69. The work on legitimacy and authority—not to mention “philosophical anarchism” and states’ illegitimacy—is voluminous. See, for example, SIMMONS, *supra* note 65, at 102–21, for an account of how problems with the various theories of legitimacy might lead one to philosophical anarchism.

70. There are of course many liberal philosophers who do not view reciprocation as the *basis* of legitimacy, but this does not mean that reciprocation is not a fundamental aspect of the liberal ideal.

71. See, e.g., SIMMONS, *supra* note 65, at 129.

72. See LUKE WILLIAM HUNT, *THE RETRIEVAL OF LIBERALISM IN POLICING* 29–30 (2019), in which I draw upon the work of a variety of liberal theorists to support the role of reciprocation in liberal states generally and liberal policing specifically. There, I note that “the ideal of the liberal state does not preclude the possibility that a state’s legitimacy could be based upon a combination of factors and theories in addition to reciprocation.” *Id.* at 55–56.

should be met in the way specified by a particular legal duty one has in one's individual capacity (rather than the demands of justice in an institutional context). This is in part because each of the theories for legitimacy mentioned above—transactional, natural, and associative—suggest that the state's authority and power is limited. The limit might be based upon the extent to which the citizenry voluntarily divested power to the state, the contours of their associative relationship with the state, or the extent to which it would be fair for them to reciprocate in light of the benefits received from the state.

The extent to which states are limited in these ways highlights a problem with Bad Samaritan Laws: Any limits placed upon such laws are in some sense arbitrary given the shortcomings of the earlier theories (from Part I) to distinguish between rescue and beneficence.<sup>73</sup> If the state has the authority to compel people to engage in easy rescues in their individual capacity, then—given the shortcomings of the earlier theories—there is no nonarbitrary way to limit the state's authority to enact laws that require one to engage in a great many other positive duties to meet the needs of others in one's individual capacity.<sup>74</sup> In a sense, then, Bad Samaritan Laws are conceivably without limits and indicative of unlimited state authority to compel individuals to “do good.” Of course, unlimited or arbitrarily limited authority is contrary to the fundamental principles of liberal states, which are presumably constrained by political norms such as the rule of law. A state with a dictate to oversee the moral character of all its citizens is akin to the ultra-paternalistic city-state illustrated in Plato's *Laws*—a state in which “[t]he purpose of the law is not merely to protect one's interests, but rather to make one better off in every respect. . . . to secure a good and virtuous life for the citizens . . . .”<sup>75</sup> Although improving one's moral character might seem like a good idea in principle, it is not typically construed as part of the mandate of liberal states.

Consider further the analogy regarding the legal duty to aid others in one's individual capacity and an argument for the moral duty to obey the law, namely, that the moral duty to obey the law is based upon the simple claim that human beings need government, which necessitates compliance with the law.<sup>76</sup> For example, necessity arguments for obeying

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73. See *supra* Part I.

74. I am not suggesting that such a legal requirement would be inconsistent with a moral duty to aid (we may very well have expansive moral duties to aid others beyond easy rescue situations), but rather that such legal requirements may be inconsistent with the state's authority. Moreover, the issue here is the state's authority to require duties of rescue and beneficence in one's individual capacity. The state may very well have the authority to promote the general welfare of the polity based upon broader, *institutional* principles of justice.

75. Luke William Hunt, *The Law in Plato's Laws: A Reading of the 'Classical Thesis'*, 35 POLIS 102, 124 (2018).

76. WELLMAN & SIMMONS, *supra* note 63, at 121.

the law are derived from natural moral duties, which A. John Simmons has described as grounded either "(a) in the moral importance of advancing some impartial moral good or (b) in some moral duty thought to be owed by all persons to all others as moral equals, regardless of roles, relationships, or transactions."<sup>77</sup> It is thus easy to see how a legal duty to aid others in one's individual capacity may be compared with a necessity argument based upon this understanding of a natural duty.

The intuitions involved in this sort of argument are similar to the ones that form the basis of a legal duty to rescue a drowning child, make a 9-1-1 call, and so on. To put the analogy simply, other persons are our moral equals; they have certain biological needs, which necessitate and justify a legal duty to aid them. Although this is compelling from the perspective of one's individual moral duties, such necessity accounts must show how the claims of those in need of aid authorize a governmental entity to dictate how those needs should be met *legally* by one in one's individual capacity.

In his critique of necessity claims for a duty to obey the law, Simmons argues that it is unclear how a person's needs *authorize* another to dictate anything in particular about that need: "The fact that I am ill and hungry and need care does not on its face seem to give any other person or group authority to dictate to me (and/or others, absent my and/or their consent) in whatever ways are required to meet my need."<sup>78</sup> This point highlights a straightforward difference between moral and legal duties to aid: although a moral duty of rescue or beneficence might be described as a duty to offer aid to one in need, a legal duty to aid is based on governmental authority to compel one to meet the needs of another in a specific way.

There is certainly a strong case that easy rescue situations involving life or death—particularly those in which there exist a determinate number of rescuers and rescuees—generate moral duties of aid.<sup>79</sup> While it might seem intuitive to extend such moral duty to aid to a legal duty to aid, there must be a basis for the government's authority to legally compel one to comply with one's individual, positive moral duties (as opposed to addressing the broader principles of *justice* that affect general welfare on an institutional level).

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77. *Id.* at 121.

78. *Id.* at 131. Simmons analyzes necessity accounts provided by Elizabeth Anscombe and Tony Honoré, who both support their positions with examples of family relationships. However, as Simmons notes, the intuitive correctness of these sorts of examples is based in large part on the traditional conviction that family members owe duties to each other. And while one might argue that there is similar intuitive force regarding claims that one has a duty to rescue another in an emergency situation, the intuition is much less powerful when extended to the distant needy.

79. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247, 287–88 (1980).

Alison McIntyre supports the intuition by arguing that one's duty to perform easy rescues is based upon one's public duty as a citizen, which is analogous to the public duties of law enforcement and other emergency services.<sup>80</sup> For example, one's community undertakes to protect property against damage from fire by providing fire departments.<sup>81</sup> That said, it would be impractical for communities to appoint "fire monitors" with contractual duties to alert the fire department if they see signs of fire.<sup>82</sup> Instead, this *public* duty is left to the citizens in the same way firefighters perform *public* duties rather than private duties with respect to individuals whose houses need saving: "The state has a duty to protect the general welfare, and one way of carrying out this duty is to 'deputize' citizens to function as part of a monitoring system and, in circumstances in which assistance can be easily provided, as surrogates for professional rescuers."<sup>83</sup> Moreover, McIntyre argues, such emergency assistance "constitutes a reasonable and not excessively burdensome interference with individual liberty because it applies only to cases in which a fairly small effort is able to avert a very great harm and the threat arises out of exceptional circumstances."<sup>84</sup> So one violates a positive duty grounded in a public duty when one fails to perform an easy rescue.

One worry about this argument is that it would also benefit the public if everyone refrained from eating fast food, smoking, and drinking alcohol because public health would be improved significantly, as would the strain on and cost of healthcare. But we do not say the government has the authority to legally compel one to volunteer at homeless shelters, donate to cancer research, eat healthily, or floss daily. There are innumerable needs in society for which there would be an interest in legally compelling others to meet, and it would of course be absurd to try to legally compel one to meet all such needs.

One might object by suggesting that rescue is a particularly important public benefit. In other words, legally compelling one to easily rescue another in a life-or-death situation is of a profoundly different character than legally compelling one to maintain a healthy diet. However, legally compelling society to maintain a healthy diet would save vastly more lives—and vastly more money—than legally compelling society to provide easy rescue in the rare cases one finds oneself in such a situation. So, though it may sound odd, legally compelling one to maintain a healthy diet is arguably far more morally significant than legally compelling one to easily rescue another, at least to the extent one is

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80. Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157, 181–82 (1994).

81. *Id.*

82. *Id.* at 181.

83. *Id.* at 181–82.

84. *Id.* at 182.

working within a utilitarian framework. Of course, many are unconvinced by utilitarian arguments because they fail to account for the moral significance of each person, as noted above. This leads to the second issue that must be examined in the context of legal duties to provide aid to others: *special relationships*.<sup>85</sup>

There is good reason to think the state has authority to impose duties of aid with respect to special relationships, including because many states are themselves based upon special relationship theories (e.g., the contractual relationship in social contract theory). For instance, states in the liberal tradition are often viewed as a cooperative scheme in which persons cooperate to produce a morally and prudentially superior condition than the alternatives. By morally superior I mean that such a political community is justified inasmuch as it conceives of persons as free and equal rather than bound by unlimited state authority. Likewise, with respect to the community's prudential superiority, I mean to describe how broadly defined theories in the social contract tradition claim that there are practical reasons for embracing a cooperative political community based upon reciprocity. In other words, schemes based upon reciprocity better preserve the conception of persons as free and equal, such as by enforcing negative duties and dealing with law-breaking. One can see this inasmuch as, say, Locke's political theory is based upon the goal of eliminating inconveniences. A central component of this goal is collectively providing for security by centralizing the right to punish, to eliminate bias, and personal incapacity. The upshot is that many government regulations in fact enhance liberty rather than restrict it.<sup>86</sup>

## CONCLUSION

The above sketch of liberal and social contract theory highlights the role of special relationships within those theories. In the same way the

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85. McIntyre's argument draws out this point, namely, that there is a substantial gap between the way the law treats one who fails to rescue another with whom one has a special relationship and the way the law treats one who fails to rescue another with whom one has no relationship. The law can be quite strict in the case of the former, though quite lenient in the case of the latter (even if a Bad Samaritan law exists). This brings us back to the discussion of Feinberg's determinateness in Part I. In other words, is there something morally significant about cases in which there is a determinate rescuer and rescuee? Does a special relationship exist between rescuer and rescuee that justifies a legal duty to provide aid? Even if the relationship between determinate rescuers and rescuees is more similar (than indeterminate rescue/beneficence situations) to familial, contractual, and professional emergency service relationships, I assume (based upon the shortcomings of the arguments to distinguish rescue and beneficence in Part I) that they are not sufficiently similar to justify many legal duties to aid. *See generally id.*

86. Or consider how Kant's goal in political philosophy might be described broadly as making justice possible through unilateral authorization. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 30 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797). *See also*, HUNT, *supra* note 72, at 21, for discussion of these points.

state's legitimacy may be based upon a special relationship (e.g., a transactional relationship based upon consent or reciprocation), the state has the limited authority to legally require one to meet the obligations derived from one's special relationships with others. This could be, in part, based upon the state's role of eliminating inconveniences noted above, which prevents one from having to enforce one's agreements with others (or having to punish those who fail to honor their agreements). Although it would of course be difficult to identify exactly which special relationships—and the exact positive duties that exists within those relationships—the state has the authority to enforce, it is perhaps less difficult to identify the broad families of such relationships.

A short list might include contractual relationships, certain familial relationships, and so-called “seclusion relationships” (situations in which one prevents another from receiving aid from others).<sup>87</sup> So, for example, the state might have the authority to impose a legal duty to rescue those with whom one has a contractual relationship (e.g., a contract in which a caregiver agrees to meet the needs of one who is sick or disabled), a familial relationship (e.g., parents to their minor children),<sup>88</sup> or a seclusion relationship (e.g., situations in which one has secluded the one needing aid so as to prevent others from giving aid). Although these families of special relationships are by no means exhaustive, they highlight the general ways in which a state might have the limited authority to compel one in one's individual capacity to meet the needs of others. While these families of special relationships no doubt require exceptions and caveats, they provide a rough framework for grappling with questions about the legitimacy of laws that require one to rescue another in one's individual capacity.

Interestingly, the three types of special relationships above track the three broad theories of a state's legitimacy discussed earlier: (1) agreements to aid others track *transactional* theories of state legitimacy; (2) familial relationships that generate obligations track *associative* theories of state legitimacy; and (3) seclusion relationships track natural

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87. *Jones v. United States*, 308 F.2d 307 (1962) (holding that there is no legal duty to rescue without a special relationship involving (1) a status relationship, such as parent to child; (2) a contractual duty of care; or (3) a seclusion relationship; of course, the court also held that legal duties to rescue exist when there is a statute requiring rescue (e.g., Bad Samaritan Laws)—the issue that this Article addresses).

88. For example, while Locke's general position is that persons are born equally with a set of rights that allow them to govern themselves, minor children are not included among such persons. This is one reason (among others) that states in the liberal and social contract tradition might have the authority to require parents to aid their minor children.

duty theories of state legitimacy inasmuch as it would be just to aid those from whom one secludes others from aiding.<sup>89</sup>

One might think that these three accounts of a state’s legitimacy would yield three different conclusions regarding the boundaries of state authority generally and the boundaries of Bad Samaritan laws particularly. This is an apt observation, but, as noted in the last section, one need not take a dogmatic approach with respect to theories about legitimacy and authority. In other words, it seems reasonable to think that a state’s legitimacy could be based upon a combination of factors and theories, such that different theories work in tandem to provide a more robust account of legitimacy with respect to a larger swath of people. And regardless of the theory of state legitimacy, there is an overlapping principle of limited state authority within liberal societies—and this principle suggests a shared boundary between different theories of state legitimacy that has implications regarding what can be legislated.<sup>90</sup>

This raises the broader point of the relationship between state authority on the one hand, and, on the other hand, the arbitrariness of the distinction between duties of rescue and beneficence. If the theories of rescue discussed fail to limit a duty of beneficence in a nonarbitrary way, then the state may not legitimately impose legal duties to aid others in one’s individual capacity (e.g., via Bad Samaritan Laws) without some independent basis from within its (limited) authority. Otherwise, the state would in a sense have unlimited authority to impose legal duties to aid others. Of course, many state laws—not just Bad Samaritan Laws—might involve arbitrary distinctions given the practical difficulty of line-drawing. The legitimate limit of such other laws is a worthy topic of inquiry, but, here, the point is simply that Bad Samaritan laws raise unique questions given the fundamental nature of their mandate.

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89. These categories are treated as broad families of relationships that lend support to state authority. This Article claims neither that these are the only ways that Bad Samaritan Laws are justified, nor that there are no limitations on Bad Samaritan Laws beyond those discussed herein.

90. It seems right to say that theories of legitimacy and authority (whether based upon transactional, associative, or natural duty theories) do not provide precise limits on the state’s authority—with respect to legislation or otherwise. For example, the content of one’s consent to authority is unlikely to be spelled out in significant detail; perhaps the clearest account of consent to authority would be that of the roughly 20 million naturalized citizens in the U.S. who took a specific oath to freely support and defend the Constitution, as well as a number of other commitments. From a narrow, jurisprudential point of view, theories such as legal positivism (holding that the existence and content of law depends on social facts and not on its merits or morality) cannot be regarded as sources of obligation to follow the law because that is ultimately a moral issue that brings us back to fundamental questions about political obligation. See Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN, ed. A. Ripstein (Cambridge, 2007), for an overview of these issues. The broader point is that liberal societies are based in part upon a general principle of limited authority that has implications regarding the boundaries of legislation.

This tentative conclusion should be tempered by the central role that reciprocity plays in liberal societies. To be sure, even if one assumed that individual liberty is the only value for which the government exists, a view with which this Article does not agree, there is not a strict inverse correlation between individual liberty and government regulation. Indeed, as noted above,<sup>91</sup> many government regulations in fact enhance liberty rather than restrict it. More broadly, one of the values promoted by liberal states is what we might describe colloquially as “helping each other out” given the role that reciprocity plays in liberal states. These points highlight the well-known tension between the conception of liberal states as cooperative schemes in which persons reciprocate and the limits of such conceptions given liberal theories of legitimate authority. This tension is often focused upon the line between the state’s authority to compel one in one’s *individual* capacity to help another and the state’s authority to address the broader principles of *justice* that affect general welfare on an institutional level.

The upshot is a presumption of reciprocity in liberal states that gives rise to difficult line-drawing exercises with respect to legitimate and illegitimate regulations. A principled way to evaluate the legitimacy of Bad Samaritan Laws is to answer two related questions: (1) On what ground does a state have the authority to dictate that one’s needs should be met in the way specified by a particular legal duty? (2) Does a special relationship exist that authorizes the establishment of such legal duties? This Article has sketched answers to those questions, leading to the conclusion that paternalist and moralistic laws—including Bad Samaritan laws—are sometimes justified and certainly not ruled out in liberal states. However, they are limited based upon a variety of grounds, including those that are analogous to the ways in which states might achieve legitimate, limited authority.

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91. HUNT, *supra* note 72, at 88 (discussing how freedom-limiting aspects of the state may in fact be a means of protecting freedom, as with Kant’s idea of the state’s role of “a hindering of a hindrance to freedom”).