

1-1-2000

# On the Road: Good Samaritans and Compelling Duties

Jeremy Waldron

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

## Recommended Citation

Jeremy Waldron, Symposium, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053 (2000).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol40/iss4/6>

This Symposium is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# ON THE ROAD: GOOD SAMARITANS AND COMPELLING DUTIES

Jeremy Waldron\*

## I.

In this essay, I would like to explore the relation between two stories—the sorry tale of David Cash and the biblical story of the Good Samaritan. The story of the Good Samaritan is already well known to you. It's about a lawyer.

And, behold, a certain lawyer stood up, and tempted [Jesus], saying, Master, what shall I do to inherit eternal life? He said unto him, What is written in the law? how readest thou? And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbour as thyself. And he said unto him, Thou hast answered right: this do, and thou shalt live.

But [the lawyer], willing to justify himself, said unto Jesus, And who is my neighbour? And Jesus answering said, A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead. And by chance there came down a certain priest that way: and when he saw him, he passed by on the other side. And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side. But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him, [a]nd went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him. And on the morrow when he departed, he took out two pence, and gave them to the host,

---

\* Professor of Law, Columbia University School of Law. LL.B., University of Otago, New Zealand; M.A., University of Oxford; D. Phil., University of Oxford; B.A., University of Otago.

and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.

Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves? And he said, He that shewed mercy on him. Then said Jesus unto him, Go, and do thou likewise.<sup>1</sup>

The tale of David Cash is less uplifting than this—so much less uplifting that Mr. Cash has sometimes been referred to in the newspapers as a “Bad Samaritan”<sup>2</sup> (though this, as we shall see, is a slander on Samaritans).

Cash, a Los Angeles area resident, saw a friend, Jeremy Strohmeyer, 19, of Long Beach, attack a 7-year-old girl in the ladies restroom of a Nevada casino near Las Vegas, but only walked away without trying to stop the attack or report it, police say. The victim, Sherrice Iverson, was then sexually molested and strangled to death, authorities say. Strohmeyer was charged with murder, kidnapping and sexual assault in the May 1997 crime and is on trial. But Cash was not charged with anything. Police determined Cash was not an active participant in the rape and murder, just a witness, although a horrendously passive one, to the beginning of the crime.

It was Cash's refusal to show any remorse for the child or any regrets for his inaction in interviews with the Los Angeles Times and on a radio talk show in Los Angeles in July that really made stuff hit the fan. “I'm not going to get upset over someone else's life,” he told the Times. “I just worry about myself first.” His sympathies were with jailed friend Strohmeyer, he said, and he was “not going to lose sleep over somebody else's problems”—a reference to Sherrice's death. On the contrary, he said, his notoriety had helped him get dates. . . .

Clark County, Nev., District Attorney Stewart Bell said, Cash's inaction “may be a crime in the eyes of God, but not in the eyes of the Nevada Legislature.”<sup>3</sup>

The two stories are connected by the fact that laws of the sort that would have been necessary to punish David Cash for walking out of the restroom without trying to save Sherrice

---

1. Luke 10:27–37 (King James).

2. See *Bad Samaritan: Law Does Not Require People to Help, but Decency Does*, HOUS. CHRON., Sept. 12, 1998, at A46; *Bad Samaritan: Youth Stands by While Pal Kills 7-year-old*, SAN DIEGO UNION-TRIBUNE, Aug. 29, 1998, at B10.

3. Clarence Page, *Some Others Take the Prize for Selfishness*, HOUS. CHRON., Sept. 1, 1998, at A16.

Iverson are known as "Good Samaritan" laws.<sup>4</sup> Needless to say, there was pressure to enact a Good Samaritan law in Nevada after the events involving David Cash and Sherrice Iverson;<sup>5</sup> indeed, it was even proposed that there should be federal legislation urging states to do this.<sup>6</sup>

It is perhaps unfortunate that the legislative proposal was tailored very specifically to the event that elicited it: the proposal was not for a general duty to rescue, but a duty to rescue *children* who were being *sexually* assaulted.<sup>7</sup> This de-

---

4. For recent examples, see Sungeeta Jain, *How Many People Does it Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State*, 74 WASH. L. REV. 1181 (1999); John T. Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L.J. 591 (1998). Pardun cites the following definition from *Black's Law Dictionary*: "Good Samaritan statute. A law that requires a person to come to the aid of another who is exposed to grave physical harm, if there is no danger of risk of injury to the rescuer." BLACK'S LAW DICTIONARY 694 (6th ed. 1990). Sometimes, however, laws of this kind are called "Bad Samaritan" laws (named, presumably, for their targets rather than their role-models). See, e.g., H.M. Malm, *Liberalism, Bad Samaritan Laws, and Legal Paternalism*, 106 ETHICS 4 *passim* (1995).

5. See Martin Kasindorf, *Bystander Also Guilty, Slain Girl's Advocates Say*, USA TODAY, Aug. 26, 1998, at 4A.

To give prosecutors new options in future cases, syndicated columnist Earl Ofari Hutchinson and Najee Ali, director of Project Islamic Hope here, are lobbying Nevada legislators to pass "Sherrice's Law" and have suggested a federal version of the same bill. These "good Samaritan" measures would criminalize an adult's failure to report a sexual assault on a child.

*Id.* For a critique, see Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385 (1998).

6. See Nick Lampson, *Need Better Tools to Protect Our Missing Children*, HOUS. CHRON., Feb. 11, 1999, at A41. Lampson, a Democrat who represents Texas' Ninth U.S. Congressional District, wrote in that article:

While Congress cannot legislate morality, we have the unique opportunity of directing attention toward a specific issue. After 7-year-old Sherrice Iverson was molested and killed in a Nevada casino while another man watched and did nothing to stop the attack, I wanted to raise the public's awareness of its responsibility of reporting crimes to authorities. I introduced the Sherrice Iverson Act, which called for states to enact "Good Samaritan" laws and create criminal penalties for witnesses who fail to report sexual crimes against children to authorities. Although the bill did not pass the House last session, I have since gained considerable bipartisan support for the bill, which I will reintroduce during this Congress.

*Id.* There is a discussion of this legislative proposal in Jessica R. Givelber, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169 (1999).

7. But at least the proposal did not restrict the duty to incidents occurring in handicapped stalls in casino restrooms.

gree of specificity reminds me of Jeremy Bentham's comment on the blind, impulsive character of legislation in eighteenth-century England: "The country squire who has had his turnips stolen, goes to work and gets a bloody law against stealing turnips. It exceeds the utmost stretch of his comprehension to conceive that the next year the same catastrophe may happen to his potatoes."<sup>8</sup> Nevertheless, the story of David Cash and the legislative proposals responsive to it have helped to bring more general issues into focus. Legal scholars have debated the desirability of Good Samaritan laws for some time now,<sup>9</sup> and there is continuing controversy about how badly it reflects on our type of legal system that such requirements seem incompatible with the spirit of the common law.<sup>10</sup> The fact that many jurisdictions outside the common law world have and enforce such requirements—apparently as a matter of course—only heightens the issue for us.<sup>11</sup>

My intention in this essay is to consider anew the relevance of the original Good Samaritan story. There are a couple of aspects I want to consider. First, in Part II of the essay, I shall consider the significance of the fact that the parable of the Good Samaritan is told to a lawyer and presented as a story about legal obligation. Given that fact, is there any reason for us to regard it as relevant only to moral duty, as opposed to state-enforced law? I shall argue that the answer is "No" and that the response of the Good Samaritan is presented as exactly the sort of response that law is capable of securing in a circumstance of immediate danger or

---

8. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 264 (1986).

9. See, e.g., Anthony D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U. L. REV. 798 (1976); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994); Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983); Wallace M. Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980). There is an excellent collection of papers in *THE GOOD SAMARITAN AND THE LAW* (James M. Ratcliffe ed., 1966).

10. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 76-98 (1991).

11. See Pardun, *supra* note 4; see also Peter M. Agulnick & Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT'L L. REV. 93 (1998); F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning failure to Rescue*, 14 AM. J. COMP. L. 630 (1966).

need. Secondly, in Part III of the essay, I shall consider the importance for us of an aspect of the parable that is least studied by modern lawyers and moral philosophers, though it is perfectly familiar to theologians and biblical historians. There was an important ethnic and religious divide between Jews and Samaritans in first-century Palestine. That it was a Samaritan, rather than either of the temple officials from Jerusalem, who proved neighbor to the man who fell among thieves is—I shall argue—a challenge to all who would pursue a communitarian account of the obligation of mutual assistance. The point of the parable is to reprove not only the inauthentic self-interest of a David Cash, but also the conviction of many self-confident theorists that the category “human” is too abstract to serve as a focus for what we owe to one another. They think that duties owed to humanity must be “thickened” with a generous roux of convention and shared understanding. But the parable does not suppose that. Rather, it supposes that people can see right through the layers of convention, commonality, and difference, and respond directly—as the Good Samaritan responded—to the immediate presence of the person underlying the layers of community.

I know it may be thought inappropriate to place too much weight on the parable, given that we have an obligation to present legal and political proposals in a way that is accessible also to citizens who do not regard the Christian Gospels as authoritative.<sup>12</sup> However, I believe the Good Samaritan story is helpful in bringing some important issues into focus,<sup>13</sup> and

---

12. John Rawls has argued that a liberal society must respect an ethos of “public reason,” in which at least constitutional essentials are debated in terms that are accessible to all citizens and that do not presuppose allegiance to any particular comprehensive philosophy or religious tradition. See JOHN RAWLS, *POLITICAL LIBERALISM* 212–54 (1996); see also KENT GREENAWALT, *RELIGIOUS CONVICTION AND POLITICAL CHOICE* (1988); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); JOHN RAWLS, *THE LAW OF PEOPLES* 146, 152 (1999) [hereinafter RAWLS, *THE LAW OF PEOPLES*]. I have expressed my own doubts about this requirement in Jeremy Waldron, *Religious Contributions to Political Deliberation*, 30 SAN DIEGO L. REV. 817 (1993).

13. In his latest book, John Rawls suggests that the introduction into public discourse of something like the Good Samaritan story may be appropriate “provided that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.” RAWLS, *THE LAW OF PEOPLES*, *supra* note 12, at 152. Notice that Rawls mentions the use

it is important, too, to deal with some misapprehensions that may arise out of too hasty a reading of the parable.

How likely is it, though, that we will be able to find anything new in the Good Samaritan story?<sup>14</sup> The parable has been interpreted and reinterpreted, and one might be excused for thinking its significance for our debate is pretty much exhausted.<sup>15</sup> But like many biblical passages, these three hun-

---

that someone might make of the story of the Good Samaritan in order to illustrate this point. *See id.* at 155.

14. I made an attempt myself some years ago in Jeremy Waldron, *Welfare and the Images of Charity*, 36 PHIL. Q. 463, 469 (1986), reprinted in JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981-91*, at 225, 232 (1993). There I suggested we might think of the Good Samaritan in some cases as helping *by omission*: failing to enforce his own property rights when another tries to take what he desperately needs. See also the use of the Good Samaritan parable to illustrate the difference between telling a story and stating a rule, as rival modes of moralizing, in JEREMY WALDRON, *THE LAW* (1990).

15. The record for the largest number of political uses of the Good Samaritan story is held, I believe, by Margaret Thatcher (Baroness Thatcher, former Prime Minister of the United Kingdom). Her most famous (from 1980) was reported in David Sexton, *Laughing In The Face Of Adversity*, FIN. TIMES, Jan. 3, 1987, at xi: "No one would remember the Good Samaritan if he only had good intentions. He had money as well," Margaret Thatcher observed." This remark (now collected in several modern Dictionaries of Quotations) enraged her opponents. See Frances Welch, "Elastic" Christian Can't Stretch to Lady T., SUNDAY TELEGRAPH (London), Dec. 10, 1995, at 2 ("When I bring up Lady Thatcher's espousal of religion and her controversial 'Good Samaritan' talk to the Scottish clergy, Dalyell stiffens: 'I loathe that woman . . . . The Church of Scotland clergy and elders treated her with the contempt she deserved.'"). At the same time, Thatcher's remark encouraged one of her ministers to add that the Good Samaritan evidently did not believe in the welfare state. See Damian Thompson, *Runcie Irritated by Political Lectures*, DAILY TELEGRAPH (London), Jan. 26, 1991, at 5:

Sir Rhodes Boyson, Tory MP and former Minister, has attacked the Churches for criticizing Government policy rather than preaching the virtues of personal morality. In a speech at Durham University, he said the Good Samaritan "did not send for a welfare officer or stand on a street corner with a petition for additional Government expenditure when he met the wounded man."

*Id.* More recently the British conservative party has sought to distance itself from Thatcher's interpretation. See Jill Sherman, *Tories are Samaritan Party*, says Hague, TIMES (London), Feb. 16, 1999, at 8:

Mr Hague said it was Margaret Thatcher who pointed out that if the Good Samaritan had not been a wealthy man he would not have been able to help the poor victim. "She was absolutely right," Mr Hague said. "My determination is to ensure that when the Samaritan is wealthy he doesn't cross by on the other side of the street. My Conservative Party is going to reach out."

*Id.* Other interpretations by Baroness Thatcher are reported in the following:

(1) Philip Johnston, *Thatcher Joins Battle on New-look Labour*, DAILY TELEGRAPH (London), Oct. 14, 1989, at 1: "She also displayed her irritation with

dred words (there are footnotes in this essay that are longer!) have a potential out of all proportion to their size. And as we shall see, they hold one or two surprises.

## II.

To begin: the presence of a lawyer (*nomikos*)<sup>16</sup> in the Good Samaritan story ought to be of interest to us. It is commonplace to remark that the parable is about morality, not law, and that the most it establishes is a basis for a *moral* reproach against the likes of David Cash, not a reason for enacting and enforcing a statutory duty. Thus, Chief Justice Carpenter observed in the 1898 case of *Buch v. Armory Manufacturing*,

With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved.<sup>17</sup>

---

the recent remarks of the Archbishop of Canterbury, Dr. Runcie, who said Britain had become a Pharisee society of self-interest and hypocrisy. Mrs. Thatcher retorted: 'For every Pharisee our system produces, you will find at least three Good Samaritans.' *Id.*

(2) David Wastell, *Thatcher accuses West*, SUNDAY TELEGRAPH (London), Aug. 6, 1995, at 2:

Lady Thatcher has renewed her assault on the Western powers for failing to act more effectively over Bosnia, accusing the UN and, by implication, Britain of "acquiescing in genocide." In a lecture to the Aspen Institute in Colorado—where, five years ago almost to the day, she met President Bush to plan the West's response to Saddam Hussein's invasion of Kuwait—Lady Thatcher said the policy that had worked then had been abandoned for Bosnia. The most significant lesson of history, she said, was "never appease an aggressor." But, in Bosnia, she said, "the Serb aggressor is being appeased, while we do not even allow the Bosnians to be supplied with the arms with which to defend their homes, women and children." She said "abiding principles," not just temporary interests, were at stake in Bosnia. "Feeding and evacuating the victims rather than giving them the means to resist aggression make us accomplices, rather than Good Samaritans."

*Id.*

(3) Finally, Matthew D'ancona reported that Baroness Thatcher also argued "that it was all very well to love your neighbour as yourself, as long as you remembered that you often hated yourself." Matthew D'ancona, *The Tory Faith of Tony Blair*, SUNDAY TELEGRAPH (London), Apr. 7, 1996, at 28.

16. In some translations "an expert in the law," in others "a man who taught Mosaic law."

17. *Buch v. Amory Mfg. Co.*, 44 A. 809, 810 (N.H. 1898).

Now actually, as an observation about the Mosaic tradition that was at issue between Jesus and His interlocutor, this is mistaken. What Jesus' questioner produced was a summary of *the law*, with "Love thy neighbor as thyself" understood by all concerned as an all-purpose commandment covering every single legal duty that is owed to other human persons. It is supposed to epitomize not only the requirement of helping behavior, but also the duty not to kill, the duty not to steal, and the general duty of justice. "Love thy neighbor" is emphatically not a moralistic add-on to a legal code. Instead, it sums up the spirit of the legal code. There is, moreover, no reason to suppose that the helping behavior required is any different from the negative duties set out in more extensive statements of the law. So Chief Justice Carpenter is wrong.<sup>18</sup> The priest and the Levite did have a legal obligation to aid their fallen neighbor; Mosaic law imposed quite comprehensive duties to render aid to the needy.<sup>19</sup>

Later, I shall say something about the reading of the parable that has the priest and the Levite torn between the duty they owed to the man who fell among thieves and their legal obligation, as temple officials, to maintain ritual purity.<sup>20</sup> If they thought the man was dead, the requirements of their temple ministry might preclude touching his body. Or, if they thought there was a chance he was dead—remember his assailants "wounded him, and departed, leaving him half dead"<sup>21</sup>—they would not want to take the risk of pollution.

18. See *supra* text accompanying note 17.

19. See, e.g., *Deuteronomy* 15:4–11 (King James); see also Anne Cucchiara Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives*, 10 J.L. & RELIGION 193 (1993/1994).

Jewish law, by contrast, emphasizes the obligation of the stranger to help one in need. Liabilities may be incurred if the bystander fails to act. . . . Unlike American common law concepts, which imposed no duty to rescue a stranger, Jewish law obligates the bystander to intervene when someone's life is endangered. The Torah commands "Thou shalt not stand idly by the blood of thy neighbor." This means, for example, that an individual may not neglect to save the life of an Israelite if the would be rescuer is a good swimmer and has the ability to save the person drowning with no harm to himself.

*Id.* at 196, 211 (quoting *Leviticus* 19:16).

20. See *infra* text accompanying notes 68–71.

21. *Luke* 10:30 (King James). Our phrase "half-dead" translates a Greek term that would refer to someone on the point of death. As one commentator puts it: "He is between life and death, beaten so badly that one cannot be certain whether he will survive." BRAD H. YOUNG, *THE PARABLES: JEWISH*

Even so, the issue was still one of law: only, on this reading, it involved a dispute, in the interpretation of the Torah, as to whether the legal demands of ritual purity prevailed over the legal requirements either to help a wounded man or to bury a dead one.<sup>22</sup>

Of course, the fact that this was a legal issue in first-century Israel doesn't settle the matter *for us*, for our concern is to elaborate (and consider changing) a body of secular law, rather than the norms of a religious tradition. Some readers may object that I am in fact cheating, by saying that the priest and the Levite were bound by religious law to help the man who fell among thieves. This, they may say, is an equivocation on "law." For of course the term "law" is used loosely to cover all sorts of norms—from the laws of God to the laws of baseball. One might as well say that David Cash was bound by *the moral law* to intervene to save Sherrice Iverson. That might be true, and if we said it, everyone would know what we meant. But it would not be the same thing as saying that Cash ought to have had legal liability for his omission in the sense of *real* law—the law enforced by the civil authorities in the state of Nevada, in the United States of America. From this perspective, then, the presence of "a certain lawyer" in the Good Samaritan story is just a distraction. Luke's *nomikos* was an expert in religious "law," not law in the sense we are talking about. One might as well have begun the story by saying, a certain theologian or a certain moral philosopher stood up to question Jesus.

That is an understandable objection. But it is not appropriate for two reasons. First, in Israel in the era of the Second Temple, there was no such distinction between religious law and real law.<sup>23</sup> Religious law was fully part of the law en-

---

TRADITION AND CHRISTIAN INTERPRETATION 111 (1998).

22. See YOUNG, *supra* note 21, at 109–15.

23. The closest approximation might be a distinction between the rules enforced by the Roman occupiers and the rules that the Romans permitted the Jews to enforce among themselves. See, for example, passages such as this:

Then led they Jesus from Caiaphas unto the hall of judgment: and it was early; and they themselves went not into the judgment hall, lest they should be defiled; but that they might eat the passover. Pilate then went out unto them, and said, What accusation bring ye against this man? They answered and said unto him, If he were not a malefactor, we would not have delivered him up unto thee. Then said Pilate unto them, Take ye him, and judge him according to your law. The Jews therefore said unto him, It is not lawful for us to put any man to

forced in Jerusalem (just as—though the case is different in other respects—*shari'a* is fully part of the law enforced in Iran, Afghanistan, or Saudi Arabia). Secondly, no one is denying that David Cash was innocent of any offense in the Sherrice Iverson case so far as the laws then enforced by the civil authorities in Nevada were concerned. The question is whether those laws ought to be changed. The story of the Good Samaritan is used in the discussion of that question. It is, of course, not dispositive of the question; but it may be judged irrelevant only if the duties appealed to in that story (or the considerations on which they are based) are shown to be wholly inappropriate as a basis for law reform in Nevada or elsewhere in the modern world—if, for example, they are shown to be oriented towards wholly non-legal ideas. But we must not simply dismiss the parable in the peremptory way that the objection envisages.

In general, it is probably not a good idea to begin our discussion of the Good Samaritan story (and its relevance to the sorry tale of David Cash) by trying simply to *impose* on it our distinction between “law” and “morality” as an appropriate template of analysis.<sup>24</sup> Instead, if we think that the distinction is important, we should bring it thoughtfully into relation with the Good Samaritan story by asking ourselves carefully what exactly we think is at stake in the distinction, and what (if anything) is being *made* of that stake in the story. For example, we may think that there is an important distinction between actions for which a certain motivation is important, and actions that are important or necessary no matter how they are motivated. And we may think that law (in

---

death. . . .

*John* 18:28–31 (King James).

24. Cf. Besser & Kaplan, *supra* note 19.

The difference between Jewish and American systems in imposition of liability for failure to give aid can be explained, in part, by the recognition in Jewish law that law and morality are closely linked and have a common origin in Judaic sources. This inseparability finds expression from time to time when Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction. This notion depends on the fundamental belief that human punishment and divine retribution function as equal components of a single scheme. The Pentateuch makes no textual distinction on which to base enforcement and non-enforcement or between those which are humanly enforced and divinely enforced.

*Id.* at 196–97.

the sense of “the law enforced in the state of Nevada”) should be concerned only with the latter. If that is what we think, then we should ask whether any distinction of that kind is important in the Good Samaritan story, and—if it is—what is made of it. By doing that, we take the opportunity to reflect on our distinction between law and morality—an analytical construct that seems to do so much work in our thinking about David Cash—by holding the distinction itself open to illumination or revision on the basis of our discussion of the parable.

I can think of at least five things in regard to our law/morality distinction that we might want to consider in this way. The first, which I have just mentioned, is the issue of moral motivation and its relation to the imposition of legal sanctions. The second has to do with the importance, in modern law, of actually specifying the behavior that is required or forbidden: moral values are sometimes thought not to be capable of pinning things down in the way that law requires. The third has to do with the existence of moral (and also religious) disagreement and diversity in a pluralist society. The fourth is our sense of the distinction between requiring omissions and requiring actions, and the rough correspondence between that distinction and the distinction between law and unenforceable morality. The fifth concerns the special concern for individual liberty which our law/morality distinction is supposed to uphold. Thus, an opponent of Good Samaritan laws may say we should not legislate to require a future David Cash to come to the rescue of a future Sherrice Iverson (1) because we want rescuers to be motivated by altruism, not fear of criminal sanctions, (2) because such legislation, motivated as it is by a mere moral “ought,” will likely be too vague to admit of fair and consistent administration, (3) because there is no consensus in society on the moral/religious values on which a duty to rescue is based, (4) because the required intervention would be an action, not an omission, and (5) because such legislation would not do justice to the future David Cash’s right to liberty or the value of his freedom. If the Good Samaritan story is to cast any light on our modern thinking about legal duties to rescue it ought to help us think through considerations like these.

### A. *Moral Motivation and Sanctions*

Some writers object that Good Samaritan laws will subvert altruism by replacing other-regarding motives with a self-regarding fear of legal penalties.<sup>25</sup> Their objection may be filled out by pointing to the difference between a legal tradition (like Mosaic law), which unites what we think of as moral obligation with a more general scheme of sanctions, and a legal tradition (like ours), which draws sharp distinctions in the area.

But, even filled out in this way, the objection fails.<sup>26</sup> One thing to note is that, in fact, modern law does *not* distinguish sharply between motivations in this way. Criminal courts commonly use the language of moral condemnation, to distinguish, for example, cases where the death penalty is thought appropriate in American law, or to govern whatever discretion is left to judges in sentencing. It is implicitly and importantly assumed, in the body of the criminal law, that people's main motivations for refraining from rape, murder, robbery, etc. is that they know it is wrong; and the imposition of sanctions, like death or imprisonment, is intended to cover the cases—alarming cases, not ordinary cases, in the eyes of the law—in which moral requirements *per se* have not been effective. And this remains true in cases where the law requires action, rather than merely forbidding it. The law requires the

---

25. See, e.g., Lester H. Hunt, *An Argument Against a Legal Duty to Rescue*, 26 J. SOC. PHIL. 16, 18–20 (1995); see also MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 747–48 (1997).

26. For an excellent refutation, see A.D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983).

A Good Samaritan law would require us, not to become Good Samaritans, but only to behave as if we were. . . . What the law would require is a certain performance. If it also induces a certain attitude, then so much the better. But the requirement would be the minimum requirement of performance, that we do not pass by on the other side; and, if some of us need as our motive the fear that the law may catch us if we try to pass by, then the existence of the law would provide it. But it would do nothing to prevent a genuine Good Samaritan from acting as one; the demand that we act according to the law is not the demand that we act out of respect for it. If the criticism had the force claimed for it, and the introduction of a Good Samaritan law would make it impossible for us to be Good Samaritans, then by analogy it must be the case *now* that none of us can display honesty in our handling of each others' goods—owing to the unfortunate existence of the larceny laws.

*Id.* at 1292–93; see also Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152, 1169–76 (1999).

ordinary citizen to remain at the scene of an accident in which his car has been involved, and there is no question but that it expects him to do so on the basis of a desire to render aid, summon help, and assist the authorities. It is nonsense to suppose that the law discounts such motivations or seeks to supplant them with a fear of penalties. The penalties are there to ensure that, in the unlikely event the moral motivation fails, there will be something else with which to deter flight or the evasion of responsibility. And the same is evidently true of those many countries in which there is a general duty to rescue.

Opponents say, nevertheless, that the imposition of legal sanctions will mean that neither rescuers nor beneficiaries will ever be sure that the rescue was motivated by altruism. This is a preposterous objection, for two reasons. First, as Immanuel Kant noted at the beginning of Section II of his *Groundwork to the Metaphysics of Morals*, no one can ever be sure of their motivations anyway, even in cases where the law is not involved.<sup>27</sup> And secondly, as one commentator has pointed out, it hardly seems right that those whose rescue might be motivated by a Good Samaritan statute should have to linger in danger so that the rest of us fine people can secure for ourselves a clearer sense of our own altruistic virtue.<sup>28</sup>

If we turn now to the detail of the Good Samaritan story, we find almost nothing to indicate that what mattered was the Good Samaritan's attitude or his altruistic mentality (or anything else that civil law might complicate or undermine). Admittedly, unlike some Bible stories,<sup>29</sup> the account is not en-

---

27. See IMMANUEL KANT, *Groundwork to the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 37 (Mary J. Gregor ed., 1996).

It is indeed sometimes the case that with the keenest self-examination we find nothing besides the moral ground of duty that could have been powerful enough to move us to this or that good action and to so great a sacrifice; but from this it cannot be inferred with certainty that no covert impulse of self-love, under the mere pretense of that idea [*i.e. moral duty*] was not actually the real determining cause of the will; for we like to flatter ourselves by falsely attributing to ourselves a nobler motive, whereas in fact we can never, even by the most strenuous self-examination, get entirely behind our covert incentives. . . .

*Id.* at 61. This passage is conventionally cited as 4:407, referring to the Prussian Academy Edition of Kant's works.

28. See Woosley, *supra* note 26.

29. See ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN*

tirely objective: we are told that when the Samaritan "came where [the wounded man] was: and when he saw him, *he had compassion on him*."<sup>30</sup> Still, it is what the Samaritan *did* that matters, not the integrity of his compassion.<sup>31</sup> Indeed, there is an attractive matter-of-factness in the story. The Good Samaritan does not pause to congratulate himself on his virtue. As Peter Winch puts it, nothing intervenes between the Samaritan's taking in the situation and his practical compassionate response.<sup>32</sup> The Samaritan simply *does* what compassion *dictates*.

[A] certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him, [a]nd went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him. And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.<sup>33</sup>

When, at the end of the story, the lawyer is asked which of the characters in the parable proved himself neighbor to the man who fell among thieves, he has no hesitation in resolving the matter by reference to action—"He that shewed mercy on

---

WESTERN LITERATURE 5-9 (1953).

30. *Luke* 10:33 (King James) (emphasis added).

31. Similarly, Kant argues that even "the passages from scripture in which we are commanded to love our neighbor, even our enemy," KANT, *supra* note 27, at 55 (4:399), must be interpreted as being mainly about actions rather than affections:

For, love as an inclination cannot be commanded, but beneficence from duty—even though no inclination impels us to it and, indeed, natural and unconquerable aversion opposes it—is *practical* and not *pathological* love, which lies in the will and not in the propensity of feeling, in principles of action and not in melting sympathy. . . .

*Id.* at 55. Note that "pathological" here means "dependent upon sensibility," not "sick." But see Oswald Hanfling, *Loving My Neighbour, Loving Myself*, 68 PHIL. 145, 149-51 (1993) (doubting about whether Kant's interpretation will do).

32. See Peter Winch, *Who is My Neighbour?*, in TRYING TO MAKE SENSE 154, 156 (1987). I am grateful to Jeffrey Murphy for this reference.

33. *Luke* 10:33-35 (King James); see also YOUNG, *supra* note 21, at 107. Young provides an intriguing account of the structural properties of the way the narrative describes the Samaritan's helping. "[T]he Samaritan reverses the actions of the robbers in dramatic movements that retrace their steps." *Id.* The robbers left him; the Samaritan "went to him." The robbers beat him and wounded him; the Samaritan "bound up his wounds, pouring in oil and wine." The robbers took the man's money; whereas the Samaritan paid in advance for his care at the inn. See *id.*

him<sup>34</sup>—as opposed to the bare psychological fact of compassion.

Finally, we should remember that—to the to the extent that there is a distinction between morality and sanctions—the Good Samaritan story is presented in Luke's gospel as *a story about sanctions*. "[W]hat shall I do," said the lawyer, "to inherit eternal life?"<sup>35</sup> Do what the Samaritan did, says Jesus: "Go, and do thou likewise."<sup>36</sup> That is the way to get the reward that the lawyer is inquiring after. There is no suggestion in response to this or any other similar inquiry that asking about the prospects for eternal life is an inappropriate way of approaching duty. All of Jesus' teaching associates altruism with sanctions, and not just affirmative sanctions either.<sup>37</sup> The notion that there is something unchristian or amoral about compelling or extrinsically motivating helping

34. *Luke* 10:37 (King James).

35. *Id.* 10:25.

36. *Id.* 10:37.

37. Thus consider the great parable of the sheep and the goats in *Matthew* 25:31–46:

When the Son of man shall come in his glory, and all the holy angels with him, then shall he sit upon the throne of his glory: And before him shall be gathered all nations: and he shall separate them one from another, as a shepherd divideth his sheep from the goats: And he shall set the sheep on his right hand, but the goats on the left.

Then shall the King say unto them on his right hand, Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world: For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me. Then shall the righteous answer him, saying, Lord, when saw we thee an hungred, and fed thee? or thirsty, and gave thee drink? When saw we thee a stranger, and took thee in? or naked, and clothed thee? Or when saw we thee sick, or in prison, and came unto thee? And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.

Then shall he say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels: For I was an hungred, and ye gave me no meat: I was thirsty, and ye gave me no drink: I was a stranger, and ye took me not in: naked, and ye clothed me not: sick, and in prison, and ye visited me not. Then shall they also answer him, saying, Lord, when saw we thee an hungred, or athirst, or a stranger, or naked, or sick, or in prison, and did not minister unto thee? Then shall he answer them, saying, Verily I say unto you, Inasmuch as ye did it not to one of the least of these, ye did it not to me. And these shall go away into everlasting punishment: but the righteous into life eternal.

*Id.*

behavior is quite ill-founded.<sup>38</sup>

### B. *Specification*

Morality can inspire action, but it is often not clear exactly what it demands of us. In the most generous understanding, it requires us to orient our practical capacities to certain goods and (aversively) to certain evils, with regard to others as well as ourselves. But figuring out how to do justice to various moral values in one's choices is a difficult and delicate task in the complicated circumstances of human life.<sup>39</sup> For consider the Samaritan: he seems to do everything that is necessary for the relief of the man who fell among thieves.<sup>40</sup> But we can imagine him doing less or more, and still counting as "good."<sup>41</sup> He might have bound up the man's wounds, but left him by the side of the road until someone else came by with a wagon; or he might have taken him to the inn, but left it up to the innkeeper to decide what provision to make for his needs.<sup>42</sup> Or, in addition to what he did do in the story, he might have come back later and visited the man to see how his wounds were healing, how his family was getting by without the money he was robbed of, and so on. The elasticity of the duty generated by the commandment "Love thy neighbor" may not be a worry in a moral or religious code, but it does seem to be a worry in a system of state-enforced law. Enacted

---

38. However, I do not mean to deny that the way moral sanctions are integrated with conceptions of duty in Mosaic law is somewhat different from the way the two are integrated in modern American law (not to mention modern ethical thought). For a discussion of some differences, see Besser & Kaplan, *supra* note 19, at 193. Nor do I mean to gloss too quickly over the idea of *extrinsic* motivations: it is probably quite wrong, theologically, to regard Jesus' promise of eternal life in His presence as a mere hedonistic incentive, unrelated to the content of His commandment to us to love one another.

39. There is an excellent discussion in the chapter on "Practical Reasonableness" in JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100-27 (1980).

40. With perhaps one exception: the Samaritan does nothing to help the authorities track down the bandits who assaulted he has rescued. *But see infra* text accompanying notes 100-05.

41. Compare the distinctions drawn between Minimally Decent Samaritans, Good Samaritans, and Splendid Samaritans in JUDITH JARVIS THOMSON, *RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY* 15-18 (1986).

42. Because Samaritans were despised by Jews, the Good Samaritan was actually taking a risk in doing more than was strictly necessary. As Brad Young points out, "if a despised Samaritan had been found with a man who had been brutally murdered by brigands, it is not unlikely he would have been charged with the crime." YOUNG, *supra* note 21, at 117.

in that form in the criminal code of Nevada, it would likely be struck down as void for vagueness.<sup>43</sup>

There are two versions of this difficulty, one mild, one severe. The mild version is that anyone fashioning a Good Samaritan statute for modern law will be faced with the challenging task of specification, so that the legislation makes it reasonably clear to the citizen—especially, I guess, the non-morally-motivated citizen—what is required and in what circumstances.<sup>44</sup> And it may be difficult, as it often is in legislation, to establish and defend a particular bright line between conduct which the law will require on pain of penalty and conduct whose omission it will at most simply deplore.<sup>45</sup> But

---

43. *But see* Wisconsin v. La Plante 521 N.W.2d 448 (Wis. Ct. App. 1994) (discussing the failure of a vagueness challenge to an actual Good Samaritan statute).

44. The specification need not be fanatically precise to avoid a vagueness challenge.

The challenged statute . . . “need not define with absolute clarity and precision what is and what is not unlawful conduct.” A statute is not void for vagueness simply because “there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.” The ambiguity must be such that “one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule.”

*Id.* at 450 (quoting State v. Pittman, 496 N.W.2d 74, 93 (Wis. 1993)).

45. The classic discussion is in Thomas Macaulay, *Report Upon the Indian Penal Code*, in 7 WORKS OF LORD MACAULAY 493–94 (H. Trevelyan ed., 1866), cited by Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 391 n.57 (1997). Commenting on the absence of what we would call “Good Samaritan” requirements in the code, Lord Macaulay remarked:

We are sensible that in some of the cases which we have put our rule may appear to be too lenient. But we do not think that it can be made more severe, without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man,—a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save the beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard earned rice? Again: If the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees?

*Id.*

And Macaulay's discussion culminated with this oft-quoted example: It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an op-

this need not be a problem for the citizen unless he is faced with the additional prospect of guilt or liability established by analogy upon this vague provision as a premise.

It may help here to consider a particular dimension of vagueness. It is tempting to think that we should take our stand in favor of a principle of easy rescue—i.e., a principle requiring people to come to the aid of others only when it is easy for them to do so.<sup>46</sup> The moral philosopher T.M. Scanlon's formulation is typical:

One principle stating our duties in such cases would hold that if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so.<sup>47</sup>

Now, as a legal principle, this might face problems, on account of the indeterminacy of phrases like "something very bad" and "slight (or even moderate) sacrifice." For exactly similar reasons, however, Scanlon's formulation is probably best not regarded as a moral principle either. Instead, it conveys an idea that might be associated with a moral principle—namely, the idea that the greater the sacrifice that would be borne by the rescuer, the less unreasonable a failure to rescue might be. Once that idea is understood, it can be embodied in the law in either of two familiar ways: either by artificially stipulating a bright legal line at some point along what morality regards as a continuum (as we do with speed limits, ages of consent, etc.), or by making it clear (through the use of terms like "reasonable") that the relevant legal provision is to be administered by prosecutors and juries as a standard, not a rule.

Neither of these strategies is objectionable in itself. But

---

eration, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die.

Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PA. L. REV. 1455, 1458 (1994).

46. See, e.g., Lipkin, *supra* note 9, at 258 ("There are different types of rescues, some more difficult than others. The controversy over whether to recognize a general legal duty to rescue is primarily a controversy about easy rescues."); see also Weinrib, *supra* note 9, at 250. The legislatures of almost all the states in the U.S. with Good Samaritan laws have imposed duties of "easy rescue." See Givelber, *supra* note 6, at 3191.

47. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 224 (1998).

there remains a worrying possibility that, by pinning things down in a way that satisfies the requirements of legality, a legislature may actually distort and damage the moral character of the duty to rescue. That possibility may be understood as follows.

Suppose we view coming to a person's aid—the sort of thing the Good Samaritan did—as part of a general moral requirement of beneficence. When we think about beneficence, we may regard it as (in the technical philosophical sense) an *imperfect* duty: a duty that commands concern for the welfare of others, but which is understood to leave a certain amount of latitude for free choice in determining what to do about it.<sup>48</sup> For example: I meet many beggars as I walk around New York, and I am sure it would be wrong not to give money to any of them; but I am (almost) equally sure it would distort my moral situation to require me to give money to each, or to say that I am required to use specified criteria to figure out who to give money to and who to refuse.

One way of capturing that distortion is as follows: it misconceives my moral relation to the beggars to say that any of them has a moral *right* to money from me; it is right for me to give, and wrong not to give (at least to some of them), but that choice is morally mine and not the subject to any rightful demand on their part. By contrast, a perfect duty—i.e., a duty determining a particular action that must be performed (or, as the case may be, omitted) on every occasion—can usually be correlated with a right.<sup>49</sup> I owe a perfect duty of repayment to each of my creditors, and I do not have a morally protected choice to pay some but not all when the time for repayment comes: each of them has a right to be repaid by me. Similarly, I have a perfect duty not to kill you: and you have a

---

48. See KANT, *supra* note 27, at 521. For technical discussions of Kant's idea, see Thomas E. Hill, *Kant on Perfect Duty and Supererogation*, 62 KANT-STUDIEN 55 (1971); Daniel Statman, *Who Needs Imperfect Duties?*, 33 AM. PHIL. Q. 211 (1996); Michael Stocker, *Acts, Perfect Duties and Imperfect Duties*, 20 REV. METAPHYSICS 507 (1967).

49. For the distinction between perfect and imperfect duties in regard to rights, see 3 JOHN STUART MILL, *Utilitarianism*, in DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 300, 369 (1882). For earlier sources (in Pufendorf and Grotius), see Heyman, *supra* note 9, at 673, 699–701. Note that although most perfect duties can be correlated with rights, not all can. Those that are not correlative to rights are things like perfect duties to oneself—for example, the duty to refrain from suicide—or perfect duties owed to God—for example, the duty to refrain from blasphemy.

right not to be killed by me. Any time the possibility of my killing you is in question, the duty and the right kick in, and I am required to refrain from killing you on *all*—not merely most—occasions when the question arises.

The worry then is that, by enacting Good Samaritan statutes, the legislature would distort our moral life by turning imperfect moral duties into perfect legal duties, or duties that do not correlate with moral rights into duties whose violation may justly be complained of at law, as a matter of right, by those whom we fail to assist.<sup>50</sup>

What sort of worry is this? What sort of distortion is involved when an imperfect moral duty is supplanted by a perfect legal one? Is the issue one of liberty (or something like liberty, such as protected discretion or the importance of choice)? Immanuel Kant didn't think so: he was quite impatient with the idea that we should place any value on the element of freedom or self-regard in a person's proper moral attention to his imperfect (or, as Kant called them, "wide") duties:

[A] wide duty is not to be taken as permission to make exceptions to the maxim of actions but only as permission to limit one maxim of duty by another (e.g., love of one's neighbor in general by love of one's parents), by which in fact the field for the practice of virtue is widened. . . .<sup>51</sup>

This might strike us as overly rigoristic. Maybe we *do* value the element of freedom that is involved in a person choosing which sorts of "good works" to get involved with, which charities to give to, etc. But even if we do, the most that can be demanded for this freedom of choice is that it have *some* such sphere for its operation; and that sphere of possible good works is likely to continue, largely undiminished, whether we enact Good Samaritan laws or not.

Moreover, the passage from imperfect moral duties to perfect legal duties need not involve any distortion at all. It

---

50. See Christopher H. Schroeder, *Two Methods for Evaluating Duty to Rescue Proposals*, 49 L. & CONTEMP. PROBS. 181, 181 (1986).

Failures to act, including failures to rescue, allegedly exhibit a difference in kind from actions that justify, indeed demand, different legal treatment. That difference is variously described: . . . as that between duties of a specific obligor to a specific obligee ("perfect" duties) and those that take no specific obligee ("imperfect" duties).

*Id.*

51. KANT, *supra* note 27, at 521.

may simply be a transformation reflective of the changes in circumstances that make law and legal duty possible in a sphere previously governed only by morality. There may be areas where one of the proper functions of law is actually to *perfect* what, from the moral point of view, are imperfect duties.<sup>52</sup> An obvious example is welfare provisions for the poor. In the absence of any collective provision coordinated by the state, each of us would have an imperfect duty to do something to alleviate the direst poverty. That duty would be somewhat more demanding than our present duty to give to beggars in the streets (for whom some sort of organized assistance is supposedly available). But it might still be an imperfect duty even in a welfare-less state: since there are millions of us, and since each case of dire poverty is contemplated by many people, each of whom is capable of ameliorating it, it would not be reasonable to require each of us to give aid on *every* occasion where giving aid was a possibility. Such a scenario of individual giving would of course be haphazard: the burdens of duty-performance would likely be spread unevenly, and many cases of dire need might not be relieved at all. Morally lax people might free-ride on everyone else's response to the problem; and good people might be deterred from charity by a fear of being taken advantage of in this way. Thus, the institution of a coordinated scheme in which collective efforts were made to divide the burdens and benefits of poverty-relief fairly and evenly would have considerable advantages, from a moral point of view. But it could only work if, in effect, previously imperfect duties were reconceived as perfect duties (e.g., a duty to contribute one's fair share to a central fund, out of which each and all of the needy would have something like a right to a fair share of assistance). Those who cite the perfect/imperfect duty distinction to resist Good Samaritan statutes have seldomly thought about this possibility. But in fact it is implicit as the moral basis of existing doctrine: emergency personnel (firefighters, etc.) have a special and perfect obligation to come to the aid of those in their jurisdiction who need their help, and we as tax-

---

52. There is an excellent discussion of this in Allen Buchanan, *Perfecting Imperfect Duties: Collective Action to Create Moral Obligations*, 6 BUS. ETHICS Q. 27, 32–41 (1996); see also Robert E. Goodin, *The State as a Moral Agent*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 123 (Alan Hamlin & Philip Pettit eds., 1989).

payers have a perfect obligation to pay our fair share of the cost of providing such services. In this way, even if the background duty to rescue is an imperfect duty, we have discovered an efficient way of perfecting it.

I wonder, however, whether it even really makes sense to think of the moral duty to rescue—in either the David Cash case or in the Good Samaritan case—as an imperfect duty (even a legally perfectible one). The mere fact that it is related to and can be derived from an imperfect duty (viz., the general duty of beneficence) does not mean that the duty to rescue is itself imperfect. Think, again, of David Cash watching from a bathroom stall as his friend struggles with Sherrice Iverson. Cash is there, on the spot, and there are things he can do—he can rush in, he can try to haul his friend off her, he can start shouting as loud as he can for help—things that are quite likely to save the girl from indecent assault, injury, and death. Does anyone really want to say that Cash has a moral obligation to intervene only in *some* such situations that he finds himself in, *but that he need not intervene in all*? Does anyone really want to imply that there could be a number of situations—say three—just like this in David Cash's adolescence, such that he would have a moral obligation to intervene to save little girls' lives from the depredations of his friends in only one or two of them? Surely the moral truth of the matter is that he had a *perfect* duty to intervene in this case—there, as he was, on the spot, with some influence over his friend and no other help immediately available. And if this was his moral situation, it is not at all clear why a legislature would be distorting anything by making it his legal duty as well.

Peter Winch has made a similar point about the story of the Good Samaritan. The Samaritan evidently does not see his helping the man who fell among thieves as a matter of discretion:

The Samaritan responds to what he sees as a necessity generated by the presence of the injured man. What I mean by introducing this word ["necessity"] can be brought out by considering what someone in the Samaritan's position, and responding as he did, might say if urged by a companion to hurry on so as not to miss his important appointment. "But I can't just leave him here

to die.”<sup>53</sup>

Evidently the “can’t” here is not physical necessity: the priest and the Levite seem to experience no difficulty in passing by on the other side after they see the injured man’s plight.<sup>54</sup> But it is something like *moral* necessity, akin—and this is the important point—to the necessity (*the moral stop*, if you will) associated with perfect duties, like the duty not to kill or the duty to repay one’s debts. Someone who doesn’t really grasp the moral category of murder may think it a matter of discretion whether to take a life or not; but he is wrong. And similarly, the story indicates, the priest and the Levite are wrong:<sup>55</sup> they fail to see that the injured man’s plight presents assistance as compulsory—a matter of moral necessity—not a matter of choice or discretion.

The key here to all this—in the rescue cases—is something like *proximity*, the persons in question *being there*, on the spot: “a certain Samaritan, as he journeyed, *came where he was*. . . .”<sup>56</sup> The others—the priest and the Levite—when they were “at the place, came and looked on him, and passed by on the other side.” Like David Cash, they had to go out of their way to break the relation of sheer proximity that had generated a perfect duty on them, also, to help.<sup>57</sup> There is something determinate about these situations that no theoretical talk of imperfect duty can really shake. In a case like this, where I am on the spot, and where help, if it is to come at all, can only come from me, the demands of morality are compelling. To that extent, it is quite wrong to say that a Good Samaritan law would distort the moral structure here by making this duty—like certain other moral duties—compulsory.

### C. *Disagreement*

In modern society, the law/morality distinction sometimes marks the difference between moral disputes on which

53. Winch, *supra* note 32, at 157.

54. *See id.*

55. This is true, of course, barring the issues about ritual purity raised in *supra* text accompanying note 20, and *infra* text accompanying notes 68–71. In that regard, note that conflicts of duty, or limits or qualifications on duty, have nothing to do with the perfect/imperfect distinction.

56. *Luke* 10:33 (King James) (emphasis added).

57. Note also the discussion of the active and intentional nature of the omission in these cases. *See infra* text accompanying notes 76–78.

the law has taken sides, and moral disputes which have been left to rage unresolved. Sometimes law withdraws from a field, once it becomes clear that the citizens do not agree about whether something is a moral duty: this is true of states where, for example, anti-sodomy laws have been repealed. And it is true, too, of law's withdrawal in modern liberal societies from the field of religious observance. Perhaps, then, by the same token, law should refuse to enter a field where moral controversy is raging. If the citizens disagree about the morality of rescue, then the law should be wary of taking a stand on the issue.

But whatever we think of this as a general position in political theory, it is mostly inapplicable here. For—as far as one can tell—there is almost *no* disagreement in our society about the existence of a moral requirement to rescue. The disagreement is only over the question of whether this acknowledged *moral* duty should be enforced by a legal duty.<sup>58</sup> And of course it would be question-begging to say that the mere existence of *that* disagreement counts in favor of one side rather than the other.

Thus, people who argue for Good Samaritan laws and those who oppose them mostly agree about the moral wrongness of failures to rescue. Indeed, opponents of Good Samaritan laws are often the most vocal in their moral condemnations.<sup>59</sup> Very few of those who opposed the prosecution of David Cash believed he behaved morally or well in failing to intervene to save Sherrice Iverson.<sup>60</sup> And despite his *bragga-*

---

58. Even Eugene Volokh's latest intervention, Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105 (1999), is at most an economic argument against legal enforcement. Professor Volokh is not like Mr. Gradgrind in Book II, Chapter 12, of CHARLES DICKENS, *HARD TIMES* 215 (The Oxford Illustrated Dickens, 1955), who "sat writing in the room with the deadly statistical clock, proving something no doubt—probably, in the main, that the Good Samaritan was a Bad Economist."

59. Jeffrey Murphy, for example, says that a man he imagines sitting in a lounge chair next to a swimming pool while a toddler drowns should be condemned "as a piece of moral slime properly to be shunned by all decent people." Jeffrey Murphy, *Blackmail: A Preliminary Inquiry*, 63 THE MONIST 168, cited in JOEL FEINBERG, *HARM TO OTHERS* 130 (1984); see also Leonard Pitts, Jr., *Stories about Two Men, Two Killers and One Conscience*, HOUS. CHRON., Sept. 11, 1998, at 2 ("I wonder how it lives with itself, this little scrap of putrefaction called David Cash."). Needless to say, there is nothing in the story of the Good Samaritan or the moral to be drawn from it that can possibly justify the use of dehumanizing epithets like these.

60. A typical newspaper column opposing Good Samaritan legislation be-

*docio* of self-interest,<sup>61</sup> I suspect that David Cash also believes he acted wrongly. (I shall argue later that these points are relevant also to the issue of liberty.)<sup>62</sup>

I noted earlier that the fact that the Good Samaritan story is told in the New Testament may be thought to be a reason why the law should steer clear of its moral.<sup>63</sup> After all, Christianity is just one religion among others in a pluralistic society, and perhaps we should not intervene legislatively on behalf of *its* lessons as opposed to those of other belief-systems. But even if that is true in general, it is hardly true of the Good Samaritan parable in particular. The parable does not present the duty to rescue in any controversial theological or metaphysical light: it is not presented, for example, as a response to the immanence of Christ in the victim as it is in Matthew's sheep and goats story.<sup>64</sup> The Good Samaritan story is a straightforward account of ordinary human responses to ordinary human need. On most accounts, the story itself betrays nothing about moral disagreement: the priest and Levite simply put the demands of convenience ahead of the demands of morality. And at the end, the lawyer has no greater hesitation in answering Jesus' question—"Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves?"<sup>65</sup>—than he had in answering the original question about what is written in the Torah. The lesson of the story, I guess, is the *insistent* and almost *self-evident* character of this ordinary moral demand. It is the sort of thing that is often subordinated to self-interest; but it is the sort of thing that definitely should not be. Such rigorism is certainly Christian; but in this context, there is no reason whatever to say that it is exclusively so.

---

gins: "No one denies what college student David Cash Jr. did or did not do was deplorable." Lynda Gorov, *Proposed Samaritan Law Comes Under Fire*, BOSTON GLOBE, June 20, 1999, at A3.

61. See *supra* text accompanying note 3:

"I'm not going to get upset over someone else's life," [Cash] told the *Chronicle*. "I just worry about myself first." His sympathies were with jailed friend Strohmeier, he said, and he was "not going to lose sleep over somebody else's problems"—a reference to Sherrice's death. On the contrary, he said, his notoriety had helped him get dates.

*Id.*; see also *infra* text accompanying notes 157–58.

62. See *infra* text accompanying notes 81–94.

63. See *supra* discussion notes 12–14.

64. See Matthew 25:31–46 (King James); see *supra* note 37.

65. Luke 10:36 (King James).

Theologians have suggested a couple of dimensions of possible controversy. W.O.E. Oesterley suggests that those who failed to help the man who fell among thieves might have neglected him perhaps because they thought his fate was probably deserved.<sup>66</sup> Paul Ramsey asks us to consider whether Jesus would have countenanced the Samaritan's using force against the robbers if he had come on the scene earlier.<sup>67</sup> Brad Young raises the possibility that there is a particular issue about ritual purity in the parable, with the priest and the Levite portrayed as overly concerned with ritual cleanness, and unwilling to risk impurity from touching what might well turn out to be a corpse.<sup>68</sup> There was, says Young, disagreement between Sadducees, who interpreted such cleanliness demands as absolute, and Pharisees, who qualified them with rules drawn from the "oral Torah," like the duty to save life and to bury the dead. We are supposed to understand, apparently, that the priest and the Levite would have fallen into the former category.<sup>69</sup> (Ironically, however, an observant Samaritan would have sided with the Sadducees rather than the Pharisees on this matter, for they too observed the written Torah unembellished by oral teachings.)<sup>70</sup> But even if there is an issue of ethnic or religious disagreement here, it is not the sort of thing which makes it impossible to legislate. At worst, it could be handled by a religious accommodation, of the sort that enables members of religious groups to avoid otherwise applicable requirements and prohibitions.<sup>71</sup>

#### D. *Acts and Omissions*

In *our* discussions of the duty to rescue, an enormous amount turns on the distinction between the active infliction

---

66. See W.O.E. OESTERLEY, *THE GOSPEL PARABLES IN THE LIGHT OF THEIR JEWISH BACKGROUND* 163-64 (1936).

67. See 41 PAUL RAMSEY, *Christian Vocation and Resistance*, in *THE ESSENTIAL PAUL RAMSEY: A COLLECTION* 47-48 (W. Werpehowski & Stephen D. Cracco eds., 1994).

68. See YOUNG, *supra* note 21, at 109-10.

69. See *id.* at 112-15.

70. See *id.* at 115-17.

71. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (discussing variations from required military dress code). *But cf.* *Employment Div. v. Smith*, 494 U.S. 872 (1989) (discussing accommodation of religious duty to smoke prohibited substance).

of harm and the failure to provide assistance. Bad as David Cash is, for example, we think there is a huge difference between his wrongdoing and that of his friend Jeremy Strohmeyer, who actually molested and killed the little girl. Even those of us who believe in a duty to rescue think that the primary duty we owe to others, in regard to the harm that might befall them, is to *not actively inflict it*.

From this perspective, there is something unsettling about the story of the Good Samaritan. Neither Jesus nor the lawyer shows any interest at all in this aspect of the matter. We may think it negligence, even malpractice, on the lawyer's side not to have raised the acts/omissions distinction (or plead it in behalf of the priest or Levite). But the fact remains, it does not appear to be an issue in the story. It is taken for granted on all sides that one's duty to one's neighbor is a duty to help as well as a duty not to harm. There is no question of its being *merely* the latter. That is, there is no question of anyone thinking that the priest and Levite are bound only by negative duties to the man who fell among thieves, or that they proved neighbor to him simply in virtue of their not actively making things worse.

Again, in our parsing of the commandment "Love thy neighbor," the neighbor is seen as the beneficiary, as contrasted with the person to whom the command is directed. Holding fast to this distinction is important for us, so we can keep track of who is acting and who is omitting. But none of this seems to matter in the story of the Good Samaritan. The active culprits—the thieves—leave the picture very quickly, and little is said about them. For the rest, "neighbor" is treated as a purely symmetrical relation, applying equally to salvor and victim. Indeed, so striking is the biblical neglect of our distinctions that the lawyer—though anxious to justify himself—makes no comment on the fact that Jesus turns the issue around so that by the end of the story "neighbor" designates not the person to be helped, but the person who provides assistance.

"Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves? And he said, He that shewed mercy on him. Then said Jesus unto him, Go, and do thou likewise."<sup>72</sup> That this reversal or reciprocity of *neighbor*

---

72. *Luke* 10:36–37 (King James).

is deliberate is clear also from the entanglement of roles in the parable of the sheep and goats in Matthew, where Christ, in His glory, is presented as saying to those who have proved good neighbors:

For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me. Then shall the righteous answer him, saying, Lord, when saw we thee an hungred, and fed thee? or thirsty, and gave thee drink? When saw we thee a stranger, and took thee in? or naked, and clothed thee? Or when saw we thee sick, or in prison, and came unto thee? And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.<sup>73</sup>

There, the role of beneficiary is entangled with that of commander, and we are given a glimpse of the depth of meaning in Christ's commandment in the intimacy of the *Farewell Discourses*: "A new commandment I give unto you, That ye love one another; as I have loved you, that ye also love one another."<sup>74</sup>

There is another point, too, in the parable, about acts and omissions. Those who fail to help the man who fell among thieves are portrayed as *going out of their way* not to help, or *going out of their way* to avoid the decision about whether to help. They may have been inactive—going about their own business, with no thought for the man who fell among thieves—at the time the latter was actually robbed. But at the moment they confront the choice of whether to help, their attention is riveted upon him and their actions are more or less completely oriented to his plight (oriented aversively, it's true, but oriented all the same): "[B]y chance there came down a certain priest that way: and *when he saw him*, he passed by on the other side. And likewise a Levite, when he was at the place, *came and looked on him*, and passed by on the other side."<sup>75</sup> Their not helping is an intentional doing: a decision to cross the road, a choice to go out of their way to

---

73. *Matthew* 25:35–40 (King James).

74. *John* 13:34 (King James). "Farewell Discourses" refers to chapters 13 to 16 of John's Gospel.

75. *Luke* 10:31–32 (King James) (emphasis added).

avoid the injured man. Modern philosophers, in their hypotheticals, like to present the failure to rescue as a mere *absence of response* to someone's plight.<sup>76</sup> But in real life it is seldom that. One's hard-heartedness often has to struggle with a combination of impulse or attempt to help, and with confusion, distress, anger, a voyeuristic desire to see what is happening, and so on.<sup>77</sup> Even David Cash made a half-hearted attempt to stop his friend's assault on Sherrice Iversen: his offense was not one of pure inaction, but rather of failing to do very much or a decent minimum to help the girl. And he too, like the priest and the Levite in the biblical story, eventually turned and walked away from the scene.<sup>78</sup> And like them, he did this deliberately.

One need not hold this as a general truth about omissions. There is no logical difficulty in conceptualizing an omission as the mere absence of action.<sup>79</sup> But it is not always a good idea to orient oneself to the purity of the most abstract case. In almost all situations where rescue might plausibly be required by law, all the agents concerned—potential helpers and potential victims—are likely to have their attention *focused* on the victim's predicament, and they would have to make a serious effort of will to shift from that orientation to going about their ordinary business with no thought for the victim's plight. It is not a question of the law making us pay attention—distracting us, as it were, from our own legitimate pursuits. Humans being what they are, their attention is fo-

---

76. For instance, take the example of a man sitting in a lounge chair next to a swimming pool while a toddler drowns in Murphy, *supra* note 59, at 168.

77. See Lawrence Zelic Freedman, *No Response to the Cry for Help*, in THE GOOD SAMARITAN AND THE LAW, *supra* note 9, at 171, 173–82.

78. See Nora Zamichow, *The Fractured Life of Jeremy Strohmeyer*, L.A. TIMES, July 19, 1998, at A1.

David watched. He would admit later that he had a "small degree" of concern. He walked to the adjacent stall, boosted himself up onto the toilet seat and tried to get Jeremy's attention. Sherrice was struggling. As Jeremy clutched the squirming girl, he repeatedly told her, "Shut up or I'll kill you," according to David.

"I was telling him to let go," David would later tell a grand jury, "trying to get him to come out of the restroom. I knew at that point that the little game that they were playing kind of crossed the line. I was tapping on his forehead. At one point, I accidentally knocked off his hat. He looked up at me, kind of in a stare, you know, like he didn't care what I was saying."

*Id.*

79. See generally MOORE, *supra* note 25, at 262–73.

cused already: the law's contribution is to add an extra layer of motivation for action pursuant to that attention.

I don't mean this point about psychological orientation to be conclusive in the debate. And certainly, the fact that almost all of the omissions that Good Samaritan laws would punish are *intentional* omissions—i.e., decisions that are pre-occupied with the situation to which they are an agonizingly non-interventionist response—does not make them equivalent to the active infliction of harm. But Good Samaritan laws do not aim at such legislative equivalence. What is proposed as a penalty for failing to prevent a harm of level *H* is usually a great deal less than what is already established as a penalty for the active infliction of *H*. Maybe there are some hardline consequentialists who see this as an inconsistency,<sup>80</sup> but the advocacy of a duty to rescue does not depend on any such equivalence. Points about failures of equivalence between an omission to rescue and the active infliction of harm are therefore simply irrelevant. So it is not enough for opponents of Good Samaritan legislation to simply cite the acts/omissions distinction, unless what they are proposing is that the law should *never* penalize omissions at all, no matter how modest the penalty might be.

#### E. *Liberty*

I believe the points just made may be quite important also for the way we think about liberty-based objections to Good Samaritan laws.<sup>81</sup> Even if we grant that a legally enforced duty of easy rescue would be a restriction on people's choices, it is likely to be a restriction only upon a "choice" that is already torn and conflicted between the impulse to help and the aversion to getting involved, a choice whose cheerful autonomy is most likely already drained or polluted by bad conscience. As we have seen, libertarian opponents of the duty to rescue insist—often quite stridently—that they are very much in favor of moral sanctions for failures to rescue. They hope that David Cash will burn in hell, that others will avoid him, and that he will find it impossible to live with

---

80. See, e.g., TED HONDERICH, VIOLENCE FOR EQUALITY: INQUIRIES IN POLITICAL PHILOSOPHY 58–100 (1976).

81. See, e.g., Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

himself. Assuming all this is sincere,<sup>82</sup> the liberty they argue for in these cases is a liberty that they themselves hope will be more or less worthless to its possessor, as he turns away from another's need "into the bleak wilderness of his soul."<sup>83</sup>

Still—I suppose we have to concede—liberty remains liberty even when it is liberty to do wrong, even when it is haggard by the free man's own bad conscience.<sup>84</sup> To deny this would be to move from the liberal conception of negative liberty—the absence of coercion—to some notion of positive liberty, where a person is said to have freedom only if he is in a position to do what he at least judges to be good or right.<sup>85</sup> But although conceding that is often regarded as the end of the debate, it is striking how many of those who have thought most deeply about liberty have ended up adopting some version of the positive or moralized view: I mean not just the usual suspects, like Rousseau,<sup>86</sup> Hegel,<sup>87</sup> and T.H. Green,<sup>88</sup> but also St. Paul,<sup>89</sup> John Locke,<sup>90</sup> and (in some moods) even Isaiah

82. Perhaps a dodgy assumption, given the *stridency* of the rhetoric used by opponents of Good Samaritan legislation, when they are trying to show everyone how much they agree that failures to rescue are *immoral*.

83. I have adapted this characterization of David Cash's "freedom" from Michael Kelly, *Decency Demands Some Justice*, DENVER ROCKY MOUNTAIN NEWS, Sept. 10, 1998, at 53A.

84. This point is usually supported with a citation from Isaiah Berlin: "Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience." ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 125 (1969).

85. See *id.* at 131–34, 148–54.

86. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 65 (Maurice Cranston trans., 1968) ("[T]o be governed by appetite alone is slavery, while obedience to a law which one prescribes to oneself is freedom.").

87. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 192–93 (Allen W. Wood ed., 1991) ("[D]uty is not a limitation of freedom, but only of freedom in the abstract, that is, of unfreedom: it is the attainment of essential being, the acquisition of affirmative freedom.").

88. See T.H. Green, *Liberal Legislation and Freedom of Contract*, in *LIBERTY* 21, 21 (David Miller ed., 1991) ("When we speak of freedom as something to be so highly prized, we mean a positive power or capacity of doing . . . something worth doing.").

89. See *Romans* 7:15–20 (Revised Standard Version) ("I do not understand my own actions. For I do not do what I want, but I do the very thing I hate. . . . I can will what is right, but I cannot do it. For I do not do the good I want, but the evil I do not want is what I do. Now if I do what I do not want, it is no longer I that do it, but sin which dwells within me.").

90. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305–06 (Peter Laslett ed., 1988) ("Freedom is not, as we are told, a Liberty for every Man to do what he lists . . . but a Liberty to dispose and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the allowance of those Laws

Berlin himself.<sup>91</sup> All of these thinkers are disposed, one way or another, to deny that there is a genuine trade-off of liberty in cases where the law prohibits an action that is wicked, depraved, or unjust. (Certainly this is the upshot of the Jewish tradition invoked in the Good Samaritan story.)<sup>92</sup> Those who take this approach need not deny that there is restriction, constraint, even coercion when penalties are imposed to get people to do things that (they know) they ought to do. What they usually do deny is that there is any liberty-cost, any loss of liberty, in the sense in which liberty is a value.<sup>93</sup> There is an element of constraint in the laws against murder, they may say, but that hardly implies that we face a trade-off in the case of homicide legislation between a loss of valued liberty, on the one hand, and the protection of human life against murder, on the other. On the contrary, we usually deny that the murderer's "freedom" to kill should have any weight in our calculations at all; and it is hard to see why we should say anything different about the "freedom" of David Cash to leave his best friend killing Sherrice Iverson in a bathroom.<sup>94</sup>

---

under which he is.").

91. Even Isaiah Berlin, certainly no friend to this sort of positive conception, is aware of its attraction. "Have not men had the experience of liberating themselves from spiritual slavery, or slavery to nature, and do they not in the course of it become aware, on the one hand, of a self which dominates, and, on the other, of something in them that is brought to heel?" BERLIN, *supra* note 84, at 132.

92. Cf. Besser & Kaplan, *supra* note 19, at 193.

The newcomer to Jewish law finds a major surprise in the law's insistence that freedom is expressed specifically in the performance of the 613 commandments (*tiryag mitzvot*). This can be seen in Rabbi Aha ben Jacob's interpretation of the biblical phrase *Harut al ha-Luhot*: "Read not 'harut' (carved) but 'herut' (freedom) on the tablets." One is not free until he devotes himself to the study of Torah. It is precisely the obligatory aspect of the *mitzvah* (commandment) that heightens the merit (and freedom) of the performer: "one is commanded and he accepts the authority of the commandments upon himself."

*Id.*

93. This is not the same as saying that the loss of liberty is *de minimis*. Cf. Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 714 (1995).

94. Admittedly, this does not entirely dispose of the libertarian worry. As Richard Epstein has observed, "imposing affirmative legal duties necessarily increases the total level of coercion, public and private, in society," and this involves a "risk of excessive government power," quite apart from its immediate effects on individuals. Richard Epstein, *Rights and "Rights Talk"*, 105 HARV. L. REV. 1106, 1118 (1992)

In his book *Placing Blame*, Michael Moore suggests that laws which prohibit actions impact on liberty in a different way than laws which require actions.<sup>95</sup> He is right about that: a law that prohibits action *A*, still leaves us free to choose between *B*, *C*, and *D*, etc., whereas a law that requires *A* effectively means that none of those other actions is available to me during the time I am supposed to be *A*-ing. I doubt though whether this can be translated (as Moore suggests) into a broader theorem about quantum of liberty.<sup>96</sup> Such calculations are notoriously difficult, particularly when one has to factor in the breadth of the description under which the actions are, respectively, required and prohibited, as well as things like the onerousness of the action required (how much other choice it crowds out) and the attractiveness of the action prohibited (how much I have to keep checking my impulse to perform it). Quite apart from the considerations discussed in the previous paragraph, one can think of all sorts of cases where a requirement seems less of an interference with liberty than a prohibition.<sup>97</sup>

Moore has made the additional, and rather odd, suggestion that whether there is an important liberty-cost in regard to a legal provision depends on whether the moral duty enforced is a matter of "agent-relative" deontology or not.<sup>98</sup> The duty not to kill may be conceived as an agent-relative duty: this would mean one must not kill, not even to prevent a greater number of killings on other occasions by others.<sup>99</sup> Du-

---

95. See MOORE, *supra* note 25, at 278.

96. See *id.* ("A law that (positively) coerces me to do some action takes away more of my liberty than does a law that (negatively) coerces me from doing some action.").

97. A requirement that all newspapers publish a 15-word slogan for the ruling party seems, intuitively, less offensive to liberty than a prohibition on criticizing the regime; though even there, a moment's thought reveals the importance of the other factors just mentioned.

98. See MOORE, *supra* note 25, at 279–81, 755–56. For the notion of agent-relativity, see DEREK PARFIT, 27 REASONS AND PERSONS (1984) and SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM 24–26 (1982). A moral restriction (such as "do not kill") is treated as agent-relative if each agent is to be concerned as a matter of priority with his own refraining from killing—for example, if he may not kill in order to prevent a greater number of prohibited killings by others. This means, in effect, that each agent is assigned his own goal—*viz.* preventing killings done by himself—as opposed to the common goal of preventing killings generally.

99. See also the account of rights as "side-constraints" in ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–30 (1974).

ties of this kind have a stringency that, in Moore's view, may properly override or displace any liberty-based objection to their legal enforcement. But, says Moore, the moral duty to rescue is not like that, for, of course, one may refrain from rescuing *X* (even when *X*'s predicament is immediate and *X* is easily rescuable) if the opportunity cost would be a failure to rescue a larger number of people—*W*, *Y*, and *Z*. One may trade off positive duties against one another, in a way that one may not trade off agent-relative duties. This shows, Moore thinks, that the former are less stringent and the issue of their enforcement is less compelling. Just as a duty to rescue *X* may have to yield to a duty to rescue *W*, and *Y* and *Z*, so it may also have to yield to a duty to respect liberty. But the duty not to kill is not vulnerable in this way; it yields to nothing, and so there is no difficulty with its enforcement.

The argument is ingenious, but unsuccessful. The distinction between agent-relative and agent-neutral duties may tell us something about the appropriate structure for certain defenses (in the event that these duties are legally enforced): that is, it may tell us something about the conditions of justification, e.g., that it is easier to justify on grounds of necessity a breach of the duty to rescue than it is to justify, on similar grounds, a breach of the duty not to kill. But there is no reason to think it tells us anything about the relation between duty and liberty-costs. Given that there are such things as non-agent-relative duties, the actions they require are already removed from the sphere of liberty, and may be made available only—at most—for the performance of other duties, not for the sort of pursuit of self-interest or whim which is what a presumption of liberty protects.

With this point, we come to the end of my review of the five main reasons people think we have for hesitating before embarking on the legal enforcement of a duty imposed by morality. What we have seen in this review is that none of the alleged reasons, supposedly telling against legal enforcement, is particularly cogent. The example of the Good Samaritan story has helped us to see (1) that a duty to rescue may be appropriately motivated by law, where other motivation fails; (2) that a legal duty to rescue need not introduce any unwelcome or inappropriate determinacy in regard to our imperfect duty of beneficence; (3) that there is no serious moral disagreement concerning a duty to rescue; (4) that the legal re-

quirement of an action rather than an omission is no more a source of difficulty than any other area of affirmative legal requirement; and (5) that there is little plausibility in liberty-based objections to a legal duty to rescue once the moral duty to rescue is acknowledged.

There is one last legal aspect of the David Cash story, and the law proposed in response to it, that has no counterpart in the story of the Good Samaritan. In the David Cash story, we know about Jeremy Strohmeyer and what happened to him. No thanks to David Cash, Strohmeyer was apprehended and charged with murder, kidnapping, and sexual assault: he pleaded guilty and was sentenced to life imprisonment.<sup>100</sup> The Good Samaritan laws proposed as a response to Cash's callousness would have required him to report Strohmeyer's offense to the authorities (whether this would have saved Sherrice's life or not).<sup>101</sup> Nothing of this kind is indicated in the Good Samaritan story. The thieves who attacked the man whom the Samaritan helped are long gone, and there is no question of apprehending them.<sup>102</sup> That is a contingent feature of the story. But it is also worth noting that a duty to report is not at all the same thing as a duty to rescue, except in cases where the report is what makes a rescue (or a responsible or effective rescue) possible.<sup>103</sup> As Daniel Yeager has noted, a duty to report raises issues about misprision of felony,<sup>104</sup> which may be quite distinct from the immediacy of

---

100. See Eric Lichtblau & Nora Zamichow, *Guilty Plea in Casino Slaying: Strohmeyer Deal Averts Murder Trial And Chance of Death Sentence*, L.A. TIMES, Sept. 9, 1998, at A1.

101. See *supra* notes 5–6; see also *Call for Samaritan Law Out of Child-Sex Case: Penalties for Witnesses Who Don't Report*, S.F. CHRON., Sept. 10, 1998, at A2 ("Witnesses who fail to report sexual crimes against children would face criminal penalties under federal legislation proposed yesterday by a Texas lawmaker.").

102. See OESTERLEY, *supra* note 66, at 162 (pointing out that the testimony of a Samaritan would not have been admissible in a Jewish court).

103. This may be so in the reporting requirements of ordinary child abuse statutes, where a report is needed to initiate the rescue of a child from an ongoing abusive situation.

104. See Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 30–38 (1993); see also Jay Silver, *The Duty to Rescue: A Reexamination and Proposal* 26 WM. & MARY L. REV. 423, 427 n.35 (1985). For American case law rejecting misprision of felony as a common law offense, see *Pope v. State*, 396 A.2d 1054, 1069 (Md. 1979).

harm-prevention involved in the duty to rescue.<sup>105</sup>

### III.

From the point of view of our concern with David Cash *et al.*, one of the most striking features of the interaction between Jesus and the lawyer in the Good Samaritan story is the lack of any particular interest in the *content* of the commandment to "Love thy neighbor." The focus is all on the issue of scope ("Who are the beneficiaries?"), not content ("What exactly do I owe to them?"). As I said in Part II, the lawyer has no hesitation in recognizing that the priest and the Levite have failed to prove themselves neighborly to the man in need, even though they never affirmatively harmed him. Anxious as he was to justify himself,<sup>106</sup> the expert on the law did not seize on this aspect of the matter.

So what *was* the lawyer's concern when he stood up to put Jesus to the test? He asked what he must do to inherit eternal life. When Jesus threw his question back at him, the lawyer produced the conventional summary of the Decalogue.<sup>107</sup> That might have been the end of the exchange; but the lawyer did not want to let go. Seeking perhaps to avoid the appearance of having asked a simple question to which any fool (even a lawyer) might know the answer, the *nomikos* makes the question an issue of definition: "And who is my neighbour?"<sup>108</sup>

Some theologians have condemned this follow-up question as sinful or corrupt logic-chopping.<sup>109</sup> But actually, the

---

105. "Do we really want to become a nation of snitches?" asked Jack King, attorney and spokesman for the National Association of Criminal Defense Attorneys." Dan Reed, *Experts Warn about Impact of Proposed Good Samaritan Laws*, DALLAS MORNING NEWS, Sept. 6, 1998, at 44A. Clearly this is quite a different question from "Do we really want to become a nation of rescuers?"

106. See *Luke* 10:29 (King James).

107. See *id.* 10:27; *Deuteronomy* 6:5 (King James) ("And thou shalt love the Lord thy God with all thine heart, and with all thy soul, and with all thy might."); see also *Leviticus* 19:18 (King James) ("Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself . . .").

108. *Luke* 10:29 (King James). Joel Feinberg is mistaken in his suggestion that "Jesus . . . puzzles the lawyer by framing his most basic moral teaching in terms of one's 'neighbor.'" See FEINBERG, *supra* note 59, at 133. This is, first because the "neighbor" formulation is presented initially by the lawyer not Jesus; and secondly, the "neighbor" formulation is canonical. See *Leviticus* 19:18 (King James).

109. See DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* 77 (1959).

definitional question is not at all unreasonable in the context of Mosaic law. Jesus himself acknowledged this when He told His disciples, "Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy,"<sup>110</sup> and when He presented His own teaching in this regard—"But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you"<sup>111</sup>—as explicitly radical and unfamiliar.<sup>112</sup> Mosaic injunctions of mutual aid sometimes do draw distinctions between neighbors and near neighbors, brothers you know and brothers you don't know, etc.<sup>113</sup> Joel Feinberg has suggested that "[t]he reason why a *lawyer* might ask Jesus 'Who is my neighbor?' may be that a neighbor, in the ordinary narrow sense of the term, is a person with whom one has a somewhat special moral relationship, if only in terms of constant proximity and shared interests."<sup>114</sup> Feinberg adds: "Special relationships often generate special duties and reciprocal expectations."<sup>115</sup> The lawyer may have wanted

---

Jesus parries the question as a temptation of the devil. . . . It is the sort of question you can keep on asking without ever getting an answer. Its source lies in the "wrangling of men, corrupted in mind and bereft of truth"; of men "doting about questionings and disputes of words." From it "cometh envy, strife, railings, even surmisings" (I Tim. 6.4 f). It is the question of men who are puffed up, men who are "ever learning, and never able to come to knowledge of the truth." Of men "holding a form of godliness, but having denied the power thereof" (II Tim. 3.5 ff). They cannot believe, and they keep on asking this same question because they are "branded in their own conscience, as with a hot iron" (I Tim. 4.2).

*Id.*; see also PAUL RAMSEY, BASIC CHRISTIAN ETHICS 92 (1950) ("It may be supposed that the priest and the Levite were hurrying along that day to a conference called to give authoritative answer to the question, 'Who is my neighbor?'").

110. *Matthew* 5:43 (King James).

111. *Id.* 5:44.

112. See *id.* 5:46–47 ("For if ye love them which love you, what reward have ye? do not even the publicans the same? And if ye salute your brethren only, what do ye more than others? do not even the publicans so?").

113. See *Deuteronomy* 22:1–2 (King James).

Thou shalt not see thy brother's ox or his sheep go astray, and hide thyself from them: thou shalt in any case bring them again unto thy brother. And if thy brother be not nigh unto thee, *or if thou know him not*, then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt restore it to him again.

*Id.* (emphasis added). Some translations put "fellow-countryman" for brother.

114. FEINBERG, *supra* note 59, at 132; see *supra* note 108 (discussing Feinberg's mistake in attributing the neighbor formulation to Jesus, as though that might have taken the lawyer by surprise).

115. FEINBERG, *supra* note 59, at 132.

Jesus' "take" on the conditions under which one person becomes specially related to another in this way: in the exchange, Jesus refused to give any special gloss on the commandments; but maybe He would do so with regard to the definition of "neighbor." Again, Mosaic law is riddled with important distinctions between insiders and outsiders, friends and enemies, those who may be admitted to the people of Israel and those who must be shunned.<sup>116</sup> In light of Jesus' radical teachings on other matters, the lawyer would have been interested in whether He wanted a radical reconception of these differences as well.

In this regard, it is highly significant for our story that one of the most important groups of outsiders in the era of the Second Temple were *Samaritans*. Jews regarded Samaritans with contempt, as half-breeds and apostates. "They were publicly cursed in the synagogues; and a petition was daily offered up praying God that the Samaritans might not be partakers of eternal life."<sup>117</sup> As the woman at the well said famously to Jesus, "How is it that thou, being a Jew, askest drink of me, which am a woman of Samaria? for the Jews have no dealings with the Samaritans."<sup>118</sup>

The answer, then, that the lawyer receives is quite startling. Instead of a reiteration (or even a reconception) of the traditional divisions, animosities, and taboos, the lawyer is given an answer which cuts straight across ethnic and religious lines. From the standpoint of Jewish law, the Samaritan was definitely not a neighbor of the Jew he assisted.<sup>119</sup> The story might be compelling enough if it contrasted the helping

---

116. See *Deuteronomy* 23:1-4 (King James).

He that is wounded in the stones, or hath his privy member cut off, shall not enter into the congregation of the Lord. A bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord. An Ammonite or Moabite shall not enter into the congregation of the Lord; even to their tenth generation shall they not enter into the congregation of the Lord for ever: [b]ecause they met you not with bread and with water in the way, when ye came forth out of Egypt; and because they hired against thee Balaam the son of Beor of Pethor of Mesopotamia, to curse thee.

*Id.*

117. OESTERLEY, *supra* note 66, at 162.

118. *John* 4:9 (King James).

119. See JOHN BOWMAN, *THE SAMARITAN PROBLEM: STUDIES IN THE RELATIONSHIPS OF SAMARITANISM, JUDAISM, AND EARLY CHRISTIANITY* 69 (Alfred M. Johnson trans., 1975).

behavior of a stranger with the neglectful behavior of a friend, or the neglectful behavior of a professional (the priest in the story) with that of a layman. But, as Herbert Fingarette points out, "Jesus . . . substitutes a Samaritan, a geographical neighbor, but one who was despised and hated by the Jews of his time as being uncouth, unclean, immoral, and heretical."<sup>120</sup> One might as well tell a story about a Palestinian coming to the aid of an Israeli.<sup>121</sup>

It is worth pausing to consider the basis of the particular antipathy between Jews and Samaritans. The division between Samaria and Israel proper had its origins in the division of the people of Israel into southern and northern parts (Judah and Samaria), recorded in the first book of Kings.<sup>122</sup> The same book records the depravity and idolatry of the kings of Samaria (though it indicates also that the contemporary rulers of Judah were not much better). The biblical account has the northern kingdom succumbing to Assyrian conquest and deportation a little earlier than the southern kingdom.<sup>123</sup> The most important upshot of the conquest is recorded in the second book of Kings: the settlement of foreigners in the conquered lands of Samaria and the mixing of Jewish and foreign traditions:<sup>124</sup>

[T]he king of Assyria brought men from Babylon, and from Cuthah, and from Ava, and from Hamath, and from Sepharvaim, and placed them in the cities of Samaria instead of the children of Israel. . . . And so it was at the beginning of their dwelling there, that they feared not the Lord: therefore the Lord sent lions among them, which slew some of them. Wherefore they spake to the king of Assyria, saying, The nations which thou hast . . . placed in the cities of Samaria, know not the manner of the God of the land: therefore he hath sent lions among them. . . . Then the king of Assyria commanded, saying, Carry thither one of the priests whom ye brought from thence;

---

120. Herbert Fingarette, *Some Moral Aspects of Good Samaritanism*, in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 9, at 217–18.

121. See Winch, *supra* note 32, at 156.

122. See 1 Kings 16:21–33 (King James); see also 9 FLAVIUS JOSEPHUS, *ANTIQUITIES OF THE JEWS*.

123. See *Isaiah* 10:10–11 (King James) ("As my hand hath found the kingdoms of the idols, and whose graven images did excel them of Jerusalem and of Samaria; [s]hall I not, as I have done unto Samaria and her idols, so do to Jerusalem and her idols?"); see also *Ezekiel* 16:51–52 (King James).

124. See 2 Kings 17:18–33 (King James).

and let them go and dwell there, and let him teach them the manner of the God of the land. Then one of the priests whom they had carried away from Samaria came and dwelt in Bethel, and taught them how they should fear the Lord. Howbeit every nation made gods of their own, and put them in the houses of the high places which the Samaritans had made. . . . So they feared the LORD . . . [but] served their own gods, after the manner of the nations whom they carried away from thence.<sup>125</sup>

On some accounts the bulk of the deported Northerners never returned.<sup>126</sup> However, a number of them may have returned by Assyrian order, and of course we should bear in mind that many were never deported, but coexisted and interbred with the Assyrian colonists.

By contrast to all this, when the Jews of Judah and Jerusalem were exiled, following the invasion by the Babylonians under Nebuchadnezzar, they remained a homogenous group. No foreign settlers were brought in to occupy their land, and they were allowed to return to Jerusalem and rebuild their temple within seventy years. From then on, the Jerusalem community remained as a self-contained entity, avoiding contact with their paganized neighbours as far as possible.<sup>127</sup>

The Jerusalem attitude to those living in Samaria is summed up in what must be regarded as a sermon or propaganda on the issue in *2 Kings* 17:

Unto this day they do after the former manners: they fear not the LORD, neither do they after their statutes, or after their ordinances, or after the law and commandment which the LORD commanded the children of Jacob, whom he named Israel; . . . Howbeit they did not hearken, but they did after their former manner. So these nations feared the LORD, and served their graven images, both

125. *2 id.* 17:24–29, 32–33 (King James).

126. See R.J. COGGINS, *SAMARITANS AND JEWS: THE ORIGINS OF SAMARITANISM RECONSIDERED* (1975). Coggins summarizes the traditional view as follows:

After the Assyrian conquest of the Northern Kingdom of Israel, the inhabitants of the land were deported never to return (the "ten lost tribes"). In their stead, the land was repopulated by groups brought from other parts of the Assyrian Empire—groups whose race was as mixed as their religion, which was a syncretistic blend of their own local cults and a debased version of Yahwehism.

*Id.*

127. *Id.*; see also *Ezra* 9:1–11 (King James).

their children, and their children's children: as did their fathers, so do they unto this day.<sup>128</sup>

Subsequent biblical material prophesied a reintegration of the people of Samaria into the greater Jewish community,<sup>129</sup> but the issue remained a problem, up to and beyond New Testament times. Matthew's gospel appears to take the conventional (Jerusalem) view, for it has Jesus directing His disciples: "Go not into the way of the Gentiles, and into any city of the Samaritans enter ye not."<sup>130</sup> But John Bowman has argued that the Gospels of John and Luke (the source of our first story) were directed explicitly to the Samaritan problem.<sup>131</sup> In those texts, the problem is grappled with in a much more conciliatory way, and Jesus is said variously to have refused to lash out at a Samaritan refusal of hospitality,<sup>132</sup> to have conversed with and accepted refreshment from a Sa-

128. 2 *Kings* 17:34, 40–1 (King James). The online ENCYCLOPEDIA BRITANNICA provides the following entry for "samaritan":

[M]ember of a community of Jews, now nearly extinct, that claims to be related by blood to those Jews of ancient Samaria who were not deported by the Assyrian conquerors of the kingdom of Israel in 722 BC. The Samaritans call themselves Bene-Yisrael ("Children of Israel"), or Shamerim ("Observant Ones"), for their sole norm of religious observance is the Pentateuch (first five books of the Old Testament). Other Jews call them simply Shomronim (Samaritans); in the Talmud (rabbinical compendium of law, lore, and commentary), they are called Kutim, suggesting that they are rather descendants of Mesopotamian Cuthaeans, who settled in Samaria after the Assyrian conquest. Jews who returned to their homeland after the Babylonian Exile would not accept the help of the dwellers of the land, who were later identified as the Samaritans, in the building of the Second Temple of Jerusalem.

ENCYCLOPEDIA BRITANNICA (visited Apr. 20, 2000) <<http://www.eb.com>>.

129. See, e.g., *Jeremiah* 31:5–6 (King James).

130. *Matthew* 10:5 (King James).

131. See BOWMAN, *supra* note 119. See also the apostolic concern for the conversion of the Samaritans to Christianity in *Acts* 1:8 and 8:14–15 (written, as we think, by the author of *Luke*).

132. See *Luke* 9:51–56 (King James).

And it came to pass, when the time was come that he should be received up, he steadfastly set his face to go to Jerusalem, [a]nd sent messengers before his face: and they went, and entered into a village of the Samaritans, to make ready for him. And they did not receive him, because his face was as though he would go to Jerusalem. And when his disciples James and John saw this, they said, Lord, wilt thou that we command fire to come down from heaven, and consume them, even as Elias did? But he turned, and rebuked them, and said, Ye know not what manner of spirit ye are of. For the Son of man is not come to destroy men's lives, but to save them. And they went to another village.

*Id.*

maritan woman,<sup>133</sup> to have cured a group of lepers of whom only one—a Samaritan—expressed gratitude,<sup>134</sup> and to have remained silent in face of a Jewish accusation that He Himself was a Samaritan.<sup>135</sup> In this context, the story of the Good Samaritan can only be understood as an attempt to widen the scope of “neighbor,” to heal the breach in Israel, and potentially to embrace the whole of mankind.<sup>136</sup>

---

133. See *John* 4:5–10 (King James).

Then cometh he to a city of Samaria, which is called Sychar, near to the parcel of ground that Jacob gave to his son Joseph. Now Jacob's well was there. Jesus therefore, being wearied with his journey, sat thus on the well: and it was about the sixth hour. There cometh a woman of Samaria to draw water: Jesus saith unto her, Give me to drink. (For his disciples were gone away unto the city to buy meat.) Then saith the woman of Samaria unto him, How is it that thou, being a Jew, askest drink of me, which am a woman of Samaria? for the Jews have no dealings with the Samaritans. Jesus answered and said unto her, If thou knewest the gift of God, and who it is that saith to thee, Give me to drink; thou wouldest have asked of him, and he would have given thee living water.

*Id.*

134. See *Luke* 17:11–18 (King James).

And it came to pass, as he went to Jerusalem, that he passed through the midst of Samaria and Galilee. And as he entered into a certain village, there met him ten men that were lepers, which stood afar off: And they lifted up their voices, and said, Jesus, Master, have mercy on us. And when he saw them, he said unto them, Go shew yourselves unto the priests. And it came to pass, that, as they went, they were cleansed. And one of them, when he saw that he was healed, turned back, and with a loud voice glorified God, [a]nd fell down on his face at his feet, giving him thanks: and he was a Samaritan. And Jesus answering said, Were there not ten cleansed? but where are the nine? There are not found that returned to give glory to God, save this stranger.

*Id.* It is possible that the Samaritan leper returned to show himself to Jesus as his “priest.”

135. See *John* 8:42–50 (King James).

Jesus said unto them, If God were your Father, ye would love me: for I proceeded forth and came from God; neither came I of myself, but he sent me. Why do ye not understand my speech? even because ye cannot hear my word. . . . He that is of God heareth God's words: ye therefore hear them not, because ye are not of God. Then answered the Jews, and said unto him, Say we not well that thou art a Samaritan, and hast a devil? Jesus answered, I have not a devil; but I honour my Father, and ye do dishonour me. And I seek not mine own glory: there is one that seeketh and judgeth.

*Id.*

136. Consider also the way in which Jesus is presented as open to persuasion to extend his healing ministry beyond Israel in *Mark* 7:24–30 (King James).

And from thence he arose, and went into the borders of Tyre and Sidon, and entered into an house, and would have no man know it: but he

Construed along these lines, the parable of the Good Samaritan might seem quite irrelevant to the case of David Cash. It might be viewed as an attempt to cross parochial boundaries, and widen our sense of duty to include all mankind—a kind of lesson in cosmopolitan concern, of the sort found, for example, in Martha Nussbaum's recent work.<sup>137</sup> Against those who would confine the basis of moral concern within the boundaries of one's own community, Professor Nussbaum quotes the Stoics:

When Diogenes the Cynic replied, "I am a citizen of the world," he meant . . . that he refused to be defined by his local origins and group membership. . . . The Stoics, who followed his lead, further developed his image of the *kosmou polites* (world citizen) arguing that each of us dwells, in effect, in two communities—the local community of our birth, and the community of human argument and aspiration that is "truly great and truly common, in which we look neither to this corner nor to that, but measure the boundaries of our nation by the sun." It is this community that is, fundamentally, the source of our moral obligations. With respect to the most basic moral values, such as justice, "We should regard all human beings as our fellow citizens and neighbors."<sup>138</sup>

Well, similarly, by saying that the lawyer should go off and do as the Samaritan did—that he too should be prepared to cross communal boundaries to render aid to others *qua* human—Jesus may be viewed preaching a form of universalism that is no doubt very important,<sup>139</sup> but not really at issue in regard to

---

could not be hid. For a certain woman, whose young daughter had an unclean spirit, heard of him, and came and fell at his feet: The woman was a Greek, a Syrophenician by nation; and she besought him that he would cast forth the devil out of her daughter. But Jesus said unto her, Let the children first be filled: for it is not meet to take the children's bread, and to cast it unto the dogs. And she answered and said unto him, Yes, Lord: yet the dogs under the table eat of the children's crumbs. And he said unto her, For this saying go thy way; the devil is gone out of thy daughter. And when she was come to her house, she found the devil gone out, and her daughter laid upon the bed.

*Id.*

137. See MARTHA C. NUSSBAUM, *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (1996).

138. *Id.* at 6–7 (citations omitted).

139. See Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1992) (showing my own estimate of the importance of universities).

duties to rescue.<sup>140</sup> It is more about *Médecins sans Frontières*,

---

140. For modern Samaritans' views on ethnic boundaries, consider the rather sad article, James Meek, *Even for the Samaritans Giving Is Getting Harder: Ethnic Survival Is the Priority for the Bible's Model People*, *GUARDIAN* (London), Dec. 31, 1999, at 15:

It wasn't that the Samaritans weren't good any more, explained Husney Cohen. It was just that these days they were so much in need of help themselves that there wasn't a lot left over for anyone else. Mr Cohen, one of the world's last surviving ethnic Samaritans, was trying to get across why, nigh-on two millennia after Jesus's parable made his people a byword for goodness in the Christian world, Samaritan philanthropy was on hold. "The only thing we have left is the land the village is built on here, and in five years' time we're going to need more."

The present-day Samaritans cherish their benign reputation, but it hasn't made them outward-looking. In their two tiny communities—the village of Kiryat Luza, 720 metres (2,400ft) up on their holy Mount Gerizim near Nablus in the northern part of the West Bank, and a housing estate in Holon near Tel Aviv—the hereditary priests of the Cohen family keep scrupulous guard on Samaritan mores, ensuring that only a trickle of non-Samaritan genes enters the 600-strong nation.

Mr Cohen, a priest on Mount Gerizim and curator of the Samaritans' one-room museum, likes to put the mere 2,000 years of Christianity in perspective. The Samaritans believe they, not the Jews, are the true inheritors of the covenant between God and Moses's Israelites. On a genealogical ready reckoner Mr Cohen showed who was the Samaritans' high priest in the time of Jesus: "Jonathan," he said, as if talking about a favourite uncle.

The Samaritan name also opens doors. A Samaritan emissary called at the foreign office in London and the US state department in Washington this month, seeking support for guaranteed freedom of passage between Mount Gerizim in Palestinian territory and Holon in Israel.

Mr Cohen stressed that the Samaritans only followed their own, slightly different Torah, the first five books of the Old Testament, but: "It's written in the New Testament that we were good people, trying to help others. That makes us feel that we exist." Asked whether the Samaritans were aware of Margaret Thatcher's infamous 1980 attempt to reinterpret the Good Samaritan story, when she said the point was that the Samaritan had been wealthy enough to be charitable in the first place, Mr Cohen said no, but endorsed the sentiment. "Of course," he said, "You have to be able to earn something to be able to give to others. Even God says you have to give a tenth of what you get to help others, but you have to have something in order to be able to give."

The bad news for Thatcher-ites is that not only are there no Samaritan philanthropists on Mount Gerizim: there are no entrepreneurs, either. The Samaritans have all found state-funded work in the emerging bureaucracy of the Palestinian Authority. The Samaritan communities have undergone something of a renaissance in the past 50 years. In 1917, only 146 were left alive. Since then numbers have quadrupled. This resurgence is all the more remarkable given the severity of the marriage rules laid down by the Cohens, one of five extended Samaritan families. Females may not marry a non-Samaritan.

than about David Cash and Sherrice Iverson.

That is a possible response. But it is not the only one. We might approach the matter instead by emphasizing the *focused* altruism of Jesus' Good Samaritan rather than a more diffuse and universal human concern. If we emphasize the concrete focus of the Samaritan's altruism, we may find that we can hold on to an illuminating version of the "special relationship" idea. Instead of saying that Jesus' parable establishes an *all-purpose neighborhood* as between any two members of the human race, we focus instead on the specialness of the Samaritan's *proximity* to the man who fell among thieves. Several times in Part II of this essay I drew atten-

---

Males may, but only if they can persuade a non-Samaritan women to convert to their religion, similar in many ways to ultra-Orthodox Judaism. Diseases connected with inbreeding are a constant fear. One researcher found that more than four-fifths of marriages took place between first and second cousins; deafness and a paraplegic disability were higher than average. And for unknown reasons, the Samaritans give birth to many more boys than girls.

In its eyrie on the mountain, with neat modern bungalows and magnificent views, the village of Kiryat Luza is pretty. But its single street is the scene of nightly heartache as scores of young men woo the same 20-odd women they have known since they went to kindergarten together. Yet the Samaritans say that to their knowledge no one has ever left the community. Hind Samri, a 23-year-old Samaritan woman who is engaged, said: "I never thought about it. It's the way we were brought up. I've got friends from other religions but I'd never think of marrying someone from a different religion." One of the Samaritan bachelors, Sami Samri, 24, said: "There's never been a single case of somebody going outside the community to get married. But some of us have managed to convince Jewish girls to become Samaritans."

With the shortage of eligible partners, regular meetings between the Holon Samaritans and the mountain Samaritans are vital. But the communities are growing apart. The Samaritans of Holon speak Hebrew at home, serve in the Israeli army and have begun to fall subtly under the spell of modern life. The Samaritans of the mountain use Arabic and have thrown in their lot with the nascent Palestine. "We have eastern customs and they have western customs. That doesn't mean they don't protect their religion. They do," said Sami Samri. "They have some western mentalities which don't contradict their religion. Like boy and girl go out, they stay out till late at night. Girls wear short skirts. It's true, we do feel it. We used to be closer."

Benyamim Tsedaka, editor of AB, the first and so far only Samaritan newspaper and a Holon resident, acknowledged that today what concerned him was not being a good Samaritan but being good at being a Samaritan. We're not a group of angels, thinking how to help people all the time, but we care for ourselves and our existence," he said. "I want to leave this world with a feeling that I did the best for my community."

*Id.*

tion to the particular compelling immediacy that the Samaritan responded to in the situation.<sup>141</sup> And this I think is the key to the matter. In pursuit of this line of argument, I shall argue that the important work in the story is done not by any general cosmopolitan universalism, but by the sheer particularity of the accidental conjunction in time and space of two concrete individuals. And I shall argue, too, that this is the lesson we should draw from the parable so far as our response to the sorry tale of David Cash is concerned.

I admit that at first sight this strategy seems unpromising. The *denouement* of the parable may certainly be read perhaps as an explosion of special-relationship approach to the definition of "neighbor." It may be read as indicating that we should stop thinking about the specialness of certain human relations (as opposed to others) and focus instead on the mere fact of someone's humanity. But the mere fact of someone's humanity can be emphasized in two ways. It is evident that the Samaritan's benevolence was not like that of Charles Dickens's character Mrs. Jellyby, who was so "devoted to the subject of Africa; with a view to the general cultivation of the coffee berry—and the natives—and the happy settlement, on the banks of the African rivers, of our superabundant home population"<sup>142</sup> that she took no notice of the hungry and dirty children at her feet (tumbling downstairs and into the fireplace). Though Mrs. Jellyby was a pleasant enough woman, Dickens's narrator in *Bleak House* observes that her "handsome eyes . . . had a curious habit of seeming to look a long way off. As if . . . they could see nothing nearer than Africa!"<sup>143</sup> The Good Samaritan was not a humanitarian in that sense; he was not a "telescopic philanthropist."<sup>144</sup> Also, unlike his modern namesakes—I mean the Samaritans' Organization (an entirely worthy group that maintains a counseling service available by telephone to those who are depressed, lonely, or suicidal)<sup>145</sup>—there is no reason to think that the Samaritan in Jesus' parable was on the look-out for an oppor-

---

141. See *supra* text accompanying notes 29–34, 53–57.

142. CHARLES DICKENS, *BLEAK HOUSE* 36 (Fields, Osgood & Co. 1869).

143. *Id.* at 39.

144. *Id.* "Telescopic Philanthropy" is Dickens's title for Chapter IV of *BLEAK HOUSE*, from which I have just been quoting.

145. See MONICA DICKENS, *BEFRIENDING: THE AMERICAN SAMARITANS* (Bowling Green State Univ. Popular Press 1996) (giving a good account of the Samaritans Organization's activities).

tunity to rescue people who fell among thieves or other victims of disaster. He was simply *on the road*, and he came upon the scene of the robbery "*as he journeyed*."<sup>146</sup> When he came near the man, he apprehended roughly what had happened, and straight away gave aid to him as a neighbor. He would have surmised quickly enough that the injured man was probably a Jew rather than a fellow Samaritan. Apparently that did not present itself as an obstacle,<sup>147</sup> for he responded immediately to the injured man's presence and his plight. Paul Ramsey's commentary is helpful:

Never is it said [in the story] that "neighbor" includes "enemy" among those who ought to be loved because they are human beings, but rather that love for another *for his own sake*, neighborly love in the Christian sense, discovers the neighbor in every man it meets. . . . Christian love does not mean discovering the essentially human underneath differences: it means detecting the neighbor underneath friendliness or hostility or any other qualities in which the agent takes special interest. The full particularity of neighborly love . . . should not be reduced to universal brotherhood or the cosmopolitan spirit.<sup>148</sup>

Ramsey is no doubt exaggerating when he goes on to say that the Samaritan's good deed "stands at an opposite pole from love for mankind generally,"<sup>149</sup> but it puts the emphasis healthily on the compelling nature of the particular and the present, so far as rescue is concerned. From this point of view, the cosmopolitan strand of the story highlights nothing much more than the arbitrary "thrownness"<sup>150</sup> of our being in the presence of another. There is no telling who you will run into—who you will find yourself in the immediate neighborhood of—when you are on the road. That you find yourself side-by-side with an *X* rather than a *Y* may be discomfiting—even a source of anxiety and tension<sup>151</sup>—but *there it is*: this is

146. *Luke* 10:33 (King James) (emphasis added).

147. *But cf.* Winch, *supra* note 32, at 156 (pointing out that it was "just the sort of situation in which one might expect questions and hesitations").

148. RAMSEY, *supra* note 109, at 94. I am grateful to Philip Selznick, years ago, for drawing my attention to this passage.

149. *Id.* at 95.

150. MARTIN HEIDEGGER, *BEING AND TIME* 127 (Joan Stambaugh trans., 1996). This is a translation from the term "Gerworfen[heit]." *Id.* at 472 (alteration in original).

151. *See id.* at 163–64.

who, in particular, you have to deal with.<sup>152</sup>

Now, just like the Samaritan, David Cash was on the road, driving from casino to casino, and thus in a situation where there was no telling who he would find himself alongside. Consider some more details in the story. We are told that “[i]t was supposed to be a brief stop at the Primadonna casino, [forty-three] miles south of Las Vegas, but one poker game led to another. By 3 a.m. May 25, 1997, Jeremy Strohmeyer and David Cash were tired of hanging around the arcade, waiting for David’s dad.”<sup>153</sup> Striking up conversations with those around them, they began kidding around with a seven-year-old girl, Sherrice Iverson, who was also waiting for her father to finish gambling. Like them she came from Los Angeles, but their backgrounds were utterly different. They were white and affluent; she was a black girl from a broken home. Sherrice’s father, Leroy, who had recently split up with her mother,

didn’t trust baby-sitters. So when he went gambling just across the Nevada border, he always took Sherrice and [Sherrice’s brother] Harold. It had become a family ritual. On this Memorial Day weekend, they scrambled into his ’91 white Dodge van and left Los Angeles at 8 p.m. to avoid traffic. Wearing a white “Jesus Loves Me” T-shirt, Leroy pulled into the Primadonna parking lot around midnight. Leroy told Harold he was in charge of Sherrice and gave each \$5 to play arcade games. Leroy then headed for the slot machines.<sup>154</sup>

Sherrice played with her brother, and was occasionally taken back to her father by security guards. The father sent her away. She began playing hide-and-seek with Jeremy Strohmeyer.

---

152. See Jeremy Waldron, *Cultural Identity and Civic Responsibility*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 173–74 (Will Kymlicka & Wayne Norman eds., 2000). There, discussing the idea of civic cooperation, I said:

Civic responsibility—this business of coming to terms responsibly with others—is relative to what is more or less a geographical relation of being unavoidably side by side with others. In the circumstances of modern life, that geographical relation—being unavoidably side by side with others—is no guarantee whatever that common moral views and shared understandings can be taken for granted. We are not in a position to pick and choose those with whom we are required to come to terms.

*Id.* at 173.

153. Zamichow, *supra* note 78, at A1.

154. *Id.*

meyer, as Strohmeyer's friend David Cash looked on:

For the next 11 minutes, they dodged around the arcade, loping up one aisle and down the next, amid the din of galactic wars, race cars and battling superheroes. A tall blond teenager from a wealthy Long Beach family playing tag with a small black girl from South-Central, whose dad was on disability. She weighed 46 pounds and stood just under 4 feet. He was nearly 2 feet taller and outweighed her by 100 pounds. Sherrice darted into the ladies restroom at 3:47 a.m. . . . Jeremy went to the water fountain. He swallowed, inhaled deeply on his Marlboro and followed the little girl into the restroom. . . . Curious, his friend David followed.<sup>155</sup>

And so, *there they were*, in the restroom, thrown together—Sherrice with Strohmeyer, and Strohmeyer's friend Cash there too, watching from the next stall. After halfheartedly trying to get his friend to stop attacking the little girl,<sup>156</sup> Cash "walked out of the restroom and left the arcade. . . . He sat on a concrete bench in the courtyard. He had been in the restroom two minutes."<sup>157</sup> A little more than twenty minutes later. Strohmeyer emerged. When Cash caught sight of him, "he said: 'Dude, let's go. My dad is waiting for us.'"<sup>158</sup> And soon they were on the road again.

The boys piled into David's father's 1988 blue Chevy and drove north to Las Vegas. As soon as they reached the city, about 7 a.m. Sunday, David Cash Sr. went gambling. The teens slept in the car until noon.

That day and the next, they played nickel and quarter slot machines. David won \$22.50. They drank beer. They rode the roller coaster at the New York, New York casino. They cruised the Luxor and MGM Grand.<sup>159</sup>

The emptiness of these lives and the transience and sad haphazardness of the encounter are not at issue here. This is what it is like to be "on the road," in the anonymity of a gambling town, in the late twentieth century. What is of more pressing moral concern is David Cash's failure to see that the fact of this anonymous encounter with Sherrice Iverson made him *her neighbor*, whether he liked that or not. His own per-

---

155. *Id.*

156. *See id.*

157. *Id.*

158. *Id.*

159. Zamichow, *supra* note 78, at A1.

ception (reported in an *L.A. Times* interview) was that he had no connection to Iverson:

Were you appalled that a friend said he killed a little girl?

Cash: "I'm not going to get upset over somebody else's life.

I just worry about myself first. I'm not going to lose sleep over somebody else's problems." . . . What about when you

think of Sherrice? Cash: "I don't think of it. I don't know

her." Do you feel bad for her? Cash: "The situation sucks

in general." Do you feel worse for her or for Jeremy?

Cash: "Because I knew Jeremy, I feel worse for him. I

know he had a lot going for him."<sup>160</sup>

The moral of the story of David Cash is that that sort of clinging to the notion of *who I know* and *who I don't know* simply will not do, in the circumstances of modern life. It wouldn't do on the road to Jericho in biblical times, and it won't do either in the casinos that line the highways of modern Nevada. There we are constantly in the presence of people we don't know, and we have an array of compelling duties in their regard—some affirmative, some negative; some legal, some merely moral—duties whose stringency bears no correspondence whatever to the degree of our connection to the other people involved or the extent of our antecedent concern. Issues like these may or may not usefully be conceived in terms of "special relationships." Though there was no *antecedent* special relationship between David Cash and Sherrice Iverson that might ground a traditional duty to rescue, that doesn't mean that their relation was wholly abstract—the relation of one instance of common humanity or of one anonymous citizen of the world to another. Their relationship at that time and in that place was morally significant in its particularity, and it was special by virtue of the immediate concrete circumstances of their encounter. Cash was close enough to touch the little girl, in circumstances in which she desperately needed someone's help and he was the only one *at hand*. True, he would have had to make a significant effort to intervene successfully, but as we have seen, his placement in the situation was already such that he also had to make a special effort to break the connection with Sherrice Iverson's predicament and walk away. Also, there were surely hundreds of other people in and around the casino who—if only

---

160. *Id.*

they had come into that restroom—might also have had the opportunity to save her. And then they too would have had this special relationship; or, in the case of people like the security guards, their existing special relationship to vulnerable youngsters in the casino would have taken on an additional layer of immediacy. The difference is that David Cash *was* there, on the spot, actually not hypothetically. The structure of the situation has singled him out. None of us has any doubt that all this placed David Cash in particular in a very different *moral* situation from those whose connection to the assault was more distant or hypothetical. Since this is so, it is difficult to see what objection there could be in principle to law's intervention to bolster this compelling moral duty. Certainly such objection can not be based on general apprehensions about the law requiring abstract benevolence, because it is the particularity of this situation, not its abstraction, that has led to the call for Good Samaritan laws.

\*\*\*