CRIMINAL LIABILITY AND THE BAD SAMARITAN: FAILURE TO RESCUE PROVISIONS IN THE CRIMINAL LAW

PART II

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Introduction - Part II

The issue of whether a stranger who refuses to act on the moral obligation to go to the aid of a fellow human being in danger or distress should be visited with the imposition of criminal liability for his/her failure to act, provides the focus for these articles. In Part I of this discussion, the conventional view regarding the imposition of criminal omissions liability in common law systems like Australia was introduced and the nature and extent of existing omissions liability examined, particularly focussing on the circumstances in which a limited duty to rescue might arise. The considerable resistance to any extension of criminal liability for rescue in the common law systems was contrasted with the long tradition of penal rescue statutes in the European and Latin American jurisdictions. In Part II, the conceptual and theoretical bases for this common law derelict on rescue will be examined and the Part will conclude with the practical exercise of formulating a workable rescue duty.

A Conceptual Basis for Common Law Derelict on Rescue: The Theory Behind Omissions Liability.

While most European (continental and eastern) systems have embraced a duty to rescue, many of them from as early as the mid to late nineteenth century, the English/Australian legal tradition has remained essentially unchanged from the way in which it was described by Sir James Fitzjames Stephens in 1883:

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> A number of people who stand around a shallow pool in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the water, are no doubt shameful cowards, but they can hardly be said to have killed the child.[1]

The question of why there has been no tradition of rescue doctrine in the common (to be compared with the civil) law jurisdictions is an interesting one. There is probably no one completely satisfactory answer.

The early common law had an highly individualistic bias which manifested itself in judicial reluctance to intervene in social and economic affairs. This bias informed and reinforced the distinction between misfeasance and nonfeasance; for the criminal law, the distinction between act and omission. The entrenched view was that the legitimate scope of the common law was to prevent harm and not to enforce the conferring of benefit. When entrenched individualism was coupled to the tradition of precedent and judge made law, the common law system had little room for the development of a rescue doctrine, nor much incentive to do so given the perceived difficulties in sensibly confining the duty.[2]

Cadoppi[3] identifies the common law heritage of judge made law as a critical aspect in the historical development of the civil and common law legal traditions, and as a significant factor in the latter's dereliction in generating any general criminal liability for failure to rescue. By contrast, the codification of the criminal law that occurred in continental Europe, for example, in the late eighteenth and early nineteenth centuries,[4] with the accompanying flexibility to re-think the criminal law and to create and categorise appropriate new offences, provided the opportunity for the enactment of such a general duty. (It is exactly for this reason that serious

1 As cited in A Ashworth and E Steiner, "Criminal Omissions and Public Duties: the French Experience" (1990) 10 *Legal Studies* 153 at 153.

2 See MA Menlowe, "The Philosophical Foundations of a Duty to Rescue" in MA Menlowe and A McCall Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid*, Aldershot, Dartmouth Publishing, 1993 at 6; J Silver, "The Duty to Rescue: A Reexamination and Proposal" (1985) 26 *William and Mary Law Review* 423 at 424-425; AW Rudzinski, "The Duty to Rescue: A Comparative Analysis" in J M Ratcliffe (ed), *The Good Samaritan and the Law*, New York, Doubleday, 1966 at 120; A Linden, "Rescuers and Good Samaritans" (1971) 34 *Modern Law Review* 241 at 242.

3 A Cadoppi, "Failure to Rescue and the Continental Criminal Law" in Menlowe and McCall Smith, n2 at 115-118.

4 Cadoppi, n3 at 115-116.

consideration should be given to rethinking the whole nature and scope of omissions liability in the current codification debate in Australia). In seeking explanations for the difference, one is also drawn to speculate, as Honore has to some extent, that continental Europe witnessed the dramatic effects of non-intervention/non-rescue. Honore posits that there is no such thing as neutrality in the sphere of morals: "if the law does not encourage rescue, it is sure to discourage it".[5]

These last insights and the doctrinal review undertaken in Part I, suggest that a conceptual fundamental to understanding the common law's regulation of omissions liability (or failure to regulate it on any principled basis),[6] is the distinction between, on the one hand, the "conventional" minimalist view of criminal liability for omissions which Hughes has described as "empty" and which Ashworth claims is based on notions maximising the individual's autonomy and liberty[7] and, on the other hand, the "social responsibility" view which provides arguments for reinforcing certain social obligations in matters of life and death. Ashworth describes the latter position as "drawing attention to the co-operative elements in social life, and would ...[fairly] place citizens under obligations to render assistance to other individuals in certain situations".[8] From the perspective of a "social responsibility view" no distinction between acts of omission and commission can or should be drawn:

> The general principle in criminal law should be that omissions liability should be possible if a duty is established, because in those circumstances there is no fundamental moral distinction between failing to perform an act with foreseen bad consequences and performing an act with identical bad consequences.[9]

This still begs the question of when a duty should be imposed, but does raise for consideration the critical issue of the way in which the criminal law treats the distinction between doing and not doing. The common law's

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5 AM Honore, "Law, Morals and Rescue" in Ratcliffe, n2 at 232.

6 See, for example, G Hughes, "Criminal Omissions" (1958) 67 Yale Law Journal 590 at 620.

7 A Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424 at 427; cf G Williams, "Criminal Omissions - The Conventional View" (1991) 107 LQR 86 esp at 89.

8 Ashworth, n7 at 425.

9 Ashworth, n7 at 458.

position is ostensibly based on the fundamental principle that requiring the performance of an affirmative act is unduly invasive of individual liberty. However, even cursory analysis of the theoretical reluctance to countenance any extension of omissions liability shows it to be more broadly based than simply "it would unduly interfere with individual liberty". If there is to be any realistic expectation of principled development in this area, the theoretical arguments must be faced.

Criminal Liability for Omitting to Rescue: The Theoretical Arguments.

There have been many arguments put both for and against wider criminal liability for omissions.[10] Those writings identify that the reasons for the common law's reluctance to impose criminal liability for omissions can be found in several sources. Two particular heads of opposition concern issues of characterisation and causation, and perceptions of the relative importance of negative over positive duties. It is to those issues that this discussion now turns.

Of the remaining arguments offered in support of the law's reluctance to extend omissions liability, several are commonly raised in the debate over imposition of rescue liability: that it is an unreasonable circumscription of liberty, that it would be vague and unworkable, that the law should not legislate to enforce morality and that law and ethics should be kept separate. These matters will also be considered briefly below.

Characterisation and Causation. One obstacle commonly referred to is that of characterising the relevant conduct as act or omission. Associated with the characterisation issue is the causation question of whether it is possible to show any sufficient nexus between the non-acting and resultant

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[10] See for example Hughes, n6; PR Glazebrook, "Criminal Omissions: The Duty Requirement in Offences Against the Person" (1960) 76 LQR 386; G Williams, "What Should the Code Do About Omissions?" (1987) 7 *Legal Studies* 92.; Ashworth, n7; cf Williams (1991), n7; G Mead, ôContracting into Crime: A Theory of Criminal Omissions" (1991) 11 *Oxford Journal of Legal Studies* 147; FM , "Action, Omission, and the Stringency of Dutiesö (1994) 142 *Uni of Pennsylvania Law Review* 1493; FB McCarthy, "Crimes of Omission in Pennsylvania" (1995) 68 *Temple Law Review* 633.

harm.[11] At a threshold level, Feinberg focuses on whether omissions can cause harm and concludes that, if blame is what is in question, then clearly omissions can cause harm. He concludes that, in any event, the distinction between causing harm and preventing it is not a morally significant one. The latter, he says, is especially clear in those cases which would be caught by a rescue provision, where the effort required is minimal, but intention, motive and degree of harm "are the same as in the corresponding case of active causation".[12]

Having passed the threshold test and accepting, as has MCCOC, that it is clear "the physical element of an offence constituted by conduct can include conduct constituted wholly by an omission to act",[13] there remains a theoretical and intuitive reluctance to extend prevailing notions of causation to omissions. Hart and Honore suggest that in the search for the identification of cause, the terminology of "active force" is influential and potentially misleading:

> ...we easily think of omissions as "negative events" and these in turn as "simply nothing". The corrective here is to realise that negative statements like "he did not pull the signal" are ways of describing the world, just as affirmative statements are, but they do it by *contrast* not by *comparison* as affirmative statements do.[14]

So it may be that knotty causation questions regarding omissions are more matters of perception than reality. As the LRCC stated:

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[11] Ashworth, n7 at 437-438; Williams (1991), n7 at 87, 89; Hughes, n6 at 598-600; B *Fisse, Laws of Australia: Homicide*, Sydney, Law Book Company, 1992 at [28]; A McCall Smith, "The Duty to Rescue and the Common Law" in Menlowe and McCall Smith, n2 at 57; Law Reform Commission of Canada (LRCC), *Omissions, Negligence and Endangering*, (Working Paper 46), Ottawa, LRCC, 1985 at 4-5; R v. *Phillips* (1971) 45 ALJR 467 at 477 per Windeyer J: different facets of conduct can suggest different characterisations; and see generally on causation HLA Hart and T Honore, Causation in the Law (2nd ed), Oxford, Claredon Press, 1985.

[12] J Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others*, New York, Oxford University Press, 1984 at 186, and see also 165-185. Also J Kleinig,"Good Samaritanism" (1976) 5 *Philosophy and Public Affairs* 382; cf Menlowe, n2 at 17-18.

[13] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Final Report, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Canberra, AGPS, 1993, hereafter "Final Report" (CLOC subsequently becoming MCCOC) at 19.

[14] Hart and Honore, n11 at 38 and generally at 32-38. Also Hughes, n6 at 627-631; Ashworth, n7 at 434-435; McCall Smith, n11 at 57.

> ...in most situations, action tends to be the abnormal feature and hence a causal factor, whereas inaction tends to be the normal feature and hence a mere necessary condition. Action interferes with the *status quo* and makes a difference; inaction leaves things as they are and makes no difference ... Causally, harm is more clearly linked to interference than non-interference.
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> Sometimes, however, non-interference is itself abnormal.[15]

But the difficulties do not end here. In relation to the one event many omissions may be causally relevant and, consequently, many non-actors may be liable. For example, in the Good Samaritan parable, the harm suffered by the victim is more obviously taken to have been caused by the actions of the thieves, rather than the non-action of the priest and Levite (and indeed any others who may have passed by). Who amongst the passers-by is to be held liable? As Fisse identifies, offences defined in terms of active conduct are limited in their application to only those persons who perform that act. On the other hand, omission offences apply to all those who fail to act, unless otherwise exempted from the scope of liability.[16] Temporally also it is obviously simpler to identify the time at which any proscribed act has been committed, rather than the moment when passive inaction attracts liability: omissions *per se* are more open-ended and difficult questions may arise such as (in the case of a death) when any passers-by, for instance, might became liable - at the time that death occurred, at the time of the non-intervention or at some other time.

It is not suggested that any of these issues are capable of easy resolution but in the rescue context, if a conduct, rather than a result, offence is enacted, many of the theoretical difficulties of causation may not arise and, with careful drafting, the remainder may be attenuated.

Negative over positive duties. Often an objection to extensive omissions liability is based on the relative importance of negative over positive duties: the suggestion that the positive duty is not as morally significant a duty as its negative counterpart, that the citizen does more wrong when s/he kills than when s/he fails to save. Williams in particular posits that the resources

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15 LRCC, Working Paper 46, n11 at 5. For the distinction between cause and mere conditions see Hart and Honore, n11 at 32-38.

16 Fisse, n11 at [29].

of the criminal law are presently more than well occupied seeking to deter those who offend by *active* conduct and that positive omission liability must have a much lower priority.[17] However, an answer may be made to this argument at two levels, and specially so in the instance of rescue where the inaction is so obviously socially harmful. First, as Feinberg has put, in situations where minimal effort is required of the rescuer and all other things (for example, intention and motive) are equal, there seems to be "no morally significant difference between [the person] allowing an imperiled person to suffer severe harm and [the person] causing that harm by direct action".[18] These matters will be explored in greater detail below. Secondly, even should it be the case that there is validity in the relative importance point, then it does not establish that omissions should be ignored in the criminal law, at most it suggests that such positive duty omissions should be subject to lesser penalties.[19]

Interference with Liberty. The charge that penalising omissions to act by imposing a duty to rescue would unreasonably interfere with liberty was encapsulated by the LRCC as follows:

> To forbid a positive act such as killing closes off one avenue of conduct but leaves all others free; to forbid an omission such as letting die closes off all other avenues till that one has been taken - nothing else can be done till the death has been prevented. ...
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> The law restricts itself to saying: "Do not harm others - do not worsen their lot in life," and refrains from adding "and do good to others - go and improve their lot." It leaves such altruism to volunteers or else to private arrangement usually through the law of contract. By this approach it serves to maximize the liberty of the individual.[20]

Rescue proponents answer the liberty objection curtly by putting that "the value of one citizen's life is generally greater than the value of another citizen's temporary freedom":[21] any interference with liberty is easily

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17 Williams (1991), n7 at 88-89; see also Fisse, n11 at [29]; cf Feinberg, n12 at 166-171.

18 Feinberg, n12 at 171. Also Hughes, n6 at 636.

19 S Freeman, "Criminal Liability and the Duty to Aid the Distressed" (1994) 142 *University of Pennsylvania Law Review* 1455 at 1464.

20 LRCC, Working Paper 46, n11 at 6-7.

21 Ashworth, n7 at 432. See also Menlowe, n12 at 8-10; Feinberg, n12 at Chapter 4; Hughes, n6 at 634; Freeman, n19 at 1483-1489.

outweighed and justified by the good produced, if not the enhancement of the liberty of the person rescued.

Vague and Unworkable. This was certainly the charge Kearney J in *Salmon* levelled at the s 155 *Criminal Code* (NT) rescue duty. The primary aspect of this objection is the "line drawing" argument originally put by Lord Macaulay: any duty to rescue would be quite uncertain because it would be difficult if not impossible to draw the line between those cases in which the duty exists and those in which it does not.

One of the early proponents of a duty to rescue, Jeremy Bentham, would have imposed a general duty to save another from harm when this can be done without prejudice to oneself. In *An Introduction to Morals and Legislation*, he discussed the limits of penal jurisprudence and in the course of addressing the rules of beneficence, said:

> ...in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?[22]

Bentham provided specific examples of situations which would come within such a duty:

> A woman's head-dress catches on fire: water is at hand: a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied? [23]

In contrast, Lord Macaulay when considering this question for the Commission to revise the Indian Penal Code in 1837, endorsed the view that an omission could be illegal if there existed some special relationship between the parties, but opposed any wider imposition of criminal

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[22] JH Burns and HLA Hart (eds), *The Collected Works of Jeremy Bentham - An Introduction to the Principles of Morals and Legislation,* University of London, The Althlone Press, 1970 at 293.

[23] Burns and Hart, n22.

responsibility for a mere omission. His main objection, which has been reiterated by some contemporary writers,[24] was that there would be significant difficulties in defining the limits of a duty to act: if you could not draw the line at a legal obligation to assist those with whom there was a special relationship, then there was no non-arbitrary line to be drawn and the legal duty would have to be very extensive.

Macaulay's well known hypotheticals illustrate bad cases which would then be caught by such an extensive duty: the person who should not be convicted of murder because s/he omitted to give alms to a beggar knowing that the death of the beggar was the likely result; and the instance of surgical non-rescue where the surgeon ought not to be "treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, 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." Macaulay considered that such claims could only be grounded in common humanity, but not in some affirmative duty to give assistance.[25]

On balance, there seems to be no reason why a sensible line cannot be drawn at some point beyond Macaulay's uncompromising one. Feinberg proposes a scope of liability for harmful omissions that snares only those who "clearly deserve" to be liable. He argues that this is the case when there is clearly no or no *unreasonable* risk, cost or inconvenience. Outside the net of liability are those who in Feinberg's words "clearly deserve *not* to be liable, and those whose deserts are not certain" in the sense that uncertain or controversial questions exist as to what is reasonable in the circumstances.[26] This would seem a sensible compromise and a standard with which the law is not unfamiliar.

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[24] For example, Menlowe, n2; MS Moore, "Reply: More on Act and Crime" (1994) 142 *University of Pennsylvania Law Review* 1749, though Moore's position is less focussed on the pre-existing legal relationship aspect and more on the gravity of the moral wrong that is done by the failure to act in the circumstances: see Freeman, n19 at 1460-1461.

[25] Lord Thomas Macaulay, "Notes on the Indian Penal Code" Note M (1837) in Trevelyan (ed), *The Works of Lord Macaulay*, New York, Longmans, Green & Co, 1897, Vol. 7 at 493-94 as quoted in Freeman, n19 at 1458. See also Feinberg, n12 at 151-152.

[26] Feinberg, n12 at 156, also 150-163: see also Freeman, n19 at 1459, 1490: Macaulay's argument is "unconvincing" agreeing with Feinberg that it begs the question and suggesting a reasonableness standard.

Whether the legislature should enforce morality. It is not seriously doubted that a moral duty to rescue exists.[27] But the question whether this moral precept should transmute into a legal duty raises a number of issues: the age old Hart/Devlin debate about whether it is justifiable for the criminal law to enforce (shared) morality in these matters or whether morality ought more properly to be left to other forms of social control or personal moral judgement; the question whether enforcement would be effective anyway - is it possible to legislate for morality; and, also, a different perspective on the line drawing debate in this context, the question of the distinction between an *enforceable* legal duty to aid and a more general *unenforceable* duty of beneficence.

The first two of these matters may be dealt with briefly. Much has been written on these issues[28] and the re-canvassing of them is beyond the scope of this article. Suffice to answer, as Honore does, that the law is justified in this intrusion unless it would be "oppressive or impracticable" to do so.[29] The duty is clearly not impractical given the number of (civil) jurisdictions to have enforced it to date and found it to be workable. As to whether a positive duty to aid fellow citizens in peril is oppressive, it is difficult to argue in support of the oppression point given a number of factors: the pre-existence of the moral duty; the common societal good that would be satisfied by its imposition; the relative failure to violate individual liberty to any significant extent; and the great harm that would be caused if the duty is breached. Freeman would add another factor to this equation and point out that, looking to social contract theory, there exists real reciprocal benefit in a duty of mutual emergency assistance, particularly in the circumstances where each individual is as likely to benefit from the duty as to be inconvenienced by it.[30] On a utilitarian level of analysis, the duty to act would be determined by the dictates of maximising social happiness: the greatest happiness for the greatest number will justify the imposition of the duty.[31] The question of the effectiveness of a criminal sanction has been touched on earlier: it is clear that the criminal law has a role to play in

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27 See H Fingarette, "Some Moral Aspects of Good Samaritanship" in Ratcliffe, n2 at 216; cf Menlowe, n12.

28 See, for example, JB Ames, "Law and Morals" in Ratcliffe, n2; Honore, n5 at 225-226, 240.

29 Honore, n5 at 240.

30 Freeman, n19 at 1479-1481.

31 Freeman, n19 at 1474-1475; Menlowe, n2 at 21-37.

reflecting, reinforcing and giving specific content to morality in this area.[32]

Whether it is possible to constrict the duty to something enforceable that is less than an extensive duty of beneficence is contentious. Menlowe, drawing on Macaulay for support, argues that, once recognised, it is impossible logically and philosophically to limit the moral obligation. Pragmatically, McInnes says that a short answer to this position is to accept that the law must be a practical exercise "in which potentially expansive concepts are invariably confined, sometimes by logic, but sometimes by policy".[33]

Tempting though it might be to leave the argument there, at a more theoretical level of analysis, Freeman distinguishes the moral duty to aid those in peril from a more general duty of beneficence by recourse to Kant's typology of duties.[34] With this typology in place, Freeman argues that one cannot always be under a duty, moral or legal, to act to prevent harm to others even when they would be no risk to one's self, otherwise Macaulay's surgeon who refused to travel to Meerut has breached the duty. What the surgeon had was an *imperfect* ethical duty of beneficence that is unenforceable as supererogatory or a duty of virtue: Kant suggests that while only *perfect* duties can be externally compelled by law, we can be selective about imperfect duties.[35] Extending the argument, Freeman posits that the rescue duty is possible of perfect definition; in particular, it is our own natural response that will illustrate and make clear the distinction between a perfect duty to aid those in peril - the duty to lift the drowning infant from the pool - and the more general, imperfect duty of beneficence - the latter upon which MacaulayÆs surgeon might chose not to act when s/he declines to travel to Meerut, given that compliance would require the rescuer to act at some cost or risk to themselves.[36]

The separation of law and ethics. A variant of the law and morality debate is the objection that a legal compulsion imposed by the criminal law

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32 Rudzinski, n2 at 122-123; Honore, n5 at 240; L Waller, "Rescue and the Common Law: England and Australia" in Ratcliffe, n2 at 140-141; Fingarette, n27 at 222; McCall Smith, n11 at 89.

33 M McInnes, "Book Review of The Duty to Rescue: The Jurisprudence of Aid", (1994) 28 *Uni of British Columbia Law Review* 201 at 202.

34 Freeman, n19 at 1470-1477; see also Menlowe, n2 at 13-17.

35 Menlowe, n 2 at 15.

36 Freeman, n19 at 1476-1478, also 1482-1483.

to save human life "deprives the rescue of its ethical character, which consists of free deeds motivated and directed by one's conscience alone".[37] A simple answer to this argument is to draw on the reasoning above and reply that the proposal is merely to impose a *legal* duty in situations where morality already sees one; as Silver sensibly points out any imposed duty would most likely not require the would-be rescuer to imperil his/her life (or even to risk serious injury). As such there would still be ample residual opportunity for heroism. Those who go beyond their moral duty will also be going beyond their legal duty.[38]

Construction of a Duty to Rescue.

Implicit in the foregoing is a distinct groundswell of philosophical support for the imposition of a legal duty to rescue. Even as ardent a proponent of conventional omissions liability as Williams is, even he declares himself in support of the creation of a duty to "easy rescue" (on condition of lenient punishment), though he summarily dismisses the debate as unimportant in the context of the broader reform agenda.[39]

Obviously, others do not agree with the last but it is equally clear that, in constructing a workable duty that is compatible with our individualistic legal heritage, it will be necessary to balance the theoretical concerns with sensitive line drawing. The goal is to strike the balance between individual liberty and the pursuit of the common good; between a perfect and compellable general duty to rescue and an imperfect and unenforceable extensive duty of beneficence. In practical terms, the question is whether it is possible to generate but then limit the scope of the duty by utilising concepts such as the immediacy of the danger, the rescuer's proximity, their capacity, opportunity and knowledge, and like matters.

Lipkin reminds us that there are different types of rescue, some more difficult than others.

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37 Rudzinski, n2 at 119-123.

38 Silver, n2 at 434; see also Honore, n5 at 241.

39 Williams (1991), n7 at 89-90.

Much of the controversy over whether to recognise a general legal duty to rescue is primarily a controversy about "easy rescue".[40]

The notion of "easy rescue", which finds its origins in Bentham's work discussed above, is defined by Weinrib as

> a duty that would arise whenever one person is caught in a dangerous situation that another can alleviate at no significant cost to himself.[41]

The language by which the liability is to be imposed should be clear and precise. That this is achievable is evidenced by the generic *Traffic Act* "duty-to-stop-in-case-of-accident" provisions: as Waller points out this particular imposition of criminal liability for neglect to assist has been enforced by the courts without undue anxiety.[42] The provisions of bad samaritan statutes in the mainly civil jurisdictions, while inevitably subject to criticism on drafting precision, have proven workable over long periods. There should be no reason to suppose that the experience of a rescue duty should prove different in our common law system.

Though Feinberg agrees that the bad samaritan statutes primarily direct their attention to the Bentham/Weinrib easy rescue scenario - the prevention of extreme harm at not unreasonable risk or effort - he also offers that this minimalist position should be tested:

> If it is the *certainty* of an endangered party's death to be weighed against only a risk of harm to ourselves, and [that party's] gravely serious harm against our mere effort, or inconvenience or expense, however great, why should we not be obligated to go to "almost any length" to save [that party]? After all, everything else being the same, we are obligated to endure almost any sacrifice in preference to killing [that party].[43]

Though this might appear to require a revisiting of the whole jurisprudential justification for the rescue duty, these questions become

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40 RJ Lipkin, "Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue" (1983) 31 UCLA *Law Review* 252 at 258; at 266 identifying four types of rescue.

41 EJ Weinrib, "The Case for a Duty to Rescue" (1980) 90 *Yale Law Journal* 247 at 250; Burns and Hart, n22 at 292-293; Feinberg, n12 at 168; Cadoppi, n3 at 119; Lipkin, n40 at 287-288; Menlowe, n2 at 8-12.

42 Waller, n32 at 152.

43 Feinberg, n12 at 168.

real ones when faced with the practical exercise of formulating a workable scheme. By way of assistance, as suggested by Freeman, we should be guided by our "natural instincts" when hard questions arise in this line drawing exercise.

In constructing a duty, the issues fall to be resolved under the following heads:

When does the duty to rescue arise?[44] This issue embraces the central question of what threshold level of danger should be posed to the *person in peril* to engage the duty. Presumably the danger may arise from an accident or the act of a third person (including the victim's own negligence and obviously the act of the potential rescuer), but what level of danger - only danger to life, or to life and limb; what about suicide?[45] The continental position under the civil codes ranges from limiting the duty to situations of mortal danger, through serious danger scenarios, to something much less and far more vague. Cadoppi finds that most civil codes do not require anything more than a "vague danger for the person or even less than that".[46] The Northern Territory *Criminal Code* s 155 requires that life be in immediate danger and that the victim be in urgent need of assistance. On balance, it is suggested that the threshold of another having sustained or being in imminent risk of serious physical harm should be the activating level.

Who is bound to render assistance?[47] As discussed in Part I, the modern Australian common law of torts looks to well established principles of proximity - physical, circumstantial and causal - to determine the imposition of a duty of care in a particular factual situation.[48] But, in a criminal context, what is to be the requisite degree of (physical and/or intellectual) proximity

44 See Rudzinski, n2 at 95; Cadoppi, n3 at 105; Silver, n2 at 436-437; FJM Feldbrugge, "Good and Bad Samaritans" (1966) 14 American Journal of Comparative Law 630 at 632-63.

45 See Silver, n2 at 436 who says that duty still applies; see also Ashworth, n7 at 429.

46 Cadoppi, n3 at 105.

47 Cadoppi, n3 at 105-106; Rudzinski, n2 at 101-105; Feldbrugge, n44 at 634.

48 See *Jaensch v. Coffey* (1984) 155 CLR 549 and *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424, particularly per Deane J at 497-498 and, most recently, *Woods v. Lowns* (1995) 36 NSWLR 344 (Badgery-Parker J at first instance) and *Lowns v. Woods* (1996) *Aust Torts Reporter* 81-376 (NSW Court of Appeal) considering s 27(1)(h) *Medical Practitioners Act* 1938 (NSW) and finding liability for a medical practitioner who negligently failed to attend and treat a non-patient in an emergency.

between the person in peril and the would-be rescuer? Are only those who "witness" or "find" the person in peril to be required to act? Given modern communications, is it appropriate to limit the pool of rescuers to those physically near? What then about everyone (reliably) informed of the danger? Cadoppi points out that most of the Continental statutes do not appear to require any proximity between the parties to the rescue[49] and certainly the NT statute is silent on the point. It is clear that restriction of the duty to the situation where the rescuer *finds* the person in peril renders it much less invasive of individual liberty and, perhaps, the least objectionable basis for the imposition of criminal liability.

What of the situation where more than one potential rescuer is available - the situation of "diffuse responsibility"?[50] As a matter of logic, it must be that all are equally liable for breach of the duty, as would be the case for offences of commission. Feldbrugge agrees that all should be liable, but suggests that if somebody is already assisting, the danger has receded and there is no duty for the others to help, unless they are able to provide faster or better help.[51]

Risk to rescuer as a basis for excluding the duty. [52] What risk? Risk to life? Of serious injury? Cadoppi records that many of the continental Codes exclude the offence when the rescuer runs a risk of *any* degree. The NT statute is again silent on this point, as are many of the other civil law countries (for example, Italy). Should it be only risk of *physical* injury that leads to the exclusion of the duty or something less serious: in Germany, for example, performance of the duty is excused if it would be particularly onerous in the circumstances (for example, because the rescuer would be seriously inconvenienced or because it unduly interferes with obligations to third parties). As discussed above, Feinberg has proposed that liability ensue only for those who "clearly deserve" to be liable: the situations where there is *clearly* no, or no unreasonable, risk, cost or inconvenience.[53] While Silver

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49 Cadoppi, n3 at 106.

50 WM Rudolph, "The Duty to Act: A Proposed Rule" in Ratcliffe, n2 at 246, 272-274; WP Keeton *et al*, *Prosser and Keeton on The Law of Torts* (5th ed), St Paul, West Publishing Co., 1984, (56 at 376; Rudzinski, n2 at 103-104, referring to the Polish (draft) of a new Criminal Code in 1963 on this point; Silver, n2 at 432; Hughes, n6 at 634.

51 Feldbrugge, n44 at 641; Silver, n2 at 432.

52 Rudzinski, n2 at 105-107; Cadoppi, n3 at 106-107; Feldbrugge, n44 at 635-638; cf Silver, n2 at 442-443.

53 Feinberg, n12 at 155-157.

presents a cogent argument that the fairest balance between the interests of rescuer, victim, and society requires the rescuer to confront an intermediate degree of risk,[54] given the theoretical discussion above, Feinberg's deserts proposal is preferred.

Should those who are bound by their profession (eg doctors, life-savers, firepersons) or by special links with the person imperiled (eg by virtue of family, employment or other ties) be under a stricter duty?[55] It is suggested that the preferable option is to make this a circumstance of aggravation, particularly given that the serious commission by omission result offences of murder and the like will remain available.

What is the rescuer obliged to do?[56] Again the duties imposed by the existing provisions vary: in some instances the duty is to rescue, in others it is the duty to procure help or inform the relevant authorities, in others again the would-be rescuer is obliged to do one or other or is given a choice. The Northern Territory *Criminal Code* offence can be committed in one or more of five possible ways:[57] by omitting to rescue, resuscitate, treat, administer first aid, *or* provide succour. The rescuer is not given the option of informing the authorities. It is clear that by providing the rescuer with a genuine alternative of rescuing or informing authorities, the duty is less invasive of individual liberty. Also obvious however, is that the choice made must ultimately be reasonable in the circumstances: as Feldbrugge recognises, the duty to procure help should be subsidiary, one should first attempt rescue and only when this appears impossible should one seek help from elsewhere.[58] With this in mind, it is suggested that Cadoppi does not go far enough when he proposes a duty that requires the most "efficient and [least] dangerous kind of rescue"[59] when, thinking of mobile phones, he posits that the law should impose no more onerous a duty than simply summoning the appropriate rescue services.

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54 Silver, n2 at 442-443.

55 See, for example, Honore, n5 at 230-231; Cadoppi, n3 at 129.

56 Rudzinski, n2 at 107-108; Cadoppi, n3 at 107; Feldbrugge, n44 at 643-645.

57 *Salmon* (1994) 70 A Crim R 536 at 544-546 per Kearney J.

58 Feldbrugge, n44, at 644-645 citing France, Italy, the Netherlands, Russia and Spain; cfCadoppi, n3 at 113, 121.

59 Cadoppi, n3 at 121.

Rudolph adds complexity to this element, by inquiring as to how long and how far the duty should extend.[60] The answer to this is bound up in the issue of how to judge the rescuer's actions.[61] The solution probably is to provide for a standard of reasonableness in the circumstances, being particularly careful in the emergency situation to give the rescuer the benefit of the doubt and not judge his/her actions too harshly with the benefit of hindsight.[62] The LRCC recommended that a law which requires rescuers to take *reasonable* steps in the circumstances to aid those in danger would fit "comfortably with the various already existing legal rules concerning reasonable care, reasonable force, reasonable time and so on": those standard setting terms are not unknown to the existing law.[63]

What are to be the criminal features of the offence? Foremost amongst these considerations is the issue of the nature of the omissions liability that ought to be imposed. As suggested by the comparative review and analysis above, and as recommended by the LRCC, the clear preference must be for a conduct offence and not for an offence that makes liability contingent on the ensuing of a result. This construction of liability also makes the provision less vulnerable to objection on the causation point, but does not exclude, however, the possibility of circumstances of aggravation being made out if, for example, death or serious bodily injury actually occurs. The question of maintaining the status quo as to separate liability for homicide and serious harm offences is also relevant here. It follows from what has been said concerning the distinction between result and conduct offences, that a failure to rescue offence of the latter type does not encroach on the existing laws for homicide and other offences against the person (which may come into operation, for example, if the particular defendant was under a special legal duty to act).[64]

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60 Rudolph, n50 at 258 using the example of a tree having fallen across the road on a blind corner: how long does the first arrival have to wait?

61 Rudolph, n50 at 264; Silver, n 2 at 440-441; Feinberg, n12 at 155-157; Freeman, n19 at 1490; Fisse, n11 at [30].

62 Such a position is not unknown to the criminal law, see, for example, self defence and the admonition in *R v. Johnson* [1964] Qd R 1 at 13-14; *R v. Marwey* [1977] Qd R 247 at 251-252.

63 LRCC, Working Paper 46, n11 at 6, 18; for example, the standard was addressed, for example, in *R v. MacDonald* [1904] St R Qd 151 at 170.

64 Cf Feldbrugge, n44 at 649-652.

As to when the offence will be complete, Feldbrugge suggests that the potential rescuer should act the minute the duty arises and that any deliberate delay or failure to act should constitute the offence.[65]

What (if any) intention is required? Kearney J in interpreting Northern Territory *Criminal Code* s 155, which requires a "callous" failure to render aid, held:

> To my mind, "callously fails" involves a deliberate and conscious choice by an informed accused not to provide aid or assistance to the victim; it does not involve an impulsive or an unconscious choice. But, further, I consider that "callous" also requires proof that the accused's failure was such as to offend common standards of respect, decency and kindness in the sense that a reasonable person would regard the accused's failure to act as callous.[66]

Certainly, the consensus is that failure to rescue is an offence that should only be committed intentionally. This must require proof that the intention existed to abstain from providing assistance in the sense that the rescuer was conscious of the danger threatened to the person in peril, that aid was urgently needed, and that s/he could have provided it without serious risk.[67] When considering appropriate fault elements for omissions, Hughes posits that the real concern should be, not with the circumstances in which an omission could properly be described as intentional, "but with those circumstances in which an omission is excusable or ought to be excusable".[68] This has been done in relation to the rescue duty that is proposed below.

It is also the case that the failure to act must be voluntary. On the issue of voluntariness, MCCOC provided in 202.2.2 that:

> An omission to perform an act is only voluntary if the act omitted to be performed is one which the person is capable of performing.[69]

Ashworth suggests that an omission is not voluntary

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65 Feldbrugge, n44 at 645.

66 n57 at 557.

67 See Feldbrugge, n44 at 641-643; Silver, n2 at 440 requires the rescuer must "know" that another is in danger; Ashworth, n7 at 435-436; Hughes, n6 at 600-620.

68 Hughes, n6 at 606 who also argues that the offence should be publicised at 618.

69 MCCOC, Final Report, n13 at 10.

> ...if the duty-bearer is incapable of doing what is required. This means physical incapacity, and does not rule out a wider defence of impossibility of compliance in appropriate cases".[70]

It must also be correct that a failure to appreciate that rescue is required should be excusable: if the non-rescuer genuinely ("honestly and reasonably" in the Australian Code jurisdictions) believed that there was no emergency, then there should be room for operation of the mistake of fact excuse.[71]

Finally, what penalties are to be imposed? Kearney J in *Salmon* observed that the 7 year maximum imprisonment provided for in s 155 was "the heaviest for any corresponding offence anywhere in the world".[72] For the reasons discussed earlier, by reason of the classification of the rescue offence as a conduct, and not a result, omissions offence, the sanctions imposed by the civil codes are generally quite lenient. The LRCC in its recodification exercise also accepted that the penalty for this offence would be "relatively low".[73]

Various circumstances of aggravation might be included attracting increased penalties: for example, when a result does ensue; where the bad samaritan originally created the perilous situation and took the separate decision not to aid:[74] or where the bad samaritan was one who, by reason of duty or profession was under an obligation to act or provide aid.

Quasi-criminal and common law aspects. The mooted imposition of a legal duty in the criminal sphere raises a number of common law issues, many of which require detailed study in their own right which is beyond the scope of this work, though much has been done by others.[75] All that is proposed here is to highlight the key issues.

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70 Ashworth, n7 at 434; see also Feinberg, n12 at 257-258 distinguishing between "inaction" merely because the person had no opportunity or no ability to act or both and other instances of "failing to act".

71 See also Ashworth and Steiner, n1, at 158.

72 n57 at 540.

73 Law Reform Commission of Canada (LRCC), *Recodifying Criminal Law*, (Report No 31) Ottawa, LRCC, 1987 at 68; see also Cadoppi, n3 at 108-109 distinguishing the French offence as embodying features of both a conduct and result offence; also Feldbrugge, n44 at 646-647; Silver, n2 at 438.

74 See further Feldbrugge, n44 at 638.

75 See, for example, McCall Smith, n11 at 73-75; Silver, n2 at 426-427, 438-439; Rudolph, n50 at 245-246, 264-265, 272.

On a hybrid point, the LRCC suggested that there should be written into the civil *and* criminal law a "Good Samaritan" provision exempting those attempting *bona fide* rescues from both criminal and civil liability for negligence.[76] Further the rescue itself may entail actions which, under other circumstances, might constitute criminal conduct. McInnes reviews the various criminal law excuses which may be available to rescuers in Anglo-Canadian common and statute law (those of necessity, prevention of crime and private defence) but, as he observes, these excuses have not been developed in a "principled and consistent" manner.[77] Against this background, and acknowledging that many Good Samaritan statutes already exist providing immunity from civil litigation except in cases of gross negligence, there is obvious merit in adopting the LRCC's recommendation, particularly given that it may also encourage rescue.

Of the other common law aspects, some have been considered in Part I in the context of discussing the present common law position. However the central issue, as Rudolph recognises, is that the introduction of a rescue duty would bring into focus a new and particular legal relationship - that between the person required to act and the person to be assisted. The relationships of third parties to those persons will further be affected. "The problems of relationship...[including] questions of compensation, indemnification, subrogation, proximate cause, and damages..." will arise.[78] For example, could a claim be mounted by the victim for failure to rescue, or will difficult causation issues (such as proof that the specific injury or damage was causally connected to the rescuer's omission of inaction) defeat such an assertion? Could a common law action be mounted by the rescuer against the victim for damages suffered in rescuing? If so, should there be a rule that the victim is not required to indemnify a rescuer for negligent injury but is otherwise liable (acknowledging that the original perpetrator of the harm (if there be one) may be ultimately responsible)?[79] Should the rescuer be liable for any damage done to third persons or to property in the course of rescuing pursuant to a duty to do so? Should the person who rescues (or their estate) be entitled to compensation? If so from whom: the

76 LRCC, Working Paper 46, n11 at 19.

77 M McInnes (1994), n33 at 332; re necessity see also Feldbrugge, n44 at 635-636.

78 Rudolph, n50 at 248.

79 Rudolph, n50 at 264-265.

person benefited (ie, the person rescued, who may be indemnified) or out of a public fund, by means of an extension of a crimes compensation scheme?[80] It may be that the imposition of criminal liability should not be parallelled by the imposition of tortious liability and that, for example, only the Good Samaritan statutes indemnifying the rescuer should be further extended. All of these questions and more would require detailed further study.

Failure to Rescue: Two Draft Proposals

In addition to the valuable precedents offered by the various civil law statutory provisions, many of which have been collected in the work of others,[81] a number of writers have formulated their own draft proposals for a rescue duty.[82] In light of the construction considered above, two in particular of those formulations stand out as workable offences and are reproduced below.

Rudzinski, after an exhaustive examination of the comparative position in continental Europe, put forward a tentative draft provision in 1966 as follows:

> Whoever, witnessing an obvious and imminent danger threatening the life of another person, fails to come to [the person's] aid either through [his/her] personal intervention or by providing aid by others or does not notify immediately the proper public officer or institution, although [s/he] could do one of those things without reasonable fear of danger to [his/her] person or to others, shall be punished by imprisonment of up to ...., or a fine of up to..., or both.[83]

As is obvious from this formulation, the duty encapsulated is limited to those persons on the spot, the risk to the victim that is critical is that of imminent and obvious danger to life (though it is suggested that serious

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80 Rudolph, n50 at 272; N Morris, "Compensation and the Good Samaritan" in Ratcliffe, n2; Silver, n2 at 444.

81 For example, Rudzinski, n2 Appendix; Feldbrugge, n 44 Appendix; Cadoppi, n3 at 127-130.

82 For example, Rudolph, n50 at 245; Silver, n2 at 435-445; Lipkin, n40 at 266; Cadoppi, n3 at 127; WP Miller and MA Zimmerman, "The Good Samaritan Act of 1966: A Proposal" in Ratcliffe, n2.

83 Rudzinski, n2 at 123-124.

injury to health should also be included), the only risk that justifies passivity on the part of the rescuer is risk of injury to him/herself or others, while the intentional character of the offence is implied or alternatively could be clarified by the inclusion of "unreasonably fails" or "deliberately fails".[84]

The LRCC in 1987 followed up the earlier work of the *Omissions* Working Paper[85] and proposed the creation of a failure to rescue offence in the Special Part of the new revised Code in the following terms:

> 54(1) Every one commits a crime who, realising that a person is in immediate danger of death or serious harm, omits to take reasonable steps to aid that person.
>
> (2) Subsection (1) does not apply to a person who cannot render aid without incurring a risk of death or serious harm to [him/herself] or another person or for any other valid reason.[86]

The formulation "take reasonable steps" is a useful one in terms of the discussion above on the difficulty of prescribing with any precision what it is that the rescuer should be required to do (in terms of whether personal action, seeking help, or calling the authorities or some combination is required). Clearly all of these options and the rescuer's freedom to make a reasonable choice in the circumstances would come within the phrase suggested.[87]

The LRCC noted that this new offence built on the principle recognised by the Quebec *Charter of Rights and Freedoms* in s 2 (in particular, the exception in 54(2) is modelled on the Quebec Charter). The Commission further observed that the proposed offence brought the law into conformity not only with "ordinary notions of morality but also with the laws of many other countries".[88]

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[84] Rudzinski, n2 at 123-124 and cf NT s 155 "callously fails".

[85] LRCC, Working Paper 46, n11 at 20.

[86] LRCC, Report No 31, n73 at 188 and see commentary at Clause 10(2), 67-68.

[87] Cf LC Wilson, "The Defence of Others - Criminal Law and the Good Samaritan' (1988) 33 *McGill Law Journal* 756 at 812 arguing the language should be more specific.

[88] Wilson, n87 at 68.

Conclusion

It has been proposed in these two articles that the criminal law is justified in demanding a moral (and legal) minimum of its citizens in emergency situations. Such a demand would sanction conduct which causes or threatens serious harm to other members of society, and would clearly satisfy societal interests. It is argued that, properly circumscribed, the rescue duty would not unduly restrict individual liberty. It is, in fact, a further step in what Ames has described as the "spirit of reform" that has been slowly bringing the legal system into harmony with moral principles:[89] the tentative extensions of the rescue doctrine both civilly and criminally in the common law jurisdictions to date, are already evidence of this slow reform process. In many countries, however, this step has already been taken and, from that experience, a fairly uniform pattern emerges: a duty of easy rescue pursuant to which the criminal law punishes persons who, without incurring serious risks to themselves, were able to help another person in grave peril, but who failed to give such help.[90] Significantly, the offences created are not ones of commission by omission but, rather, are offences of pure omission, constituted by deliberate non-conduct alone and punished accordingly.

Remaining outside this pattern, and steadfastly so, is the Anglo/American/Canadian legal tradition. In Australia, little consideration has been given to any principled extension of omissions liability, let alone to the creation of new offences. The great hope for the enactment of a duty to rescue in our jurisdiction is that, as has occurred most noticeably in recent decades under the leadership of the Australian High Court, our domestic law is being heavily influenced by international and comparative law.[91] Increasingly, there now exists a climate in which law makers, judicial and legislative, will look to other jurisdictions for assistance on and resolution of ambiguities and lacunas in the law, and for models for law reform.

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89 Ames, n28 at 20.

90 Feldbrugge, n 44 at 652.

91 See, for example, A Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *Public Law Review* 20.

Finally, it is not the case that what has been proposed is yet another offence for an already overburdened criminal justice system. As Ashworth and Steiner put:

> ...the paternalistic element [of a rescue offence] concerns life and physical safety, and therein lies the strongest argument in its favour. It is directly concerned with the preservation of life and the prevention of serious harm to other citizens. The fact that it is an offence of omission rather than commission may be a significant analytical point, but it can hardly destroy the social imperatives which underlie the public duty imposed.[92]

Indeed, as Sturgess said, referring to s 155 in the new *Criminal Code* for the Northern Territory in 1983, the appearance of a rescue offence in the criminal law "will surprise only lawyers".[93]

92 Ashworth and Steiner, n1 at 163.

93 Letter DG Sturgess QC to Attorney-General of the Northern Territory of Australia accompanying the draft *Criminal Code*, 12 August 1983.